COMMONWEALTH OF PENNSYLVANIA

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

IRWIN A. POPOWSKY
Consumer Advocate

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

February 17, 2004

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

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

Dear Secretary McNulty:

Enclosed please find for filing an original and nine (9) copies of the Office of Consumer Advocate's Main Brief in Proprietary and Non-Proprietary versions, in the above-captioned matter.

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

Sincerely,

Joel H. Cheskis
Assistant Consumer Advocate

Enclosures
cc: All parties of record
*76655

DOCUMENT
FOLDER

RECEIVED
2004 FEB 17 PM 4:25
SECRETARY'S BUREAU

143

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

MAIN BRIEF OF THE OFFICE OF CONSUMER ADVOCATE

Philip F. McClelland
Senior Assistant Consumer Advocate
Barrett C. Sheridan
Joel H. Cheskis
Shaun A. Sparks
Assistant Consumer Advocates

Counsel for:
Irwin A. Popowsky
Consumer Advocate

Office of Consumer Advocate
555 Walnut Street, Forum Place, 5th Floor
Harrisburg, PA 17101-1923
(717) 783-5048

Dated: February 17, 2004

INFORMATION ALLEGED TO BE PROPRIETARY HAS BEEN DELETED

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Administrative Decision

Statutes and Regulations

I. INTRODUCTION

On August 21, 2003, the Federal Communications Commission ("FCC") released its Triennial Review Order[1] adopting new rules concerning the obligation of incumbent local exchange carriers ("ILECs") to make their unbundled network elements ("UNEs") available to Competitive Local Exchange Carriers ("CLECs"). In the Triennial Review Order, the FCC adopted rules that establish a new standard for determining the existence of impairment under section 251(d)(2) of the federal Telecommunications Act of 1996[2] and sets forth a new list of UNEs that ILECs must make available to CLECs. The Triennial Review Order ("TRO") applied its unbundling analysis to individual UNEs in a more granular manner than was previously done by the FCC. The TRO analysis is to be conducted looking at smaller geographic areas to determine impairment. Under this more granular approach, impairment may vary by geographic location, customer class, and service, including a consideration of the type and capacity of the facilities used.

The FCC delegated to the state commissions the responsibility of conducting such granular impairment analyses and established mechanisms by which state commissions are to conduct those analyses as it pertains to their specific state. The three mechanisms provided by the FCC include: 1) a 90-day proceeding to determine whether CLECs are not impaired without unbundled switching to serve the enterprise market, i.e., medium- and large-business customers; 2) a nine-month proceeding to determine, whether CLECs are impaired without unbundled switching to serve the mass market, i.e., residential and small-business customers; and 3) another

---

[1] Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order (rel. Aug. 21, 2003)(FCC 03-36), as corrected by errata, FCC 03-227 issued on September 17, 2003 ("Triennial Review Order" or "TRO").

[2] Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §§151, et seq. ("TA-96" or "the Act")

nine-month proceeding to establish an efficient loop migration process for the effective transferring of large numbers of customers among local phone providers.

On October 2, 2003, the Pennsylvania Public Utility Commission ("PUC" or "the Commission") issued a Procedural Order establishing dockets for the three proceedings that the FCC discusses in its Triennial Review Order.[3] October 2, 2003 is the effective date of the Triennial Review Order. In that Procedural Order, the Commission discussed the standards by which it would adjudicate the proceedings in the Triennial Review Order. The Commission further established the procedural rules and schedule by which it would conduct the proceedings. The Commission also entered a Protective Order and Confidentiality Agreement. Finally, the Commission issued preliminary discovery requests to certain CLECs and petitioning ILECs to aid in the establishment of the evidentiary record.

On October 31, 2003, Verizon Pennsylvania, Inc. ("Verizon" or "the Company") filed a Petition asking the Commission to initiate a proceeding and make a finding that competitors are not impaired without access to unbundled switching to serve certain mass market customers.[4] In essence, Verizon seeks to avoid offering competitors access to local service switching in all of Density Cells 1, 2 and 3 in eight[5] Metropolitan Statistical Areas ("MSAs"). On November 13, 2003, the Office of Consumer Advocate ("OCA") filed an Answer to Verizon's Petition asserting that Verizon's Petition is not supported by sufficient evidence and should be rejected. The OCA explained that granting Verizon's Petition would eliminate the

---

[3] Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market, Docket No. I-00030100, Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements, Docket No. I-00030099, and Development of an Efficient Loop Migration Process, Docket No. M-00031754, Procedural Order (entered October 3, 2003).

[4] It later became clear that Verizon PA intended to claim UNE switching non-impairment in both the Verizon PA and Verizon North territories. Accordingly, the Verizon claims in this case relate to both Verizon PA and Verizon North. "Verizon" as used in this Brief will refer to both companies.

[5] The MSAs at issue, as most recently defined, are: 1) Allentown-Bethlehem-Easton, 2) Harrisburg-Carlisle, 3) Lancaster, 4) Lebanon, 5) Philadelphia, 6) Pittsburgh, 7) Reading, and 8) Scranton-Wilkes Barre-Hazleton. OCA St. 1 at 38-40; Verizon St. 1.1 at 6, no.1.

UNE platform ("UNE-P") which is the method most frequently used by CLECs to provide competitive local exchange service in Pennsylvania to residential customers. The OCA had previously filed a Notice of Intervention and Public Statement on October 23, 2003 asserting that it was intervening in this proceeding to address the interests of residential consumers. The OCA has also intervened into the other two TRO proceedings at Docket Nos. I-00030100 and M-00031754.

Administrative Law Judges Michael C. Schneirle and Susan D. Colwell were assigned to preside over Verizon's October 31, 2003 Petition, at Docket No. I-00030099. On November 25, 2003, a prehearing conference was held where specific procedural matters were addressed and a procedural schedule was established. On December 19, 2003, Verizon filed a supplement to its initial October 31, 2003 Petition. On January 9, 2004, the OCA filed the Direct Testimony of Dr. Robert Loube[6] and Mr. Rowland Curry[7] pursuant to the established schedule. On January 20, 2004, Verizon filed its rebuttal testimony. The OCA also was an active participant in the hearings held in this matter in Harrisburg on January 26, 2004 thru January 29, 2004. The OCA now files this Main Brief to articulate its positions in this matter.

II. SUMMARY OF ARGUMENT

To a large degree, the Commission's decision in this proceeding will determine the future of Pennsylvania's competitive local telecommunications marketplace. Real mass

[6] Dr. Robert Loube is the Director of Economic Research at Rhoads and Sinon, LLC. His consulting practice centers on providing expert advice to state agencies involved in telecommunications regulation. Prior to joining Rhoads and Sinon, Dr. Loube worked at the FCC, the Public Service Commission for the District of Columbia and the Indiana Utility Regulatory Commission on issues associated with incremental cost, rate design, competition, universal service and separations. Dr. Loube received his Ph.D in Economics from Michigan State University in 1983. *See*, OCA St. 1 at 1-2, App. 1.

[7] Mr. Rowland Curry is the Principal of Curry & Associates, an independent telecommunications consulting firm. He has 34 years experience in the telecommunications industry, predominantly focusing on state and federal regulatory policy and technological issues. Prior to beginning his career as a consultant in 2001, he worked on the staff of the Public Utility Commission of Texas for almost 25 years, most recently as the Chief Engineer, Office of Policy Development. Mr. Curry is a Registered Professional Engineer in the state of Texas. *See*, OCA St. 1 at 1-2, App. 2.

market competition has achieved a small foothold in some parts of Pennsylvania, but much of this will likely be lost if the UNE-P is eliminated. The determinations the FCC asked this Commission to make here depend on how this Commission defines markets, mass market customers, CLECs that meet trigger requirements, and how the Commission resolves hot cut impairment. Verizon's proposed definitions are in error and, if applied, would harm Pennsylvania's local telecommunications market. In contrast, the OCA's approach supports competition and administrative efficiency while at the same time meets the requirements of the TRO.

Verizon's market area definition is too large. The elimination of UNE-P according to Verizon's broad-brush MSA scheme would amount to a wholesale elimination of UNE-P from most areas of the state. This is neither the permitted method nor the desired result of the TRO. Verizon has also been inconsistent as to its desired market area outcome.

In addition, Verizon has failed to meet its burden of proof because its methodology in identifying "triggers" is over-inclusive. That is, Verizon includes cable operators and affiliated telephone companies in its analysis. It also distorts the definition of mass market customers far beyond the limits established in the TRO. First, cable providers operate under first-mover government protected franchises. Affiliated CLECs garner substantial benefit from their ability to piggy-back on the existing ILEC controlled network and market. Verizon's methodology is improper in this regard because these companies bear little resemblance to unaffiliated CLECs, and offer scant points of comparison for the Commission's purposes here. Regarding the mass market definition, Verizon's methodology is so over-broad that it includes business customers of massive size within the universe of single POTS line residential customers. Verizon's approach and preferred line counts are clearly incorrect.

The approach of the OCA is entirely appropriate to analyze the market issues posed by the TRO; an analysis of markets as density cells within each MSA satisfies the requirements of the TRO. This approach is granular enough to satisfy the requirements of the TRO, and at the same time, produce meaningful results in terms of impairment. The OCA proposal will define market areas according to where CLECs may compete with Verizon in a meaningful and sustainable manner. This approach establishes units of market analysis that are neither too large nor too small. It is also consistent with the FCC's requirement to apply triggers only where market areas and serving areas match.

Regarding mass market customers, the OCA submits that this Commission should simply apply the FCC definition. This captures the required CLECs, ensuring that any CLEC counted as a trigger serves both residential and small business customers. This approach will appropriately exclude CLECs with a minimal presence in any market.

In addition to the question of triggers, the FCC charged this to Commission to approve a batch hot cut process that will eliminate the inherent impairment of the current hot cut process. According to the TRO, even if the Commission were to find that the triggers were met in some markets, it could not find non-impairment. This is because the hot cut process required to transition customers from UNE-P, and onto UNE-L, is inherently impaired. This is because an ILEC seeking to challenge the impairment presumption must not only show that the triggers are met, but must also provide for a non-impaired hot cut process as well.

Here too, Verizon fails its burden of proof. That is true because it has presented no testimony in this, the Commission's only on-the-record TRO proceeding. While the OCA is aware that the Commission is conducting separate and related technical conferences on this topic, those conferences are off-the-record. The TRO and applicable law require full evidentiary

hearings on this matter, and this is the only on-the-record TRO preceding that has yet occurred. Verizon cannot prevail in its impairment challenge by sidestepping TRO requirements via non-TRO compliant technical conferences. Regardless of the Commission's technical conference, it is incumbent on Verizon to present all the evidence that is required of it here; it has not done so.

The Commission must consider all these matters and how they will affect Pennsylvania's local telecommunications marketplace. Before the Commission can find non-impairment, the Commission must develop a solid basis on which to conclude that UNE-P is no longer required in some markets. The OCA submits that the evidence offered by Verizon, and the definitions Verizon applies to that evidence, are unconvincing. Verizon has not demonstrated non-impairment in any mass markets. As a result, the PUC should deny the Company's Petition.

III. ARGUMENT

A. The Outcome Of This Proceeding Will Have A Tremendous Impact On The State Of Telecommunications Competition Throughout Pennsylvania As Over Half Of The Local Customers Served By Competitors In Verizon's Territory Are Served Through The UNE-P.

The Commission's decision as to where UNE switching will be terminated is vital to the continuation of competition in the Commonwealth. A finding of no impairment for UNE switching, and the related termination of the UNE-P, will have a devastating impact on local telephone competition. The definition of the market area is also a critical factor.

OCA witnesses Dr. Loube and Mr. Curry testified regarding the impact of the results of this proceeding on mass market residential customers in particular. OCA St. 1 at 4-9. Mr. Curry testified, "[T]he decisions made by the Pennsylvania PUC in response to the FCC's TRO may have a very significant impact on the availability of competitive options for residential telecommunications customers." Id. at 4. Mr. Curry further testified, "competition for

residential customers relies heavily on the ability of competitive carriers to purchase UNE-P services from [Verizon]" and that "to the extent that adequate competitive options are available, there should be no harm to the ability of customers to select competitive options. However, the OCA is very concerned that if the UNE-P elements are eliminated, Pennsylvania customers will no longer be able to benefit from competitive choice." Id. Mr. Curry emphasized that this would be particularly troublesome for many customers for whom UNE-P is their only competitive option for local telephone service. Id.

Mr. Curry supported his testimony with empirical data submitted in this proceeding, which shows that there are over 315,600 residential lines, and over 128,700 business lines served by Verizon's territory using UNE-P. Id. at 4-5, *citing*, Verizon response to MCI I-41; *see also*, Verizon Hearing Exhibit 2 (Verizon response to PUC data requests). Therefore, over half of the local customers served by CLECs in Verizon's territory are served through the UNE-P. UNE-P is the mainstay of residential competition in Pennsylvania. A termination of UNE-P would further strengthen Verizon's hold on the residential market.

Furthermore, Dr. Loube presented evidence regarding the empirical market data that shows Verizon continuing to dominate local service through an examination of the data using the Herfindahl-Hirschman Index ("HHI"). The HHI analysis is a range from a scale of 0 to 10,000, with the higher values indicating the greater existence of a monopoly and lower values indicating competitive markets. Dr. Loube testified that, in an HHI analysis, a score of 1,800 indicates when a market has become highly concentrated. Id. at 5. Dr. Loube conducted his analysis for each of the Verizon market areas at issue in this proceeding using the retail residential lines and the Verizon count of CLEC mass market lines by market. Id. at 6. Dr. Loube cautioned that using these data inputs will report more competition than actually exists because Verizon's count

of retail residential lines underestimates Verizon share of facilities-based mass market because it excludes Verizon mass market business customers. Id. Dr. Loube also cautioned that the Verizon count of CLEC mass market lines over-estimates the CLEC counts because, in many instances, the CLECs report fewer lines than Verizon reports for the same CLECs. Id.

Dr. Loube's analysis resulted in an HHI score of 5,719 to 9,238 for each Verizon market area, which demonstrates that Verizon continues to dominate every Pennsylvania market. Id. at 6, *see also*, Exhibit RL-1 (Table A). The lowest HHI (5,719 for the Allentown-Bethlehem-Easton market area) is three times higher than the score used to indicate a highly concentrated market while the highest HHI (9,238 for the Philadelphia Zone 2) is more than five times higher than that benchmark. Id. at 6-7.

This case in many ways is about achieving the goals and objectives of the United States Congress as articulated in TA-96 to foster local telephone competition. The UNE-P is the principal way in which this goal has been achieved. The Commission explicitly recognized this fact in the opening paragraph of its October 2, 2003 Procedural Order that initiated this case. *See*, footnote 3, *supra*. In particular, the Commission stated:

> In 1996, Congress adopted a national policy of promoting local telephone competition through then enactment of the Telecommunications Act of 1996. TA-96 relies upon the dual regulatory efforts of the Federal Communications Commission and its counterpart in each of the states, including this Commission, to foster competition in local telecommunications markets....

This language was reiterated verbatim by the Commission in the beginning of its December 18, 2003 Order in the enterprise market proceeding.[8] The importance of UNE-P is also clear as the Commission specifically requested in its October 2, 2003 Procedural Order that Verizon provide

[8] Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market, Docket No. I-00030100, Order (entered December 18, 2003).

with its Petition the number of residential and business voice-grade equivalent lines that CLECs are serving through UNE-P for each wire center in its territory.[9]

The Commission must be aware that their decision in this case will affect over 440,000 Pennsylvania telecommunications lines. This is particularly so for residential consumers who are most dependent on CLEC access to the UNE-P. The Commission must be aware that the basis for serving one half of CLEC local lines in Verizon's Pennsylvania territory would be eliminated if Verizon was no longer required to provide UNE-P to CLECs. The Commission should not act blindly in this proceeding but must make its decision being fully aware of the competitive facts so that it can follow the goals of TA-96.

The outcome of this proceeding will have a tremendous impact on the state of telecommunications competition throughout Pennsylvania as over half of the local customers served by competitors in Verizon's territory are served through the UNE-P. This Commission must proceed cautiously in its determination in this proceeding. As Mr. Curry testified, "competition has not yet gained a strong enough foothold to eliminate the key local circuit switching element in any market in Pennsylvania. If the Commission finds no impairment and retracts that element, then competition will be diminished and customers will no longer receive the benefits of competitive choice." OCA St. 1 at 9.

As discussed further below, Verizon has not provided sufficient evidence for a finding of non-impairment to be made for any of the markets in which it seeks such a finding in this proceeding. As such, the OCA submits that the PUC should deny Verizon's Petition.

B. The Commission Should Use The Appropriate Market Definition In Applying The Trigger Analysis Is Density Cells Within Metropolitan Statistical Areas.

[9] October 2, 2003 Order, Appendix A, B.3.

1. The Market Definition Is A Critical Element To The Ultimate Outcome Of This Proceeding.

In the TRO, the FCC states that its analysis of local circuit switching is organized "based on customer market served and the corresponding loop capacity levels used to serve each customer market." TRO at ¶ 420. As such, the FCC instituted a "more granular market-by-market analysis of impairment on a going forward basis" that is the basis for this current proceeding. Id. at ¶ 424. The FCC asked state commissions to take specific actions designed to gauge impairment in markets over which they exercise jurisdiction. State commissions are to exercise a more granular analysis in order to reveal whether CLECs in a particular market would be impaired in the absence of unbundled local circuit switching. Id. at ¶¶ 460, 461 and 486.

Despite the gravity of this single issue on the outcome of this proceeding, the FCC did not define the definition of a market area in detail. Rather, the FCC directed the individual states to make such a determination and define their own market based on the respective circumstances and peculiarities of each state. The FCC specifically directed that "state commissions must define the markets in which they will evaluate impairment by determining the relevant geographic areas to include in each market." Id. at ¶ 495.[10] The FCC further provided that "state commissions have discretion to determine the contours of each market, but they may not define the market as encompassing the entire state." Id. Rather,

> state commissions must define each market on a granular level, and in doing so they must take into consideration the locations of customers actually being served (if any) by competitors, the variations in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets economically and efficiently using currently available technologies. While a more granular analysis is generally preferable, states should not define the market so narrowly that a competitor serving that market alone would not be

[10] *See also*, discussion by OCA witness Rowland Curry. OCA St. 1 at 9 to 12.

> able to take advantage of available scale and scope economies from serving a wider market. State commissions should consider how competitors' ability to use self-provisioned switches or switches provided by a third-party wholesaler to serve various groups of customers varies geographically and should attempt to distinguish among markets where different findings of impairment are likely.

Id. (citations omitted); *see also*, 47 CFR §51.319(d)(2)(i). The FCC required that state commissions use the same market definitions for all of its analysis. Id.

The TRO ruled that, in considering the locations of customers actually served in a market area by competitors, when competitors serve a market from their own switch in a limited geographic area, state commissions should consider establishing those areas to constitute separate markets. Id. at n.1537. Therefore, if a competitor only provides service in a subset of the geographic market, that competitor cannot qualify as a trigger candidate in the entire market area. *See*, Section III.B.3.*d.*, *infra*.

The TRO specifically required that, in considering the variation in factors affecting competitors' ability to serve each group of customers in a market area, state commissions should consider UNE loop rates that vary substantially across the state as they attempt to define a geographic market. Id. at n. 1538; *infra*. In determining what the relevant market area should be, the TRO encouraged states to consider how the number of high-revenue customers varies geographically, how the cost of serving customers varies according to the size and location of the wire center, and variations in the capabilities of wire centers to provide adequate collocation space and handle large numbers of hot cuts. Id. at ¶ 496.

Additionally, the FCC noted, "for purposes of the examination, mass market customers are analog voice customers that purchase only a limited number of POTS (plain old

telephone service) lines, and can only be economically served via less than four DSO loops.[11] Id. at ¶ 497. Ultimately, the FCC states "the exact parameters of these geographic markets, however, cannot be defined nationally for switching because, as both incumbent LECs and competitive LECs agree, there are extreme variations in population density, and thus wire center line densities, across the country. States are therefore in a better position to draw these lines." Id.

As such, the FCC has given this Commission general guidance for it to fulfill its responsibility of defining the market to which the finding of impairment or non-impairment will apply in Verizon's service territory. This task is a critical element to the ultimate determination in this case and should be made with the guidance provided by the FCC.

2. Market Areas Must Be Defined In Terms Of Where CLECs Can Economically Compete.

The FCC has found that a CLEC is impaired when the lack of access to the ILEC network poses one or more barriers to entry, including operational and economic barriers that are likely to make entry into a market uneconomic. TRO at ¶ 84. Additionally, OCA witness Dr. Loube testified "the geographic boundaries of the market should reflect those factors that affect the profitability of competitive entry." OCA St. 1 at 12. More specifically, Dr. Loube testified that

> factors such as retail and wholesale rates, economies of scale and sunk cost drive the profitability of entry and should be important attributes impacting the Commission's determination. The PUC must focus on these conditions that allow new entrants the opportunity to establish long term profitability. At the same time, the markets should be as granular as possible, allowing the entrants to minimize their need to obtain large scale investments that might be beyond their ability to finance in the capital markets.

[11] As discussed further below, a DSO loop is a single line, voice grade loop.

Id. at 12-13. Dr. Loube testified that, overall, the market should be defined as such so that it does not remove the only available competitive alternative for a customer, as the ultimate objective of this proceeding should be to promote competition, not hinder competition where impairment continues to exist. Id. at 13.

In considering entrants' profitability, Dr. Loube testified that the Commission must address the revenue the entrant might be able to obtain and the costs of serving its customers. Id. As discussed further below, the revenue opportunities and market areas for CLECs are dependent on Verizon's UNE rates because a new entrant will not be able to charge as much as Verizon and in many instances must charge less than the incumbent to attract the customers. Id. These CLEC costs include the sum of any self-provisioned facilities and overhead costs along with any network elements purchased from Verizon, most particularly the UNE Loop rate. Id.

Dr. Loube testified that economies of scale affect cost and profitability. Thus, market areas must be defined as large enough so that such scale economies can be realized. Dr. Loube explained, for example, that

> using the switch equations embedded in the FCC's synthesis model, when the number of lines served increases from 1000 to 5000, average monthly investment related cost decreases from $6.46 to $2.07. However, when the number of lines served increases from 20,000 to 25,000, the average monthly investment-related cost decreases from $1.25 to $1.20, showing that economies of scale are important at low levels of output, but after a certain minimum efficient scale, become relatively unimportant.

Id. 13-14. Dr. Loube further cautioned that scale economies in one function could be offset by diseconomies in another so the market should be large enough to allow firms to exploit scale economies but not too large that the size of the market starts endangering profitability. Id. at 14.

Finally, Dr. Loube testified that sunk costs, i.e, costs such as advertising and software costs that cannot be recovered when a carrier exits the market, may also affect profitability. Id. The existence of sunk costs could cause the capital market to evaluate a CLEC's investments as risky just to enter the market. Id. at 14-15. In turn, the high risk associated with the sunken investments will increase the entrants' costs of capital and reduce its profitability. Id. at 15. There are significant economic factors that affect a CLEC's ability to compete. The PUC must consider these factors when making this market area determination.

3. The Commission Should Define The Geographic Market In Terms Of The Density Cells Within The MSAs Because Such A Definition Is Consistent With The FCC's Guidelines And Will Facilitate Any Impairment Analysis That The PUC Might Undertake.

a. The Relevant Geographic Market Is Density Cells 1-3 Within MSAs.

The OCA submits that the appropriate definition of geographic market for purposes of applying the trigger analysis is density cells within the MSAs. This definition complies with the guidance provided by the FCC. Such a definition will properly capture where CLECs are presently able to compete from their own switching facilities.

OCA witness Dr. Loube testified that "the PUC should define the markets in terms of the density cell within the MSAs" because "such a definition is consistent with the FCC's guidelines and will facilitate any impairment analysis that the PUC might undertake during further phases of this proceeding." OCA St. 1.0 at 15. Dr. Loube indicated that the local retail rates are "fairly constant" across density cells which gives CLECs the opportunity to earn a profit or to judge whether it would be impaired without access to local circuit switching and common transport UNEs. Id. Dr. Loube testified

> CLECs can make reasonable decisions about whether they should enter the market because they determine what alternatives the customers may choose from in a consistent manner. 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 reasonable backhaul network to bring the traffic back from the incumbent's wire centers to the CLEC switch.

Id. Dr. Loube concluded that density cells within the MSA are the appropriate geographic market because any changes Verizon may make to retail rates would usually also occur at the density cell level. Id.

As such, the OCA position in this proceeding is similar to Verizon's proposal, as discussed below, where Verizon would have the geographic market defined as density cells within MSAs when applying the trigger analysis. However, Dr. Loube makes one exception to Verizon's proposal. In the Scranton-Wilkes Barre MSA, the wire centers that serve the city of Hazleton, which are in Density Cell 3, should be excluded from the list of wire centers that are included in the Scranton-Wilkes-Barre-Hazleton MSA. The Hazleton area is not contiguous or even located close to the other cities in the MSA. Id. at 16. Dr. Loube added that this exception to the density cell in MSAs geographic market definition is necessary because the ability of competitors to build a compact and efficient backhaul network for the MSA would be compromised if Hazleton were included in the Scranton-Wilkes Barre market area. Id. Including Hazleton in the market area could inappropriately lead to termination of the UNE-P in Hazleton because of CLEC activity in the Scranton-Wilkes Barre area. Id.

As such, the OCA submits that there is substantial evidence of record, which supports defining the relevant geographic market as Density Cells within MSAs. This definition would allow a more accurate determination of whether competitors are impaired or not without access to the local circuit switching and common transport UNEs which are at the heart of this

proceeding. The PUC should adopt the OCA definition, as this definition is consistent with the requirements of the TRO and, as discussed further below, is consistent with portions of Verizon's market definition.

b. Verizon Has Been Inconsistent In Stating Its Position On What The Relevant Geographic Market Should Be.

Verizon seems to have had difficulty in this proceeding clearly explaining its position as to whether the appropriate market included the entire MSA or only Density Cells 1-3 in each MSA. Initially, in the testimony of Verizon witnesses Harold West and Carlo Peduto, Verizon claims "("MSAs") and density cells are the most appropriate." Verizon St. 1.0 at 11 (emphasis added). Then Verizon claims that MSAs have well-established geographic boundaries set by the federal Office of Management and Budget ("OMB") that are available from public sources and are specifically designed to capture economic communities of interest. Id. at 11. Verizon argues that MSAs meet each of the three criteria for defining the market established by the FCC, including reflecting the geographic reach of newspaper, radio and television advertising. Id. at 12.

Verizon also argued in favor of MSAs and explained that defining geographic areas smaller than MSAs would force incumbents to file additional pricing flexibility petitions, and, "although these petitions might produce a more finely-tuned picture of competitive conditions, the record does not suggest that this level of detail justifies the increased expenses and administrative burdens associated with these proposals." Id. Verizon argues that MSAs are particularly compelling as a market definition in Pennsylvania because they take into consideration the locations of customers actually being served by CLECs. Id. at 12-13.

Verizon provided the rebuttal testimony of Dr. William Taylor regarding its position on the appropriate geographic market definitions for mass-market local exchange

service. Dr. Taylor presented economic arguments as to why the MSA is the appropriate geographic market. This testimony, however, continues the inconsistency expressed by witnesses West and Peduto. Dr. Taylor testified, "in general, we would expect carriers to try to serve at least an MSA because the high degree of social and economic integration present in such areas implies that firms would generally market services throughout this geographic area." Verizon St. 2.0 at 4. Dr. Taylor concluded that "Verizon appropriately recognizes that MSAs are the relevant geographic market" but that Verizon also "presented evidence on a Density Cell basis so as to provide the Commission with an alternative to MSAs if the Commission were not inclined to accept the entire MSA as the relevant geographic market." Id. at 23.

Verizon argues simultaneously in its direct testimony that Density Cells within the MSA meet the TRO criteria. Id. at 13-14. Verizon promotes the use of density cells primarily because Density Cells recognize divergent UNE loop rates between density cells. Id. at 13-14. Verizon witnesses West and Peduto offered testimony indicating that density cells 1, 2 and 3 within the MSAs, as the OCA has proposed, would also be an appropriate definition of the relevant geographic market. Id. at 11. Verizon argues "among the existing definitions, Metropolitan Statistical Areas ("MSAs") and Density Cells are the most appropriate [market definitions]". Id. Verizon witnesses West and Peduto testified that, "within MSAs, the Commission may choose to define the market more narrowly, by differentiating among the pricing Density Cells within those MSAs." Id. at 13. Verizon argues that, as with the MSA as a whole, the evidence shows that "customers served by self-provisioned CLEC switches within a particular MSA are more concentrated within more dense Density Cells than in the least dense areas within those MSAs. ... Therefore, Density Cells also reflect the locations of customers actually being served by competitors using their own switches." Id.

At hearing, Verizon's position regarding the appropriate definition of geographic market area for purposes of applying the trigger analysis was even more confusing because of its own testimony. During cross-examination, Verizon witness West testified that Verizon is only seeking relief in this proceeding in Density Cells 1, 2 and 3 of the MSAs, not throughout all of the MSA as Dr. Taylor had testified. Tr. 196-197. However, on cross-examination by Sprint, Verizon witness West indicated that the Company "presented data so that [they] could make either case." Tr. 212. Mr. West continued that the "data is so good that when we show that we pass [the trigger analysis] in all these density cells in these MSAs, it's the same thing as showing that we pass in the MSAs of which the density cells are a part. So they actually kind of run together." Tr. 212. Mr. West testified that the Density Cell 1-3 approach by MSA is "an alternative" to the entire MSA approach. Tr. 212.

OCA witness Dr. Loube recognized the dual approach contained in Verizon's testimony and submitted testimony against Verizon's MSA-wide approach. OCA St. 1.0 at 16-19. As indicated above, the PUC should reject the MSA-wide definition but adopt the Density Cell 1-3 within the MSA definition.

There are many reasons why the relevant geographic market should not be defined as the entire MSA for purposes of applying the trigger analysis. As discussed above, Dr. Loube testified that the Commission should not use MSAs as market areas because they do not provide a sufficient granular area for determination of impairment. Id. at 19. He noted that within each MSA there are at least two density cells and, in the case of the Philadelphia and Pittsburgh MSAs, four density cells, so that it is possible that an entrant could be impaired in one of the cells but not the others. Id. at 16. Therefore, if the decision to determine whether to eliminate access to the local circuit switching UNE was made on the MSA level, there could be

areas where impairment clearly exists but the switching UNE would not be available as the entire MSA has been found to be not impaired. Id. at 16-17.

Such an MSA wide decision would be contrary to the FCC's TRO. In finding that state commissions must define each market on a granular level for the purposes of applying the trigger analysis, the FCC explained that state commissions must take into consideration, among other things, the variation in factors affecting competitors' ability to serve each group of customers. TRO at ¶ 495. The FCC then continued, "for example, if UNE loop rates vary substantially across a state, and this variation is likely to lead to a different finding concerning the existence of impairment in different parts of the state, the state commission should consider separating zones with high and low UNE loop rates for purposes of assessing impairment." Id. at n.1538. As such, the FCC has specifically recognized that the appropriate definition of geographic markets should recognize the varying UNE loop rates within the market.

This factor is particularly evident in Pennsylvania when considering Verizon's recent compliance filing in the UNE case on January 27, 2004. *See*, Generic Investigation re Verizon Pennsylvania Inc.'s Unbundled Network Elements, Docket No. R-00016683, Compliance Filing of January 27, 2004. Verizon's most recent UNE filing has further driven the UNE loop rates even farther apart. Prior to the January 27, 2004 filing, Verizon's UNE rates were $10.25 in Cell 1, $11.00 in Cell 2, $14.00 in Cell 3 and $16.75 in Cell 4. Verizon Pa. Tariff 216. Even at that time, Verizon Cell 4 rates were significantly higher than the Cell 1-3 rates. In its recent filing, Verizon proposed to reduce the compliance rate for Cell 3 to $13.07 and to increase substantially the proposed compliance rate for Cell 4 to $23.62. The Cell 4 rate would become $10 higher than Cell 3 and more than three times the proposed compliance rate of $7.14 for Cell 1. Given the huge discrepancy in UNE rates between Cells 1-3 and Cell 4 under the

recent compliance filing, it is clear that the geographic market should not be defined as the entire MSA, as Verizon suggests. It is evident that CLECs are best able to comply with Verizon's UNE Loop only in Cells 1-3 within the MSAs.

Dr. Loube testified to the practical application of the varying loop rates for purposes of finding whether competitors are impaired in particular areas. He explained that there are many small towns and rural areas that are in Density Cell 4 that are contained within an MSA such that the UNE Loop rate would cause the CLEC to be impaired when trying to serve in that particular Cell 4 area. OCA St. 1.0 at 17.

Many of the MSAs are also extremely large geographically and cannot be considered to represent the same consumer market. The rural town of Smithfield, located near the Pennsylvania/West Virginia border in Fayette County, is in the Pittsburgh MSA. Market conditions would seem to be very different in Fayette County and Allegheny County within the Pittsburgh MSA. This is one example where UNE-P could be inappropriately eliminated in Smithfield, if the geographic market was defined as the entire MSA, and a finding of no impairment was made applicable to competition in downtown Pittsburgh. Id. Certainly, the mass market customers in Smithfield should not lose the opportunity to take service from a competitor who uses UNE-P because there may be three competitors in downtown Pittsburgh who satisfy the trigger requirements.

Finally, Dr. Loube testified that the entire MSA should not be used as the relevant geographic market for purposes of applying the trigger analysis because the MSA boundaries are controlled by the United States Office of Management and Budget ("OMB") rather than by the Commission and can be changed without regard to telephone market realities. Id. Dr. Loube noted that OMB, in fact, recently changed the Harrisburg-Carlisle MSA when it removed

Lebanon. Id. at 18. Furthermore, MSAs are based on population and commuter standards and do not necessarily follow telephone traffic patterns, factors that determine impairment such as local retail rates and UNE rates, or consumer behavior in a particular market. Id. at 17.

The record evidence in this proceeding is unclear as to what exactly Verizon's position is regarding what the definition of the relevant geographic market should be when applying the trigger analysis. Verizon's own witnesses have provided contradictory testimony on this issue. However, it is clear that an entire MSA, as Verizon sometimes advocates for, is not the appropriate definition. Rather, the Commission should define the relevant geographic market area as Density Cells 1-3 within MSAs as discussed in more detail herein.

c. Many CLECs Support A Relevant Geographic Market That Is Too Large And They Have Not Provided The Granular Analysis Necessary To Determine Whether Impairment Exists.

Many competitors who have intervened in this proceeding have proposed a wide-range of possible geographic market definitions for the Commission to use in applying the trigger analysis. In comparison, the OCA proposed market definition is more appropriate and is neither too large nor too small. The OCA has presented evidence that shows that defining the relevant geographic market larger than Density Cells 1-3 within MSAs does not provide a sufficient granular analysis for TRO purposes. Given the importance in this proceeding of correctly defining the relevant geographic market, the OCA is particularly concerned that the PUC should not adopt a market definition larger than that proposed by OCA. Ultimately, poor market definitions may result in the application of triggers into remote geographic areas well beyond the reach of the urban centered competitors.[12]

[12] The OCA argues below that a CLEC serving a small portion of the mass market customers within the central market area cannot be applied as a trigger to the broader geographic market area. Nonetheless, Verizon has argued that the CLEC triggers should be so misapplied.

CLEC Coalition witness Gillan recommends, "that the Commission use LATAs to evaluate impairment, at least as a preliminary matter." CLEC Coalition St of Gillian at 26. The LATA simply represents a divestiture related boundary designed to prohibit Verizon from offering long distance between various regions of Pennsylvania. LATAs were not intended to define CLEC competition areas.

Sprint witness Sywenki testified, "MSAs, as defined by the US Census Bureau, constitutes an appropriate geographic unit for examination of impairment." Sprint St. 1.0 at 8. Furthermore, AT&T and the PA Carriers Coalition advocate for a combination of MSAs and wire centers based on a variety of factors, PA Carriers Coalition St. 1.0 at 18, including that wire centers in Density Cell 4 should be included contrary to Verizon's position. AT&T St. 1.0 at 11.

The OCA has already identified the reasons for rejecting the use of the entire MSA as the relevant geographic market definition in response to Verizon's attempt to create such a definition. The PUC should also apply those reasons in order to reject the Sprint, AT&T and the PA Carriers Coalition positions in support of the use of MSAs as the relevant market definition. Furthermore, the PUC should also use these reasons to reject the CLEC Coalition position that the entire LATA, which is also a large geographic area, should be used. Essentially defining the geographic market on such a large basis can result in the loss of UNE switching in areas where competitors may be impaired without such switching.

The OCA submits that many of the CLEC positions regarding the definition of the relevant geographic market are too large and do not provide a sufficient granular analysis necessary to determine whether impairment exists. Instead, the Commission should define the geographic market as Density Cells 1-3 within the MSAs because such a definition is consistent

with the FCC's guidelines and will facilitate any impairment analysis that the PUC might undertake during further phases of this proceeding.

d. The Use Of Density Cells 1-3 Within MSAs As The Appropriate Geographic Market Is Consistent With The FCC Requirement To Apply Triggers Only To Market Areas Where The Serving Areas Match.

In determining the relevant geographic market area to use for the purposes of applying the TRO's trigger analysis, the FCC also specifically noted that state commissions must take into consideration the locations of customers actually being served, if any, by competitors serving the mass market from their own switches. TRO at ¶ 495. The FCC specifically indicated that, if competitors with their own switches are only serving certain geographic areas, the state commission should consider establishing those areas to constitute separate markets. Id. at n.1537.

The OCA more thoroughly discusses the application of the trigger analysis to the particular set of facts and circumstances surrounding Verizon's Petition in Pennsylvania elsewhere in this brief. However, the OCA here notes that the FCC's specific example of competitors only serving in certain geographic areas within the defined market area, as explained in TRO footnote 1537, is a particularly important consideration.

The OCA has clearly articulated the substantial evidence of record that supports defining the relevant geographic market areas as density Cells 1-3 within MSAs as discussed throughout this brief. The OCA has also articulated why other proposed geographic market definitions are inappropriate either because they are too small or too large. Few, if any, CLECs serve customers with their own switches throughout the entire MSA. OCA submits that the trigger CLEC serving areas more closely match Cells 1-3 in the MSAs. This is particularly true given the high loop rates – present and proposed – in Cell 4.

As such, the OCA submits that this Commission must recognize the FCC's particular concern as set forth in footnote 1537 of the TRO. That is, if competitors with their own switches are only serving certain limited geographic areas, state commissions should consider matching their market definition to those areas. The OCA proposal using Density Cells 1-3 better matches this goal than other alternatives.

C. Verizon's Petition In This Proceeding Must Be Rejected Because Verizon Has Failed To Meet Its Burden To Prove That The TRO Trigger Analysis Has Been Satisfied Under the Appropriate Relevant Geographic Market.

1. The FCC's TRO Articulates The Standards By Which The Trigger Analysis Must Be Conducted.

a. Introduction

Once the PUC defines an appropriate geographic market area, as discussed above, this Commission must then apply its trigger analysis to that market as articulated in the TRO. This task stems from the FCC's finding in the TRO that, on a national basis, competitors are impaired without access to UNE switching for mass market customers. TRO at ¶ 459, *see also*, OCA St. 1.0 at 22-23. In making this finding, the FCC also determined that the state commissions should conduct a more granular review pursuant to enumerated triggers and other operational and economic criteria regarding facilities-based entry in all geographic markets. TRO at ¶ 419. More specifically, the FCC directed the states to "identify where competing carriers are impaired without unbundled switching, pursuant to the triggers and analysis of competitors' potential to deploy." TRO at ¶ 473. This proceeding is being conducted pursuant to that FCC directive in the TRO.

The FCC provides sufficient detail as to how this more granular state proceeding should be conducted and the standards that the PUC should use. Initially, the FCC explained that the state commissions would:

> follow a two-step process in determining whether to find no impairment in a particular market. In the first step, states will apply self-provisioning and wholesale triggers to a particular market to determine if the marketplace evidence of deployment of circuit switches serving the mass market requires a finding of no impairment. If the triggers are satisfied, the states need not undertake any further inquiry, because no impairment should exist in that 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, and whether carriers in that market actually are not impaired without access to unbundled local circuit switching.

TRO at ¶ 495. The testimony of OCA witnesses Dr. Loube and Mr. Curry essentially addressed only the self-provisioning switching triggers of the first step of the analysis. OCA St. 1.0 at 23.

The OCA will generally consider all of the trigger issues implicated in this proceeding in the following section below. The OCA will then consider these issues at greater length in later sections in this Brief.

b. Mass Market Triggers

In using the self-provisioning trigger, the PUC must consider evidence of CLEC switch deployment in the relevant customer markets to serve its customers. TRO at ¶ 435. The FCC determined that "evidence of self-deployment is the best indicator of whether competitive LECs have been able to overcome barriers to entry with respect to facilities deployment" and that "the extent of competitive LEC circuit switch deployment varies tremendously in the enterprise and mass markets." TRO at ¶ 435. To satisfy this trigger, the FCC provided that a state commission must find no impairment in a particular market where "there are three or more

carriers, unaffiliated with either the incumbent LEC or each other, that are serving mass market customers in a particular market using self-provisioned switches." TRO at ¶ 462.

The FCC chose three self-providers as the appropriate threshold to determine whether this trigger has been satisfied. The FCC ordered this analysis in order to, among other things, "be assured that the market can support multiple, competitive local exchange service providers using their own switches" and that there is "the technical and economic feasibility of an entrant serving the mass market with its own switch" indicating that the barriers to entry are not insurmountable. TRO at ¶ 501. The FCC also requires that the identified competitive switch providers should be using or offering their own separate switches and actively providing voice service to mass market customers in the area. TRO at ¶ 499. Ultimately, the FCC provided that "the key consideration to be examined by the state commission is whether the providers are currently offering and able to provide service, and they are likely to continue to do so." TRO at ¶ 500.

Of note, the FCC issued an erratum to the TRO that deleted the requirement that competitors be "capable of economically servicing the entire market, as that market is defined by the state commission." TRO at ¶ 499.[13] As Dr. Loube testified, this erratum is significant because it relieves the CLEC from the responsibility to duplicate entirely the service capabilities of the existing incumbent carrier across the entire market in order to count as a candidate in the trigger analysis. OCA St 1.0 at 26. However, the TRO continues to require that the trigger candidates "should be actively providing voice service to mass market customers in the market." TRO at ¶199.

[13] 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, Errata, released Sept. 17, 2003, FCC 03-227, Number 21.

Accordingly, Dr. Loube further testified that state commissions are not required to count every CLEC offering services at any location in the market when the state commission implements the trigger mechanisms. Id. Dr. Loube clarified that the CLEC must actively seek to serve the market such that a competitor that serves in 18 out of 20 exchanges in a market, for example, could be counted as one of the trigger CLECs. However, that CLEC could not be counted as a trigger candidate if it only serves in two of the exchanges in the market. Id. at 26-27. In support of this testimony, Dr. Loube testified that the TRO states

> For example, if the marketplace evidence shows that new entrants have deployed a certain type of facility, we will consider the facts as evidence that the barriers to entry in that market for that element are surmountable. In deciding what weight to give this evidence, we will consider how extensively carriers have been able to deploy such alternatives to serve what extent of the market, and how mature and stable that market is.

TRO at ¶ 94. He further testified that, if the Commission finds that a carrier is not serving the market to a sufficient extent, the Commission could exclude the carrier from the count used to meet a particular trigger. OCA St. 1.0 at 27. Furthermore, if the Commission finds instances where two carriers serve significant portions of a market and a third carrier serves only a small segment of the market, the Commission should redefine the market to include only the small segment served by the third carrier and not determine that the trigger has been meet for the larger market. Id. This issue is further examined above.

The FCC provides additional specific standards, which a competitor must satisfy in order for it to be counted in the trigger analysis. As Dr. Loube testified, the FCC requires competitors to have the ability to serve "each group of customers" within the relevant geographic market, namely, the residential and small business customers served using DS0 lines. Id. at 27-28, *citing*, TRO at ¶¶127 and 495. Dr. Loube testified that "the fact that a CLEC may be serving

the smaller, but more lucrative business portion of the market does not provide evidence that carriers are not impaired in general, and if the carrier is only serving this small portion of the market, without also serving residential customers, the carrier should not be included in the trigger count" in the mass market analysis. Id. at 28. Dr. Loube concluded that to do so, would discriminate against the large group of mass market customers – the residential customers. Id. OCA emphasizes that there is a great difference between serving the small business and residential customers. It is impossible to presume that the ability to serve the small business customer is equivalent to being able to serve the residential customer.

c. Minimal Presence Required in the Market

The FCC has also explained that competitors' ability to serve only 3% of the residential voice lines of reporting incumbent LECs represents a "small percentage" of the residential voice market. TRO at ¶ 438. On that basis, Dr. Loube testified that a competitor should provide service to approximately 3 percent of the mass market in a market area before that competitor could be used in the count of self-provisioning CLECs under the trigger test. OCA St. 1.0 at 30. He further stated that a 3% rule is important because it separates those competitors that are actively serving and can serve the mass market profitably from those competitors that are not able to serve the market profitably and are only functioning as niche players. Id.

Accordingly, Dr. Loube testified that the presumption of impairment still holds even if some competitors use their own switching to serve a very small percentage of residential customers. Id. at 29. He noted that competitors serving small niche markets might be doing so for a variety of reasons, such as serving an enterprise customer with an employee who is telecommuting, or a line to a corporate president at his or her residence. Id. Dr. Loube testified

that such service is not evidence of a lack of impairment in the mass market or that the competitor is actively providing voice service to mass market customers in the market. Id. He specifically articulated the number of lines in each market area that meet the 3 percent threshold in Exhibit RL-1, Table B and Mr. Curry applied this figure to the line count data on the record of this proceeding to indicate which competitors meet this criteria. OCA St. 1, RC-1.

d. Cable Companies and Competitive Affiliates of ILECS

Finally, the FCC also addressed whether intermodal alternatives, namely cable telephony providers and the competitive affiliates of incumbent LECs should count towards the trigger analysis. With regard to intermodal alternatives, the FCC found

> although the existence of intermodal switching is a factor to consider in establishing our unbundling requirements, current evidence of deployment does not presently warrant a finding of no impairment with regard to local circuit switching. In particular, we determine that the limited use of intermodal circuit switching alternatives for the mass market is insufficient for us to make a finding of no impairment in this market, especially since these intermodal alternatives are not generally available to new competitors.

TRO at ¶ 443. The FCC specifically found that cable telephony has developed because cable operators have been able to overlay additional capabilities onto their cable networks that they have built for other purposes, often under government franchise. Cable companies, therefore, have first-mover advantages and scope economies not available to other new entrants, which lower their incremental costs of providing additional services. TRO at ¶ 98. Dr. Loube also testified that the cable provider may not only self-provide its own switch, but also its own loop and, therefore, "the existence of the cable company's telephone service provides no evidence of an entrant's ability to access the incumbent LEC's wireline voice-grade local loop and thereby self-deploy local circuit switches." OCA St. 1.0 at 33. Simply put, cable companies with their

preexisting networks constructed to offer cable services do not demonstrate that other CLECs are not impaired concerning their own telephone networks that have not been supported through their own cable operations. The PUC should count cable companies as mass marketing trigger candidates. Id.

With regard to competitors who are affiliates of incumbent carriers, Dr. Loube testified that these ILECs have many of the same unique characteristics that cable companies have and therefore enjoy the benefits of economies of scope not available to new entrants. Id. He explained that some of these affiliates might have a protected monopoly franchise that provides them with a secure base of operations to expand into other services if the affiliated incumbent has a rural exemption from the provision of UNEs. Id. Dr. Loube testified that the Commission should not allow ILEC-affiliated CLECs to be included in the competitive trigger analysis unless evidence is presented that shows the CLEC's total independence from the ILEC's switching equipment and operations. Id. at 34.

As such, the FCC's TRO articulates the standards by which the PUC should apply the trigger analysis to various types of CLECs. Substantial record evidence in this case supports the use of density cells within the MSAs. The OCA submits, as discussed further below, the PUC should dismiss Verizon's Petition because it cannot satisfy the FCC's trigger analysis as articulated in the TRO.

2. The PUC Should Reject the Verizon Assumption that All DS0 Service Through CLEC Switching Constitutes Mass Market Service.

a. Introduction

As the hearings have demonstrated, Verizon promotes a simplistic concept concerning the count of mass-market lines in order to apply the self-provisioning switching

triggers. Verizon asserts that any CLEC that sells any DS0[14] service to any customer – no matter how large – is providing "mass market" service and the trigger should apply. Thus, whenever Verizon is able to identify one CLEC serving one DS0 line to any customer from the CLEC switch, then that CLEC becomes a candidate for the mass market switching trigger.

Such a definition leads to odd results and dramatically overstates the extent of CLEC self-provisioning of its switches to the mass market. Verizon's definition classifies many enterprise customers as mass market customers. Verizon's trigger line count is fundamentally inapplicable to this proceeding as it counts many enterprise customer lines. Further, it is fundamentally at odds with the FCC's description of the enterprise and mass market customers in the TRO.

Before dealing with the application of such a definition, the OCA will review below the TRO on this issue. The TRO clearly explained that the mass market was restricted to residential and small business customers. Verizon's methodology completely contradicts this restriction.

b. The TRO Restricts The Mass Market To Residential And Small Business Customers And Excludes Enterprise Customers.

i. Verizon has stretched the TRO definition of the mass market customer far from the boundaries of the TRO.

It is important to go back to the words of the TRO, and Verizon's own initial testimony, to place this discussion in context. Verizon recognized the FCC's definition of the enterprise and mass market customers in its direct testimony as follows:

> According to the FCC, "DS1 enterprise customers are characterized by relatively intense, often data-centric, demand for telecommunications service **sufficient to justify service via**

[14] A DS0 service offers sufficient capacity for one voice grade telephone service to a customer. A Residential customer purchasing basic service purchases the ability to use one DS0 circuit. A DS1 is the equivalent of 24 DS0s. Tr. 198. Thus, a customer seeking 24DS0s of voice grade capacity could purchase one DS1 and with certain equipment offer service to 24 customers using DS0 service.

> **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.

Vz. St. 1.0 at 16 (emphasis added). The FCC further explains:

> Mass market customers are residential and very small business customers – **customers that do not, unlike larger businesses, require high-bandwidth connectivity at DS1 capacity and above.** Z-Tel Comments at 30-31. Mass market customers' accounts tend to be smaller, lower revenue accounts and are often serviced on a month-to-month basis and not pursuant to annual contracts.

TRO at ¶ 459 n.1402 (emphasis added). Thus, the FCC was clear that a customer using a DS1 is **not** a mass market customer. Mass market customers purchase only a limited number of POTS (DS0) lines and "can only be economically served via DS0 lines." Id.

As Verizon explained concerning the distinction between these two sets of customers:

> 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."

Vz. St. 1.0 at 16-17. More accurately, the FCC determined that it would continue its previous determination that the appropriate line "cut off" between a mass market and an enterprise customer would be between those customers receiving DS0 service of one to three lines versus four and greater lines for enterprise customers. TRO at ¶ 497. Dr. Loube explained that, unless the PUC affirmatively voted to overturn such a "cut off," the mass market customer should

continue to be defined as customers with three or fewer lines. OCA St. 1.0 at 8. The OCA supports the FCC cut off and all enterprise customers taking service through four or more lines must be excluded from the mass market line counts.

c. Verizon's DS0 Assumption Concerning Mass Market Customers Has No Basis.

Verizon distorts the mass market definition by assuming that the **only** reason that any customer would purchase a DS0 line is because it is actually a mass market customer. Vz. St. 1.0 at 17-18. Verizon has not supported such a grand assumption in this case. Such an assumption simply overlooks the fact that large customers may choose to use DS0 service from a CLEC for many reasons other than the customer's small size.

For example, Mr. West admits that a DS0 is required for any customer to take fax service. Tr. 134. Thus, even the largest enterprise customer that uses a fax line will require a DS0 line for that purpose. Centrex service also requires DS0 lines. Tr. 514-15. An enterprise customer that chooses to purchase a Centrex service from a CLEC would also use many DS0 lines at its various locations. Verizon has clearly not offered any convincing proof that an enterprise customer would never purchase DS0 service.

d. Verizon's Mass Market Definition Misclassifies Many Enterprise Customers.

Verizon's stretching of the mass market definition leads to the strange result that, even a large enterprise customer with one DS0 line, goes down in Verizon's schedules as part of the mass market. This greatly expands the CLECs that truly offer service to the "mass market" and would misapply the triggers. The absurdity of this position was made very clear through the

Verizon witnesses' responses at the hearing. For example, the following discussion took place on the first day of the hearings:

> JUDGE SCHNIERLE: Wait; I want to ask a question. I'm going to hopefully try to cut to the chase here. Let's say you find a switch and it's got nothing but DS-3s and OCNs[15] attached to it. That doesn't count; right?
>
> WITNESS WEST: That wouldn't be a switch serving mass market customers; right.
>
> JUDGE SCHNIERLE: If I find a switch that's got OCNs and DS-3s attached to it and one DS0, is that a mass market switch?
>
> WITNESS WEST: It is a switch serving a mass market customer, and it would count as a trigger.
>
> JUDGE SCHNIERLE: So it's Verizon's position, if I found three of those in one market segment, the Commission should essentially cut off all residential UNE-P. If I found three switches, each with one DS0 that might be serving, for all I know, the president of the company or something like that, or a fax machine, under the TRO, the Commission should essentially cut off all UNE-P to every residential customer in that market. That's Verizon's position?
>
> WITNESS WEST: That's a very extreme hypothetical. I think that is consistent with Verizon's position, but it's not consistent with the evidence that we present to show that there is no impairment to local switching.

Tr. 94. OCA emphasizes that such a DS0 is not necessarily related to serving any small mass market customer. [16]

Further, it is clear that Verizon even counts as mass market lines the Adelphia lines that are served through the Commonwealth of Pennsylvania contract. Verizon's Mr. West explained that typically service to a state government is an enterprise and not a mass market service. Tr. 118. Nonetheless, Verizon shows under the Adelphia category for the Harrisburg-Carlisle MSA total "mass-market" lines of *** **PROPRIETARY BEGINS** ***

[15] A DS3 has a capacity of 45 Mega bits per second. OCn refers to Optical Carrier "n" with "n" referring to levels from OC-1(52 mbps) to OC-768 (40 gbps). Each of these circuits would offer very high capacity telecommunications.

[16] The OCA addresses below the other problem of a CLEC serving one DSO line, e.g. the president of the enterprise customer. This small member of DSOs sold by a few CLECs should not be sufficient to terminate UNE-P in the market area.

***PROPRIETARY ENDS ***.[17] Vz. St. 1.2, Att. 5, Part A1. Such a line count is the highest shown for Adelphia by Verizon in any MSA in its schedules. Mr. West was cross-examined about this as follows:

> Q. Will you accept subject to check that the company that has the state government contract is Adelphia?
>
> A. (Mr. West) I'll accept that subject to check, yes.
>
> Q. So when you, for example, in the Harrisburg MSA, went from a Verizon count of some number of hundred lines to one that is about 75 times that, did that raise any questions at all for Verizon as to whether these were lines attributable to the state contract?
>
> A. (Mr. West) No. If they were reported by Adelphia as DS-0's and enterprise, then -
>
> Q. JUDGE SCHNIERLE: Do you know what the population of Harrisburg is relative to 45,000?
>
> (no response.)
>
> JUDGE SCHNIERLE: Let's put it this way. Do you know how many lines Verizon claims to provision in the City of Harrisburg relative to 45,000?
>
> WITNESS WEST: No, I do not, Your Honor.
>
> JUDGE SCHNIERLE: You might want to take a look at that. I'd be real surprised if it isn't a comparable number at best.
>
> • • •
>
> BY MR. BARBER:
>
> Q. And as you're sitting here today, you've got no way of knowing how many of these lines are attributable to the state government contract; correct?
>
> A. (Mr. West) No. We did not try to trace back information provided by the CLECs to the Commission as to which individual customers they serve.

Tr. 118.

[17] The first line calculation reflects Verizon's estimate of Adelphia DS0 lines and the second calculation represents Verizon's view of Adelphia's calculation of lines.

The OCA submits that any calculation of trigger lines that counts the Adelphia lines serving the Commonwealth of Pennsylvania as part of the mass market is useless. It is Verizon's position that, even though an enterprise switch is clearly serving enterprise customers, whenever one such enterprise customer takes DS0 service from such a switch that line from an "enterprise switch" now satisfies the mass-market trigger. Mr. West was questioned about this as follows:

> Q. A CLEC has come and deployed an enterprise switch, and in the course of providing service out of that enterprise switch, it determines that one of its customers needs a fax line, an analog fax line. It does what it needs to provision that analog fax line out of that enterprise switch. Is that now a mass market switch?
>
> A. (Mr. West) It's not a mass market switch, but it certainly now has demonstrated with an actual DS-0 line the capability to serve the mass market. So in that sense, it should count towards the triggers.
>
> Q. By the fact that it's serving one line?
>
> A. (Mr. West) It has demonstrated through an actual experience on the ground serving arrangements a DS-0 mass market customer, so it should count as one of the triggers.

Tr. 136 (emphasis added).

OCA stresses that it is not the "capability" to serve the mass market, but actual service, which matters. Further, Verizon's claim that any customer purchasing a DS0 service is a mass market customer became even stranger when Mr. West was questioned about particular state facilities and institutions. ALJ Schnierle noted that Verizon ascribed to Adelphia *** **PROPRIETARY BEGINS** *** ***PROPRIETARY ENDS** *** in Camp Hill. Tr. 122. Upon further cross-examination, Mr. West accepted that the State Correctional Institution at Camp Hill (S.C.I. Camp Hill) is a state prison facility that is located in Camp Hill and is served under the Adelphia contract. Tr. 204. Mr. West was then asked:

Q. Would you consider prisons part of the telecommunications mass market?

A. You know, to the extent that it's a, quote, "business entity" that subscribes to DS-0's, yes.

Tr. 205. It should be beyond argument that state prisons do not represent the type of mass market, residential and small business customer that the FCC intended. Prisons as mass market customers represent the type of absurd results from Verizon's line counts that must be summarily dismissed.

e. Verizon's Mass Market Definition Cannot Be Used In This Case.

OCA emphasizes that Verizon has turned the definition of the mass market customer on its head. The FCC has clearly established the definition of the mass market customer based upon the number of lines purchased, i.e. no more than three. Verizon has turned this definition around so that it is irrelevant how many lines a mass market customer purchases, so long as the customer purchases at least one DS0 line. Verizon's entire triggers case has been built upon the baseless assumption that every DS0 line sold must represent a sale to a mass market customer. OCA emphasizes that if the Commonwealth of Pennsylvania purchases tens of thousands of lines through high capacity DS1s and DS3s, and then purchases one DS0 for a fax line, the Commonwealth does not then become a small mass market customer.

Throughout this proceeding, many of the parties have questioned and rejected Verizon's definition of mass market lines for the purpose of applying switching triggers. Among the other parties taking this approach, AT&T has explained that a DS0 line does not always represent mass market service. Tr. 441. An enterprise customer may offer DS0 lines to its work at home employees and those do not constitute mass market service. Id. Sprint's witness, Mr. Peter Sywenki, addressed this same point concerning DS0 lines and explained: "I don't agree with that, the TRO does not agree with that. So again, you're asking me to accept something that

I fundamentally do not accept and don't think is at all supported by the TRO." Tr. 583. Similarly, the CLEC Coalition rejected the idea that every DS0 line sold necessarily reflects a sale to a mass market customer. CLEC Coalition Exh. 1. Verizon's baseless assumption concerning DS0 lines as always representing a mass market customer is unsupportable and cannot be used in this case to apply the switching triggers.

f. The PUC Should Apply The FCC's Definition Of The Mass Market Customer

As explained above, the FCC has confronted these same issues and defined the mass market customer in terms of the number of lines purchased, i.e. no more than one to three lines for each mass market customer. For purposes of this proceeding, there is no reason to diverge from the FCC's judgment on this matter. What is critical in terms of deciding the definition of the mass market customer is the number of lines purchased. As noted by the FCC, the number of lines purchased closely relates to the revenues produced by such customers and the nature of the service purchased. TRO at ¶ 459 n.1402.

This is the judgment made by the FCC and should be applied in this proceeding. OCA St. 1.0 at 8. There is no compelling evidence in this proceeding as to why a mass market customer should be redefined as having a different number of lines or why a definition by line numbers purchased is not appropriate. Accordingly, the PUC should reject Verizon's mass market definition and instead adopt the mass market definition established by the FCC.

3. Mass Market Trigger Candidates Must Serve Both the Residential and Small Business Customers.

In order to be counted as a trigger candidate, a CLEC must serve the mass market. Under the terms of the TRO, this includes both the residential and small business customers.

OCA St. 1 at 28. Service to either residential or small business customers would not qualify a CLEC as a mass market trigger candidate.

Dr. Loube has explained the FCC inclusion of both groups of customers in its mass market definition. OCA St. 1 at 8. The residential market in the Verizon territory is much larger than the small business market. Id. at 28. The Commission must not allow the residential market to be overlooked by considering trigger CLECs that do not serve the residential market.

Many of the trigger CLECs nominated by Verizon only serve the business customers. OCA witness Dr. Loube's identification of certain CLECs as serving only business customers and not residential customer by unbundled loops is well supported by the record. See OCA St. 1.0 at 37-40. Specifically, ***PROPRIETARY BEGINS***

PROPRIETARY ENDS Such CLECs cannot be considered as mass market trigger candidates.

4. Verizon's Count of CLEC Lines is Inaccurate and Cannot Be Relied Upon.

a. Introduction

The OCA has explained above that Verizon's line count of all DS0 lines as mass market lines is fundamentally flawed as not accurately measuring the mass market. In addition, Verizon's count of the DS0 lines is inaccurate as well as explained in this section. Further, Verizon has misused the E911 data base records and such records cannot be used to identify individual customers or their lines.

b. Verizon Has Misused The E911 Data Base

The Verizon trigger line counts has been prepared, in part, by the review of lines served by cable telephony providers without the use of the Verizon network. Verizon based these counts on its review of the residential E911 database,[18] as it looked for residential customers served by cable telephony providers Comcast, RCN, and Adelphia. *See* Vz. St. 1.0 at 21, 25; Tr. 120.

The OCA submits that the Commission should not rely on Verizon's E911 review. As explained by OCA witness Curry, Verizon's results are not credible evidence of CLEC service to residential customers. OCA St. 1.0 at 41. As Mr. Curry explained:

> One example of potential miscounting is multi-tenant dwellings and nursing or retirement homes; in those situations, a location might contain multiple residential customers that may not be properly counted. The building owner may be an enterprise customer of the CLEC, but may re-sell service to tenants who have their own directory listings and E911 data entries.

[18] Verizon did not review E911 business listings because there was no way to distinguish between small businesses and larger business customers served by DS1s. Vz St. 1.0 at 32.

Id. Thus, a nursing home resident may be listed in the E911 data base even though that person does not purchase residential service. The residential E911 data base was never meant to function as an indicator of residential telephone service. As Mr. Curry concluded, "Those residents should not be counted as mass market customers of the CLEC." Id.

Indeed, the OCA submits that the flaw in Verizon's approach – relying on a database of information compiled for public safety purposes to identify residential telephony customers for purposes of this state level TRO review – is highlighted by its use of E911 data for Adelphia. Verizon explained that found that Adelphia serves residential customers because of its review of the E911 data base. Tr. 120. However, the affidavit of TelCove's Jeffrey J. Heins contradicts this assumption. ***PROPRIETARY BEGINS***

19

19

[20] ***PROPRIETARY ENDS***

Verizon's assumption that the residential E911 database accurately reflects individual residential customers served by CLECs through mass market local circuit switches is also not valid. The E911 database exists pursuant to the Public Safety Emergency Telephone Act ("Act"). 35 PS §§ 7011, et seq. By definition under both the Public Safety Emergency Telephone Act and related regulations, an individual E911 data base entry does not equate to an individual telephone service customer. Instead, each separate dial tone access line or PBX trunk group of a "telephone subscriber" shall "constitute a separate subscription." 35 P.S. § 7012; 4 Pa.Code § 120b.102. Contrary to Verizon's assumption, a mere listing in the residential E911 database does not prove that the CLEC serves one residential, mass market customer. A CLEC may serve one customer, which may result in multiple E911 listings. Thus, a CLEC may serve an institutional customer, such as a nursing home, and yet report many individual E911 listings. Verizon's presumption that a residential listing in the E911 database is prima facie evidence of service by telephony providers to mass market residential customers is not supported by the applicable law.

Upon further investigation, the OCA also notes that information entered into the E911 database only be used only for the purposes of the 911 emergency communications system. First, Section 7019 of the Public Safety Emergency Telephone Act addresses access and privacy

---

[20] Verizon identified Adelphia as a trigger candidate based on its E911 review alone in *** **PROPRIETARY BEGINS*** ***PROPRIETARY ENDS*** Accordingly, OCA submits that the Verizon Count does not support Adelphia as a trigger candidate for the Pittsburgh MSA. As to the other wire centers and MSAS where the Verizon Count includes supposed Adelphia lines based on the E911 review results, such line counts would also be compromised for the same reasons.

of telephone records. 35 P.S. § 7019. Section 7019(a) states: "This information shall be used only in providing emergency response services to a 911 call." 35 P.S. § 7019(a).[21]

The OCA submits that the CLECs, which report information for use in the E911 database, should not have this information misused in the current proceeding. OCA is concerned that such customer information should not be so used. The Commission should reject Verizon's E911 review as not probative or a permitted use of protected information.

c. Verizon's CLEC Line Counts Do Not Match Those Submitted By The CLECs Themselves.

Verizon's line counts also fundamentally fail to match the line counts filed by the CLECs themselves. The OCA submits that the Verizon count information provided in Verizon Statement 1.2, Attachment 5 is not reliable when compared to relevant, available information from the CLECs themselves. As OCA witness Dr. Loube explained ***PROPRIETARY BEGINS***

PROPRIETARY ENDS OCA St. 1.0 at 6. While Verizon claims that the CLEC data proves and supports the Verizon Count, Verizon has acknowledged that there are disparities. *See* Vz. St. 1.2 at 31-36. The OCA does not agree with Verizon that the PUC should nonetheless rely on combined results of the Verizon Line Count Study and E911 review.

[21]The PUC has also approved specific "Service Provider E-9-1-1 Protocols" to govern telephone service providers access to county E911 systems. Protocol 5(e), 3) provides "that the service provider agrees not to use the county's/municipality's MSAG for any purpose that is not directly related to and required for the provision of 9-1-1 service to its customers...." Petition of Bell Atlantic-Pennsylvania, Inc. for a Declaratory Order Relating to the Provision of Master Street Address Guides to Competitive Local Exchange Carriers, Docket Nos. P-00971203, M-00991217, Supplemental Final Order, 30 Pa.Bull. 2864 (pub. May 27, 2000). Such protocols are contained within the Verizon tariff. *See* Verizon Pennsylvania Inc. Tariff Pa. P.U.C. – No. 1, Section 2, original sheet 10C, 4.w. Regulations (effective Sept. 7, 2000).

5. The PUC Must Exclude CLECs with a Minimal Presence in the Market Place.

As discussed above, the FCC has provided that competitors serving only 3 percent of residential voice lines represent a "small percentage" of the residential voice market. TRO at ¶ 438. Based upon this finding, Dr. Loube testified that a competitor should provide service to approximately 3 percent of the mass market in a market area before that competitor could be used in the count of self-provisioning CLECs under the trigger test. OCA St. 1.0 at 30. The OCA submits that this 3 percent rule has a significant impact on the specific facts of this case and provides further evidence as to why Verizon has not provided evidence on the record that it has satisfied the trigger analysis and why its Petition should be rejected.

In its Petition, Verizon counted every CLEC that serves *at least one line* in any market under Verizon's calculations. Id. (emphasis added). This included five carriers that served only one line per market as effectively providing service in those areas and two of those carriers were serving an area where Verizon's retail line count exceeded 486,000. Id. Dr. Loube further testified that Verizon included an additional nine carriers that served more than one line but less than 100 lines and that two of those carriers operated in areas where Verizon has over 800,000 lines. Id. at 30-31.

Dr. Loube indicated the practical result of Verizon's method of counting trigger candidates in this case. That is, Dr. Loube testified that:

> Verizon's counting method means that if three carriers each with one customer operate in a market, then all CLECs operating in that market would be denied access to the local circuit switch UNE as part of a UNE-P combination. Thus, three carriers serving one mass market line each would eliminate UNE-P to more than 800,000 lines.

Id. at 31. Verizon's trigger analysis results in a very small number of CLECs, which serve tiny niche markets, eliminating UNE-P competition for the mass market in a wide area. The TRO does not support such a result.

Verizon justified counting such competitors in the trigger analysis by arguing that the Commission must not make any subjective decisions, but could only rely on objective data so that the trigger determination could be made quickly and accurately thereby avoiding the need for protracted proceedings. Verizon St. 1.0 at 9. Dr. Loube testified, however, that, in taking this position, Verizon ignores the FCC's statement that "the key consideration to be examined by state commissions is whether the providers are currently offering and able to provide service, and are likely to continue to do so." OCA St. 1.0 at 31, *quoting*, TRO at ¶ 500. OCA recognizes the importance of objective data in considering the trigger analysis. However, the OCA objective use of a 3 percent rule produces a better assessment than Verizon's simplistic criteria.

In applying the 3 percent rule to the facts of this proceeding, Dr. Loube and Mr. Curry have shown that, in fact, a substantial portion of those carriers, which Verizon has identified as counting toward the trigger analysis, should be removed because they do not serve a significant percentage of customers. For example, according to the Verizon line counts,

*****PROPRIETARY BEGINS*****

*** **PROPRIETARY ENDS***** The carriers serving a small percentage of the mass market should not qualify as trigger candidates.

As such, the OCA submits that Verizon's attempt in this proceeding to include in the trigger analysis those competitors who serve a small percentage of the residential voice market violates the TRO and, therefore, the PUC should reject this analysis. The OCA submits that those competitors who serve less than 3% of the mass market in a given market area should not be counted in the trigger analysis. The PUC should deny Verizon's Petition because of its heavy reliance on carriers who serve only a small percentage of the residential voice market contrary to the TRO, including many competitors who serve only one customer in a given market.

6. CLECs Must Actively Seek To Serve The Market And Service In A Small Area Is Insufficient.

a. The PUC Must Ensure That Those Clecs It Includes In The Trigger Analysis Are Actively Seeking To Serve Throughout The Market And Not Just In One Particular Area.

As discussed above, the TRO specifically provides that, for the purposes of determining trigger candidates, "the key consideration to be examined by state commissions is whether the providers are currently offering and able to provide service, and are likely to continue to do so." TRO at ¶ 500. As such, the CLEC must be actively serving the market in order to be counted in the trigger analysis and service in a small portion of the market is insufficient to qualify as a trigger candidate.

OCA witness Dr. Loube provided a practical example of this requirement. Dr. Loube testified that, "for example, if the market covers an area of 20 exchanges, a CLEC serving

only 18 of those exchanges could be counted as one of the trigger CLECs. However, if the CLEC is only serving 2 of the exchanges, the state commission may find that the CLEC is not actively serving the market." OCA St. 1.0 at 26-27. He testified that the FCC requires the CLEC to have the ability to serve each group of customers within the relevant geographic market such that "carriers serving only business and not residential customers should not be included in the self-provisioning trigger count in the mass market analysis." Id. at 27-28. The OCA submits that this criterion, in fact, eliminates many of the trigger candidates from Verizon's count. Id. at 38-40.

However, Verizon contests the OCA's interpretation of what it means for CLECs to be "actively serving customers" within the relevant geographic market area to be considered as a trigger candidate. More specifically, Verizon witnesses West and Peduto testified, "the evidence that a CLEC is 'actively providing voice service' is satisfied by evidence that it is currently serving mass market customers using its own switching." Verizon St. 1.2 at 27. Essentially, Verizon's position is that, when a CLEC offers mass market service from its switch to any portion of the market area, such a trigger is activated everywhere in the market area. West and Peduto explain that the FCC found that states could not look at other issues and explained "the Commission may look *only* at whether a CLEC has affirmatively indicated that it is exiting the market" and not at evidence that the carrier may be losing customers to its competitors, or increasing its reliance on a UNE-P strategy. Id. (emphasis added).

On cross-examination, counsel for AT&T questioned Verizon witnesses West and Peduto regarding the apparent contradiction in their testimony with the language of the TRO. The TRO explains, by way of example, that the state commissions may consider "whether a CLEC is currently offering and able to provide service, and are likely to continue to do so;" this

means that states should review whether the competitor has filed a notice to terminate service in that market. TRO at ¶ 500, fn. 1556. Verizon argued that this is the *only* criteria that the state commission may look at in making this determination. Counsel for AT&T questioned Verizon as follows:

> Q. What is the source for your claim that [affirmatively exiting the market] is the only thing that the Commission can look at?
>
> A. (Mr. West) Well, it has its roots in Footnote 1556.
>
> Q. Which says, "For instance" ---
>
> A. (Mr. West) "States should review whether the competitive switch provider has filed a notice to terminate service in that market."
>
> Q. It doesn't say states only should review; right?
>
> A. (Mr. West) Well ---
>
> Q. It says, "For instance." That's one example; correct?
>
> A. (Mr. West) You're right but the point here is they should only review things that are that definite in terms of making a termination that they're somehow that going to be actively providing service .... The idea is if it's in there today providing service, absent definitive knowledge that it's not going to be there continuing to do so, like there's a notice of termination, then that particular CLEC is a candidate for the trigger analysis.

Tr. 153-154. Clearly, however, Verizon's reading of the TRO is incorrect as the TRO merely provides that a notice of termination is only one example of evidence that a CLEC is not actively serving the market, not the only way of making such a determination, as Verizon contends. Specifically, when applying the trigger the PUC can and must consider whether CLECs serve only a small part of the market.

As such, it is clear that the CLEC must be actively serving the market in order to be counted in the trigger analysis and service in a small portion of the market is insufficient to

qualify as a trigger candidate. The PUC must deny Verizon's Petition because Verizon's inclusion of CLECs as trigger candidates who do not actively serve a large part of the market is inappropriate.

7. Verizon Fails to Recognize that CTSI has Abandoned Much of the Philadelphia MSA Market.

Even under Verizon's overly strict reading of the TRO, Verizon has failed to recognize that the PUC approved a petition by CTSI for authority to abandon CLEC service in Bucks, Chester and Montgomery counties. Application of CTSI, Inc. filed for Approval of the Partial Abandonment or Discontinuance of Competitive Local Exchange Carrier Services within the Counties of Bucks, Chester and Montgomery, Docket No. A-310510F2001, Order (June 22, 2001). The OCA submits that Verizon's position that ***PROPRIETARY BEGINS*** *** PROPRIETARY ENDS*** is untenable. The PUC cannot overlook the fact that CTSI has abandoned service to much of the area where Verizon asserts that it is a trigger candidate. Verizon witness Taylor's speculation as to how and why CTSI should still count as a trigger candidate even through CTSI admittedly served a limited part of only Density Cell 1 is just that – speculation. Tr. 230.

Similarly, Verizon pointed to Comcast's market trial in Philadelphia and its plans commercially to deploy services in 2003 as evidence of Comcast's activities. Verizon St. 1.0 at 24. Again, OCA submits that such speculation cannot stand as proof that Comcast is actively serving where Verizon claims it as a trigger candidate.[22]

[22] Indeed, Verizon seemed to contradict itself in Supplemental Direct, where Verizon stated that "Comcast's future business plans are irrelevant to a triggers case." Verizon St. 1.1 at 34. Clearly, Verizon cannot have it both ways.

8. Verizon's Attempts To Include In The Trigger Analysis Cable Telephony Providers And Competitors Who Are Affiliates Of Subsidiaries Of Other ILECs Violates The TRO And Should, Therefore, Be Rejected.

As discussed above, the FCC also questioned the relevance of intermodal alternatives, namely cable telephony providers, and the competitive affiliates of incumbent LECs towards the trigger analysis. TRO at ¶ 443. The FCC recognized that some cable companies offer local voice service, and that in mid-2002, cable telephony represented over 2.5 million access lines in 27 states. TRO at ¶ 52. The FCC stated that this figure represents a 39 percent increase over the previous year and that over 10 million households have access to cable telephony. TRO at ¶ 52. However, the FCC also noted, "carriers relying on intermodal alternatives have not needed to overcome the same kinds of barriers as new entrants without any facilities at all." TRO at ¶ 98. The FCC recognized that some intermodal technologies would only be available to one or a few firms due to legal restrictions, such as cable franchising agreements. TRO at ¶ 98. The FCC concludes that cable telephony does not provide "probative evidence of an entrant's ability to access the incumbent LEC's wireline voice-grade local loop and thereby self-deploy local circuit switches. Rather, competition from cable telephony.... providers only serve as evidence of entry using *both* a self-provisioned loop *and* a self-provisioned switch." TRO at ¶ 446 (emphasis in original).

OCA witness Dr. Loube considered the FCC's concerns on use of cable telephony providers in the trigger analysis to the facts and circumstances on the record of this proceeding. In particular, according to Dr. Loube's analysis, there is at least one cable telephony provider in virtually all of the density cells within MSAs where Verizon seeks a finding of non-impairment. *See*, OCA St. 1.0 at 37-39, Table 2. Primarily, these cable telephony providers are Comcast and

RCN.[23] Such companies should be removed from Verizon's list of trigger candidates because they provide competitive local exchange service over their cable networks.

The issue of Comcast being used as a trigger candidate has been specifically raised because *** **PROPRIETARY BEGINS*** ***PROPRIETARY ENDS*** Therefore, the exception that allows cable telephony providers that use another company's switch to be considered as a trigger candidate is not applicable to Comcast.

[23] As addressed above, Adelphia's cable telephone lines should also not count for purposes of the trigger review. *See* Section III C.4, *supra*.

The OCA has also applied the FCC's concern regarding using the competitive affiliates of other incumbent local exchange carriers in the trigger analysis to the facts and circumstances of this proceeding. Another review of Table 2 in the OCA testimony reveals that, again, a competitor who is an affiliate or subsidiary of an ILEC, other than Verizon, is present in Verizon's list of trigger candidates in nearly all of the density cells within the MSAs where Verizon seeks a finding of non-impairment in this proceeding. OCA St. 1.0 at 37-39, Table 2. Here, the competitors at issue are primarily the Commonwealth affiliate, the D&E affiliate and Penn Telecom, a North Pittsburgh Telephone Company affiliate. In this instance, elimination of these competitors would, with no other modifications to Verizon's analysis, remove at least two markets, *** **PROPRIETARY BEGINGS***** *** **PROPRIETARY ENDS***** within an MSA from a finding of impairment to a finding of non-impairment.

The issue of competitors who are affiliates of other ILECs also was addressed in cross-examination during the hearing. On cross-examination of Verizon witnesses West and Peduto, Verizon listed in its trigger analysis at least three competitors who are affiliates of other ILECs. Tr. 141. Verizon recognized that one of those competitors, Penn Telecom, is an affiliate of North Pittsburgh Telephone Company from whom they lease switching capacity. Tr. 142. This is significant because, North Pittsburgh has enjoyed a rural exemption under section 252 of TA-96 for the past several years such that it is not subject to any form of UNE competition within its service territory. Tr. 142-143. Clearly, the FCC did not intend for competitors who are affiliates of ILECs who are immune from UNE competition themselves in their own service territory to be able to count toward removing the UNE-P option in another service territory.

Verizon recognized through West and Peduto that CEI Network, a competitor in Verizon's trigger analysis, is an affiliate of the ILEC D&E. ***PROPRIETARY BEGINS***

ENDS*** Mr. West agreed that the third affiliate of an ILEC that Verizon includes in its trigger analysis, CTSI, an affiliate of Commonwealth Telephone Company, had previously been determined in a prior Commission proceeding to be "assisted in providing service because it does not need to purchase a costly switch outright and can share a switch with an ILEC." Tr. 151. Mr. West agreed that the Commission found in that the proceeding "the presence of CTSI does not establish that, in general, the purchase of unbundled loops for connection to a CLEC switch is a viable method of competing for rural customers." Tr. 151

Overall, it is clear that the PUC should not count competitors who provide local exchange service through cable facilities and are affiliates or subsidiaries of other ILECs for the purposes of determining whether competitors are impaired in the relevant geographic market areas. The OCA has submitted substantial evidence of record in this proceeding that the economics are far different for a competitor who provides local exchange service through a cable network, or that is an affiliate or subsidiary of another ILEC and uses ILEC switching, for purposes of applying the trigger analysis. The PUC should not count CLECs that enter the market by these methods in the trigger analysis. Market entry through a cable company or an ILEC affiliate reflects nothing about a CLEC's ability to enter the market without these advantages. The FCC has articulated these decisions in its TRO and, as such, this Commission should remove those competitors from the trigger analysis who fall into these categories.

As such, the OCA submits that Verizon's attempt in this proceeding to include in the trigger analysis those competitors who provide service through a cable system or are an

affiliate or subsidiary of another ILEC violates the TRO and, therefore, should be rejected. The OCA submits that the PUC should not count those competitors in the trigger analysis. The Commission should deny Verizon's Petition because of its heavy reliance on such carriers contrary to the TRO.

D. Verizon Has Not Met Its Burden To Show Non-Impairment Because The Record Lacks Evidence That Verizon's Proposed Batch Hot Cut Remedy Effectively Eliminates Hot Cut Impairment.

1. Introduction

Much of the OCA's argument above considers the trigger analysis in its various aspects. However, the FCC also established an additional critical aspect of the impairment issues for the PUC's review. The FCC required this Commission to resolve a fundamental problem of eliminating UNE-P – that of the insurmountable disadvantages imposed by the incumbent LEC's current hot cut processes. Thus, regardless of the Commission's conclusions regarding triggers, it must retain unbundled circuit switching if it does not resolve the impairment present in the hot cut process.

In his testimony, OCA witness Curry briefly explained the hot cut process. He summarized:

> [w]hen a customer decides to change service providers, certain processes must take place to physically (or in some cases electronically) disconnect the customer's line from the connection of the existing service provider and move it to the connection to the new provider. It is important that the activities are coordinated such that there is minimal interruption of the customer's service during the cut-over.

OCA St. 1 at 41. The hot cut process involves a considerable synchronization of carriers, technicians, computers, and alterations in the physical signal path of each local loop subject to

it.[24] It is neither simple nor expedient in its current form and is an insurmountable impairment within itself.[25] For this reason, the FCC has directed that the states find a way to alleviate that impairment.

Hot cut impairment is a fundamental issue in this proceeding. Regardless of the long-term implications of hot cut impairment, the one-time implications are a serious threat to Pennsylvania's local telephone services market. For example, if CLECs no longer had access to unbundled circuit switching, in excess of 444,000 individual hot cut operations would be required to convert CLEC customers from UNE-P to UNE-L based CLEC service. OCA St. 1 at 43. Given the problems inherent in the hot-cut process, as discussed below, it is unlikely that Verizon could accomplish such a massive undertaking without causing serious disruptions to the telephone service of those Pennsylvania consumers who have chosen a competitive local service provider. OCA St. 1 at 43. For these reasons, it is particularly important that the Commission proceed carefully regarding hot cuts, with full deliberation of all the issues presented here.

2. The TRO Requires This Commission To Employ Its Fact-Finding Expertise To Eliminate Hot Cut Impairment.

The FCC made the following conclusions regarding the impairment imposed by the current hot cut processes employed by incumbent LECs:

> we conclude that the operational and economic barriers arising from the hot cut process create an insurmountable disadvantage to carriers seeking to serve the mass market, demonstrating that competitive carriers are impaired without local circuit switching as a UNE. Although we find that current conditions at the national level demonstrate that competitive LECs are impaired without unbundled switching for mass market customers based on the costs and delays associated with hot cuts, we take affirmative steps to reduce this impairment and promote an environment suitable for increased facilities-based competition. As

[24] TRO ¶ 464-65.
[25] TRO ¶ 475.

> described below, we find that the present impairment can be mitigated by an improved loop provisioning process.[26]

While the FCC declined to provide specific proposals concerning how an improved loop provisioning process may mitigate hot cut-based impairment, it was confident that the states could do so through their local fact-finding expertise and that the states could construct solutions best suited to local markets.[27] To that end, the FCC directed this Commission with approving a batch hot cut process that would ameliorate the insurmountable operational and economic disadvantages imposed by the existing hot-cut process. Specifically, the FCC directed that:

> [s]tate commissions must approve, within nine months of the effective date of this Order, a batch cut migration process to be implemented by incumbent LECs that will address the costs and timeliness of the hot cut process. Alternatively, state commissions must make detailed findings explaining why such a process is not necessary in a particular market, as described below. We find that state regulators are closest to the facts particular to the provisioning issues applicable to their respective markets, and are in the best position to judge whether the incumbent LEC has indeed developed an efficient loop migration process. There can be no doubt that state commissions possess the competence to implement a cost-effective and fast process for provisioning unbundled local loops. State commissions possess the requisite expertise to apply Commission-prescribed standards, and they routinely utilize the processes and procedures – including discovery, sworn testimony, and cross examination on the record – that are essential to reasoned fact-finding. Should a state commission fail to approve a batch cut migration process or provide a detailed explanation why such a process is not necessary within nine months of this Order's effective date, an aggrieved party will be permitted to initiate a proceeding with this Commission.[28]

OCA St. 1 at 41.

The TRO thus provides that each state may make one of two determinations. Each state may either maintain its status quo or develop a batch cut process within the nine-month window of the TRO proceeding.[29] In either instance, a state must use its fact-finding function to determine how existing hot-cut processes are sufficient, or to develop and approve a

---

[26] TRO ¶ 475.
[27] TRO ¶ 488.
[28] TRO ¶ 488(citations omitted).
[29] TRO at ¶ 488.

batch hot cut process that alleviates the impairment issues identified by the FCC. The PUC recognized this requirement in its October 3, 2003 Procedural Order where it wrote, "[t]he Triennial Review requires a determination of such a process [loop migration] in order to ensure that carriers compete effectively in the marketplace."[30]

In the *TRO*, (codified at 51.319(d)(2)(ii)),[31] the FCC specifically directed state commissions to discover and approve a low-cost batch cut process to mitigate the impairment imposed by the current hot cut process in each commission designated market. "State commissions must approve, within nine months of the effective date of this Order, a batch cut migration process to be implemented by incumbent LECs that will address the costs and timeliness of the hot cut process." [32] The FCC directed the state commissions to determine the appropriate number of loops to be included within a batch.[33] In addition, the TRO directs the state commissions to evaluate whether the incumbent LEC can migrate loops from the incumbent LEC switch to the competitive LEC switch in a timely manner, and can establish quality of service standards with regard to the average completion interval to migrate the loops.[34] Regarding pricing, the FCC directed that the rate for a cut over should be determined in accordance with the FCC's pricing rules for unbundled network elements.[35]

The FCC's direction to the states asks the states to engage in a substantial fact-finding exercise. The Commission's current approach of technical conferences and comments, that is, its off-the record consideration of hot cut impairment, fails to resolve these issues as the

---

[30] Development of an Efficient Loop Migration Process, Docket No. M-00031754, Procedural Order at 25 (October 3, 2003).

[31] *See* Part 51 of Title 47 of the Code of Federal Regulations.

[32] *TRO* ¶ 488.

[33] TRO ¶ 489.

[34] TRO ¶ 489.

[35] TRO ¶ 489.

TRO and Pennsylvania law require.

3. This Proceeding Cannot Meet The Requirements Of The TRO Because It Contains No Evidence Upon Which To Base An Approval of a Batch Hot Cut Process, Or To Show That Verizon's Current Hot Cut Process Does Not Produce Impairment.

a. The TRO Requires The Commission To Examine The Batch Hot Cut Issue Within The Context Of An On-The-Record Proceeding.

In the TRO, the FCC wrote:

> There can be no doubt that state commissions possess the competence to implement a cost-effective and fast process for provisioning unbundled local loops. State commissions possess the requisite expertise to apply Commission-prescribed standards, and they routinely utilize the processes and procedures – including discovery, sworn testimony, and cross examination on the record – that are essential to reasoned fact-finding.[36]

The language of this section of the TRO is clear regarding the process that state commissions must employ to resolve the thorny issue of hot cut impairment. States must provide for discovery, sworn testimony, and cross-examination on the record to develop record evidence on this issue. Given the scope and development of the TRO related proceedings here in Pennsylvania, it appears that the Commission cannot make a finding of non-impairment regarding hot cuts because it has no evidence upon which to base such a determination.

b. The Commission Cannot Eliminate UNE-P In The Current Docket Because Verizon Presented No Evidence Of A Solution To Hot Cut Impairment.

As an initial matter, the OCA points out that Verizon did not submit any testimony regarding how its batch hot cut procedure would eliminate hot cut impairment in this

[36] TRO ¶488.

proceeding. In fact, Verizon attempted to block the OCA's attempt to address this issue at all.[37] Within the context of this proceeding, the OCA raised the issue of hot cuts and batch hot cuts in discovery directed to Verizon, and addressed the issue as a part of the testimony of the OCA. Nevertheless, Verizon failed to provide any substantial information regarding hot cut impairment in this, the only on-the-record TRO proceeding established by the Commission thus far.

The Commission has established the current on-the-record proceeding as the only means by which the PUC will make determinations of whether non-impairment exists over any portion of Pennsylvania pursuant to section 251 of the 1996 Telecommunications Act. The question of whether CLECs can use the Verizon hot cut process and the related UNE Loop facilities to serve the mass market customer is the critical factor that resulted in the FCC's finding of mass market impairment. The PUC must resolve this problem in order to meet the requirements of the TRO before it makes any finding of non-impairment. As such, the problem of hot cuts is inextricably interrelated to whether the PUC finds non-impairment in this proceeding, and must be resolved by the fact-finding process. Given that this is the only on-the-record proceeding regarding the TRO thus far, it was incumbent upon Verizon to present its batch hot cut testimony here, and it has failed to do so.

In contrast, as part of the New York batch cut proceeding, it would appear that the New York parties to a similar proceeding, including Verizon New York, are engaged in litigation in New York on the batch hot cut issue.[38] While the New York Public Service Commission established an on-the-record proceeding to examine this issue, and referenced it as being part of its TRO proceeding, the Pennsylvania Commission provided for no such on-the-record

[37] Verizon Pennsylvania Inc.'s And Verizon North Inc.'s Motion To Strike Irrelevant Portions of Intervenor Testimony, Docket No. I-00030099 (January 20, 2004).

[38] Proceeding on Motion of the Commission to Examine the Process and Related Costs of Performing Loop Migrations on a More Streamlined (e.g. Bulk) Basis, Case No. 02-C-1425, Ruling On Evidentiary Objections And Establishing Briefing Schedule (January 26, 2004) (attached in "Appendix A.")

proceeding here.[39] Thus, as the sole fact-finding TRO proceeding in Pennsylvania to date, the current docket is the correct place for an on-the-record determination of the hot cut impairment issue. To the extent that Verizon filed no testimony on this issue, a determination of non-impairment regarding hot cuts under the requirements of the TRO is impossible here.

4. Important Aspects of the Loop Migration Process Remain Unresolved.

The materials submitted to the Commission in the off-the-record Development of an Efficient Loop Migration Process proceeding cannot serve as a basis for a Commission decision regarding non-Impairment. That is true because Pennsylvania law requires that where an adjudicatory Commission decision involves a substantial property right, the Commission must provide for the making of a full and complete record.[40]

On October 3, 2003, the Commission established the proceeding, Development of an Efficient Loop Migration Process, (Loop Migration Case) as an off-the-record technical conference to explore the hot cut impairment issue.[41] How that related proceeding will influence the present proceeding is unclear.[42] The OCA understands that the Commission proposes to hold only one technical conference in mid-March; there may be no other meeting where parties may negotiate hot cut impairment issues. In fact, the PUC has stated that Staff is to notify the Commission immediately if it cannot foresee consensus among interested parties.[43] In addition, the Commission has stated that, if the parties do not arrive at consensus at that one meeting, then

---

[39] In the Matter of the Implementation of the Federal Communications Commission's Triennial UNE Review Decision, Case No. 03-C-0821, Pre-conference Ruling at 2 (September 11, 2003) (attached in "Appendix A.")
[40] AT&T Communications of Pa. v. Pa. P.U.C., 570 A.2d 612, 618 (February 15, 1990).
[41] Development of an Efficient Loop Migration Process. Docket No. M-00031754, Procedural Order at 25 (October 3, 2003).
[42] Development of an Efficient Loop Migration Process. Docket No. M-00031754, Procedural Order at 25 (October 3, 2003); Monday, February 9, 2004 email of Mohan Samuel, Fixed Utility Financial Analyst, Pennsylvania Public Utility Commission.
[43] Development of an Efficient Loop Migration Process. Docket No. M-00031754, Procedural Order at 25 (October 3, 2003).

the Commission will make its own determination using the materials and comments provided by the participants in that docket.[44]

In addition to various procedural due process issues, those portions of Verizon's batch hot cut process reviewed by the OCA witness show that there are serious substantive problems present in Verizon's batch hot cut proposal. Given the evidence in this record, the Commission cannot resolve those issues here. Even if the Commission were to find that some markets meet the triggering requirements, it cannot find non-impairment. The PUC must still resolve serious questions of fact regarding hot cut impairment that are not addressed in this case.

For example, Mr. Curry testified that Verizon has yet to test, implement, or verify the efficacy of its proposed batch hot cut process. OCA St. 1 at 49. Regarding Verizon's testing process, he points out that Verizon states "[t]he full scale and methodology of the proposed batch hot cut trial has not yet been determined nor has Verizon completed its review of the potential trial participants."[45] OCA St. 1 at 49 *quoting* Verizon response to OCA Set II, Interrogatory 3. Mr. Curry explained that, while the Commission should continue to encourage dialogue among the parties as to the implementation of this process, it should not rush to approve such a process unless Verizon shows that it actually works for customers. OCA St. 1 at 49.

For example, regarding anticipated hot cut volume and proposed scheduling, Verizon provides:

> "...with the appointment window of 6 to 26 business days for batch hot cuts, Verizon will have a better view of the orders that have been submitted. This will give Verizon more flexibility in planning its work force to ensure that the orders are all completed within the batch hot cut window."[46]

---

[44] Monday, February 9, 2004 email of Mohan Samuel, Fixed Utility Financial Analyst, Pennsylvania Public Utility Commission.
[45] Verizon response to OCA Set II, Interrogatory 3.
[46] Verizon response to OCA Set II, Interrogatory 6.

The OCA urges the Commission to examine the scheduling issue very carefully. As Mr. Curry testified, a 5-week delay in service constitutes a serious barrier within itself, and may well cause residential customers to avoid competitive service providers altogether. OCA St. 1 at 50. Mr. Curry is correct to point out that the Commission should ensure that Verizon performs all aspects of the hot cut process with parity to its own provision of service. OCA St. 1 at 50. Currently, Verizon must perform 95% of all primary service order installs within 5 working days of the receipt of that order. 52 Pa. Code § 63.58. Imposing a five-week delay for CLECs clearly places them at a disadvantage to an ILEC's five-day minimum. As Mr. Curry pointed out, the circumstance of delay is particularly troubling regarding customers in wire centers away from high-density urban wire centers where even the best batch hot cut process may constitute a barrier to entry if a lone customer must wait until other customer orders accumulate over time for batch processing. OCA St. 1 at 50.

Addressing the issue of Verizon's performance monitoring of this process, Mr. Curry pointed out "... no metrics exist for the proposed batch hot cut process."[47] Mr. Curry also pointed out that Verizon did not produce a firm proposal, implementation plan, performance monitoring metrics, or other details of the new batch hot cut process; here, it produced only speculation. OCA St. 1 at 50. The OCA submits that the Commission cannot determine that local circuit switching is not impaired until the batch hot cut issue is resolved via a demonstration of a lack of impairment. Given the large numbers of consumers placed at risk by Verizon's proposal, the PUC should not trust to hope and prayer that Verizon can turn an inherently flawed process into a highly functional one without proper process testing and

[47] Verizon response to OCA Set II, Interrogatory 4.

monitoring for a reasonable time. The Commission should not approve Verizon's proposal based on Verizon's proffer of speculation and scant evidence.

OCA witness Curry is correct that there are serious problems regarding Verizon's ability to perform hot cuts in general, and in its ability to perform hundreds of thousands of hot cuts in short order as proposed by Verizon here. OCA St. 1 at 43. The FCC's conclusions agree with Mr. Curry. The FCC found "that it is unlikely that incumbent LECs will be able to provision hot cuts in sufficient volumes absent unbundled local circuit switching in all markets."[48] The significant "issue identified by the record is an inherent limitation in the number of manual cut overs that can be performed, which poses a barrier to entry that is likely to make entry into a market uneconomic."[49]

Mr. Curry agreed with the TRO's list of factors contributing to the limited capacity of the current hot cut process. OCA St. 1 at 45. Specifically, Mr. Curry agreed with the FCC's conclusions that "the labor intensiveness of the process, including substantial incumbent LEC and competitive resources devoted to the coordination of the process, the need for highly trained workers to perform the hot cuts, and the practical limitations of how many hot cuts an incumbent LEC can perform without interference or disruption" serves to limit a LEC's ability to perform hot cuts.[50]

In addition, Mr. Curry pointed out that the costs associated with hot cuts, which are borne by CLECs, contribute to a significant barrier to entry. OCA St. 1 at 45. Furthermore, the *TRO* finds that "hot cuts frequently lead to provisioning delays and service outages, and are

[48] TRO ¶ 468.

[49] TRO ¶ 469.

[50] TRO ¶ 465.

often priced at rates that prohibit facilities based competition for the mass market."[51] In the TRO, the FCC found that "the overall impact of the current hot cut process raises competitors' costs, lowers their quality of service, and delays the provisioning of service, thereby preventing them from serving the mass market in the large majority of locations."[52]

5. A Commission Determination Based On Materials Or Comments Gathered From The Off-The-Record Development of an Efficient Loop Migration Process Proceeding Would Not Comport With The Due Process Requirements Of Pennsylvania Law.

On January 28, 2004, Verizon filed numerous and extensive Declarations of expert witnesses in the Loop Migration Proceeding docket. Verizon's experts provide declarations of a factual nature regarding how Verizon's proposed batch hot cut process ameliorates the inherent impairment of the hot cut process. Verizon's declarations include factual evidence regarding the current hot cut process, the project hot cut process, the batch hot cut process, and the costs of hot cuts.[53] Based on that filing, the Commission decided that parties in that docket would have fifteen days to respond to Verizon's Declarations.[54] The OCA points out that none of these factual materials are sworn testimony subject to on-the-record cross-examination.

---

[51] TRO ¶ 465.

[52] TRO ¶ 473.

[53] Development of an Efficient Loop Migration Process, Docket No. M-00031754, Declaration of Eugene J. Goldrick, MaryEllen T. Langstine, James L. McGlaughlin, Carlo Michael Peduto, II. Larry G. Richter and John L. White Submitted In Support Of The Comments Of Verizon Pennsylvania Inc. and Declarlation of William E. Taylor In Support Of The Comments Of Verizon Pennsylvania Inc. (January 28, 2004)

[54] Thursday, February 5, 2004 email of Mohan Samuel, Fixed Utility Financial Analyst, Pennsylvania Public Utility Commission.

Pennsylvania law requires that Commonwealth agencies provide procedural due process to those parties whose rights, duties, and obligations are affected by agency determinations. The Commission's determination of the efficacy of Verizon's proposed batch cut process will affect the rights of not only Pennsylvania's CLECs, but also the CLEC's 444,000 established Pennsylvania telephone consumers who have a right to adequate telephone service. What the Commission proposes to do here – make a determination of the efficacy of Verizon's batch hot cut process based on extra-record materials – is illegal under Pennsylvania law and Commonwealth Court precedent.

In AT&T Communications of Pa. v. Pa. P.U.C., the Commission decided that AT&T's toll-free 800 number should no longer appear on the telephone bills of those LECs that handled billing for AT&T's toll services.[55] Instead, the Commission sought to have each LEC handle all billing disputes on behalf of AT&T.[56] AT&T contested that decision, requesting a full evidentiary hearing on the matter, and the Commission did not grant AT&T such a hearing.[57] Regarding the process supplied by the commission on this question the Commonwealth Court wrote:

> section 504 of the Administrative Agency Law (Law), 2 Pa.C.S. § 504, provides that "[N]o adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. All testimony shall be stenographically recorded and a full and complete record shall be kept of the proceedings." Also, section 505 of the Law states that "[R]easonable examination and cross-examination shall be permitted."[58]

The Commonwealth Court reasoned that the Commission had engaged in "adjudication" because

[55] AT&T Communications of Pa. v. Pa. P.U.C., 570 A.2d 612, 615-16 (1990).
[56] AT&T Communications of Pa. v. Pa. P.U.C., 570 A.2d 612, 615 (1990).
[57] Id.
[58] AT&T Communications of Pa. v. Pa. P.U.C., 570 A.2d 612, 618-19 (1990).

it interpreted the rights, duties, and obligations of the parties before it in that case.[59] The court determined that the Commission committed error because it interpreted the rights of those parties without providing for an evidentiary hearing.[60] It is clear that the elimination of an 800 number on a telephone bill implicates an issue much smaller than the elimination of UNE-P across much of Pennsylvania. Any decision on batch hot cuts will affect the rights, duties, and obligations on the part of Pennsylvania's CLECs. This will also affect the CLEC service offered to thousands of Pennsylvania consumers. Thus, any Commission determination based on materials or comments gathered from the off-the-record Development of an Efficient Loop Migration Process Proceeding will violate the due process requirements of Pennsylvania law as discussed in AT&T Communications of Pa. v. Pa. P.U.C.

Hot cut impairment is fundamental to this proceeding as the issue of impairment cannot be resolved without carefully considering its impact here. At issue is the now-reliable telephone service of over 444,000 Pennsylvania consumers. Given the problems inherent in the current hot-cut process, and he serious questions of fact presented by Verizon's proposed batch hot cut process, it is particularly important that the Commission proceed carefully regarding batch hot cuts. In addition, the Commission should provide for full evidentiary hearings in accord with Pennsylvania law. This will not only protect the rights of the parties and Pennsylvania telephone consumers, but will also allow for the full deliberation of all the issues presented here.

[59] Id.
[60] Id.

E. Verizon Must Continue To Unbundle Certain Elements Pursuant To Its Other Existing Obligations.

1. Introduction.

In addition to Verizon's unbundling obligations pursuant to section 251 that are at issue in this proceeding, Verizon also has other obligations to lease portions of its network to competitors at just and reasonable rates. The OCA emphasizes this fact as the PUC considers its unbundling obligations under the TRO. These obligations come from other portions of TA-96 as well as through other state law and this Commission's directives. The OCA addresses this issue here so that it will not be overlooked as the PUC considers the unbundling obligations pursuant to section 251. As such, to the extent this Commission may determine that competitors are not impaired under section 251 of TA-96 in certain geographic markets without access to specific network elements; the OCA submits that Verizon still has an obligation to provide such access to competitors under other legal requirements.

This Commission recognized this fact as recently as December 18, 2003 in its Order regarding the obligations of ILECs to unbundled circuit switching for the enterprise market. *See*, Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market, Docket No. I-00030100, Order (entered Dec. 18, 2003). In that December 18th Order, this Commission held that their determination to deny CLEC Petitioners' request for a waiver petition to the FCC did not relieve Verizon of its obligations under separate authority to provide requesting carriers with access to its local circuit switching. Id. at 14. The Commission specifically cited the Global Order, section 271 of TA-96 and section 3005(e) of Chapter 30 for support for the independent obligation of Verizon to provide access to circuit switching. Id. (citations omitted).

The Commission explained:

> First, we previously decided in the Global Order that Verizon's obligations to provide UNE-P to CLECs servicing business customers with total billed revenue (TBR) from local services and intraLATA toll services at or below $80,000 annually would continue through December 31, 2003. Based on the positions of the parties, we assume that the TBR standard generally coincides with the enterprise market customers at issue in this case. In the Global Order, we invited Verizon to demonstrate that UNE-P would not be necessary to serve such end-user customers after December 31, 2003. Verizon has not made a filing to date, therefore, the obligation continues.
>
> .....
>
> Given the lack of record development and the uncertainty as to an actual conflict, as well as our open and unanswered invitation to Verizon to demonstrate that the Global Order requirement can be retired, we will not change the status quo vis-à-vis access at this time.
>
> This decision to maintain the status quo is further supported by Verizon's undisputed continuing obligation under 47 U.S.C. § 271(c)(2)(B)(vi) *to provide access to local circuit switching.* Thus, Verizon must continue to provide access to local circuit switching to requesting carriers for the purpose of serving end-user customers using DS1 capacity and above loops.

Id. at 14-16 (citations omitted). Therefore, the Commission determined that Verizon was not relieved of its ongoing obligation to provide access to local circuit switching under separate authority.

This determination is well-supported by the FCC in the TRO which also specifically articulates the independent access obligations for Verizon created in section 271 of TA-96. The FCC stated

> we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loop, switching, transport and signaling regardless of any unbundling analysis under section 251. [T]he plain language and the structure of 271(c)(2)(B) establish that

> BOCs have an independent and ongoing access obligation under section 271. ... Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2.

TRO at ¶¶ 653-654. The FCC continued, "it is reasonable to interpret section 251 and 271 as operating independently. Section 251, by its own terms, applies to *all* incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs." TRO at ¶655 (emph. in original). The FCC also specifically rejected Verizon's claim that any interpretation of section 271 that recognizes its independence from section 251 would improperly single out BOCs for treatment different from other incumbent LECs. TRO at ¶655.

The interplay between section 251 and section 271 of TA-96 is particularly important given Verizon's ability to enter the long distance market under section 271 in exchange for it complying with several market opening provisions, such as providing competitors access to certain elements of its network. The FCC granted Verizon permission to provide long distance services in Pennsylvania after a showing that it had taken the statutorily-prescribed steps to open its local exchange market to competition. Application of Verizon Pennsylvania, Inc. for Authorization to Provide In-Region InterLATA Services in Pennsylvania, CC Docket No. 01-138, Memorandum Opinion and Order, FCC 01-269, at ¶¶ 76 and 78. Therefore, Verizon must continue to meet its obligations under section 271 as part of its ability to provide long distance services.

The Commission also reaffirmed its position that Verizon is obligated to provide such access in its October 2nd procedural order initiating this proceeding. There, the Commission stated

> As a preliminary matter, the Commission emphasizes that as this order is implemented, the terms of an interconnection agreement may prohibit an ILEC from unilaterally discontinuing the provision

> of service on the ground that there is a change of law. Furthermore, the Commission underscores our recent order, Petition of Verizon Pennsylvania, Inc. for a Determination That its Provision of Business Telecommunications Services to Customers Generating Less Than $10,000 in Annual Total Billed Revenue is a Competitive Service Under Chapter 30 of the Public Utility Code, Docket No. P-00021973, Order entered August 13, 2003, wherein we stated that for any telecommunications service for which a Pennsylvania ILEC obtains competitive designation under Chapter 30, the ILEC is required, independent of federal requirements, to unbundle basic service functions to provide that local service.

October 2, 2003 Order at 5, *citing*, 66 Pa C.S. §3005(e) (requiring unbundling of basic service functions) and 47 U.S.C. § 271 (requiring Verizon PA to provide access to certain network elements).

The Commission has also noted the obligation of Verizon to provide access to its unbundled network elements under Chapter 30 of the Public Utility Code in its Order in the Global Order and in the Business Services case, *supra*.[61] In the Global Order, In re: Nextlink Pennsylvania, Inc., 196 PUR 4th 172 (Pa. PUC September 30, 1999) ("Global Order") the Commission recognized the impact of its decision on Verizon's obligation to continue to unbundled its network elements when it stated

> Chapter 30 provides another source of state law for requiring the unbundling of network elements. BA-PA has obtained competitive classification of several of its local services in accordance with Chapter 30 requirements. Chapter 30 also requires BA-PA to "unbundle each basic service function on which those competitive services depend ..." Thus, to the extent that BA-PA receives and accepts competitive classification of its business services as part of this proceeding, it must unbundle the "basic service functions" on which the "competitive" local service depends. Chapter 30 defines "basic service functions" as "those basic components of the local exchange carrier network which are necessary to provide a

[61] While Chapter 30 has since expired pursuant to its own terms, Chapter 30 was in existence at the time the Commission articulated its position on Verizon's unbundling obligations in Global and the Business Services case and the Commission has since declared that its orders entered prior to the expiration of Chapter 30 remain in full force and effect. Sunset of Chapter 30, Title 66 of the Public Utility Code, Statement of Policy, Docket No. M-00041786 (entered January 22, 2004)

> telecommunications service and which represent the smallest feasible level of unbundling capable of being tariffed and offered as a service." Currently, BA-PA's Centrex, Paging, Repeat Dialing, Speed Dialing and High Capacity Special Access services have been declared competitive in Pennsylvania. Therefore, any "basic service functions" used to provide these services must be unbundled. Clearly, loops, switching and transport are part of any Centrex offering. Also, loops and transport are part of special access offering.

Global Order at 207. The Commission stated, "consistent with these parameters, we emphasize that for any telecommunications service for which Verizon PA obtains competitive designation under Chapter 30, Verizon PA is required, independent of other federal requirements, to unbundle BSFs used to provide that local service." Id.

In the Business Services case, *supra*, the Commission noted that section 3005(e)(1) of Chapter 30 provides that:

> The local exchange telecommunications company shall unbundle each basic service function on which the competitive service depends and shall make the basic service functions separately available to any customer under the nondiscriminatory tariffed terms and conditions, including price, that are identical to those used by the local exchange telecommunications company and its affiliates in providing its competitive service.

Id. at 25, *citing*, 66 Pa. C.S. §3005(e)(1). The Commission referred to the Global Order when it reiterated Verizon's obligations to provide unbundled access despite Verizon's implication "that it may determine to discontinue offering unbundled network elements if the FCC rules abolish the federal requirement to provide UNEs to competitors." Id. at 25-26.

The TRO expressly determined that states could continue to impose unbundling obligations under state law. In particular, the FCC stated

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to

> state law to the extent that the exercise of state authority does not conflict with the Act and its purposes of our implementing the regulations. Many states have exercised their authority under state law to add network elements to the national list.

TRO at ¶ 191. The FCC also specifically rejected ILECs arguments that states are preempted from regulating in this area as a matter of law finding that "if Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act." TRO at ¶192. The FCC also rejected the arguments that states may impose any unbundling framework they deem proper under state law, without regard to the federal regime. TRO at ¶ 192.

As such, there is substantial legal support for the proposition that, in addition to Verizon's unbundling obligations pursuant to section 251 that are at issue in this proceeding, Verizon also has other obligations to lease portions of its network to competitors at just and reasonable rates. Therefore, to the extent this Commission may determine that competitors are not impaired under section 251 of TA-96 in certain geographic markets without access to specific network elements; the OCA submits that Verizon still has the obligation to provide such access to competitors.

F. The Commission Must Deny Verizon's Petition As It Has Failed to Meet the Requirements of the TRO In Many Ways.

In conclusion, the Commission must deny the Verizon Petition as it has failed to meet the requirements of the TRO in many different ways. The OCA has explained above the multiple reasons why Verizon's Petition has failed to meet the TRO's requirements. The Commission cannot make a finding concerning non-impairment unless the trigger analysis has been properly applied to the mass market. Granting Verizon's Petition would most likely reduce by half the number of consumers who would receive service from all CLECs due to a termination of the UNE-P.

The PUC should review the application of the triggers based upon market areas composed of Density Cells 1-3 within the MSAs. Such market areas best reflect the geographic areas where CLECs can best compete. The PUC must reject market areas reflecting the entire MSA as such market areas are too large and include Density Cell 4 where UNE loop rates are likely to be too high to sustain competition. This definition is consistent with the FCC's guidelines and will facilitate any impairment analysis that the Commission might undertake. Verizon's position on this issue has been inconsistent and the PUC should reject Verizon's position to the extent that it has advocated market areas larger than Density Cells 1-3. Furthermore, many CLEC interveners in this proceeding support a relevant geographic market that is also too large. As such, the Commission should adopt as the relevant geographic market areas Density Cells 1, 2 and 3 within the MSAs.

After making such a determination regarding the relevant geographic market area, the record evidence shows that Verizon's line count has failed to measure the mass market in each market area. Verizon's Petition is fundamentally flawed as it has assumed that all DS0 lines served through CLEC switching represent mass market customers. Verizon's analysis classifies all such switching as trigger candidates. As discussed in detail above, this position leads to odd results that dramatically overstate the extent of CLEC self-provisioning of switches to the mass market. The TRO restricts the mass market trigger analysis to only residential and small business customers and excludes large enterprise customers. Verizon's line count fundamentally fails this goal. The method by which Verizon counted CLEC lines is also without merit as, for example, the Company inappropriately used data in the E911 database to determine its CLEC count. Verizon's line count is also in error in comparison with the line counts of the CLECs themselves in many locations.

Such line counts must also make sure that trigger candidates serve both residential and small business customers. Verizon has not attempted to meet this requirement. CLECs must also have more than a minimal presence in the relevant geographic market. OCA has developed a 3% requirement within the market area as a reasonable standard to define the minimal presence necessary to count as a trigger candidate. Verizon erroneously has counted CLECs that serve only a few lines in a market area as trigger candidates. The Commission must ensure that those CLECs that it includes in the trigger analysis, in fact, are actively seeking to serve residential and small business customers throughout the relevant geographic market and not just in one small area within the MSA.

Verizon has included as trigger candidates cable telephony providers and competitors who are affiliates or subsidiaries of other ILECs. Cable and ILEC affiliates have fundamental advantages in comparison with other CLECs such that their competitive circumstances are different and distinct. Cable companies have their own network that they use to serve cable television customers and have often constructed such networks under a local cable franchise. ILEC affiliates have the advantage of being able to share the use of switching facilities within the same parent company. Such ILECs have been able to construct such facilities often based upon service to a monopoly market. Most CLECs do not enjoy such advantages. The PUC should not consider cable and ILEC affiliates as trigger candidates.

Verizon has failed to develop a record before the Commission that it has resolved the impairment problems identified by the FCC concerning mass market hot cuts. Verizon must make substantial improvements before the PUC can permit it to terminate UNE-P and force the affected thousands of CLEC customers to migrate to CLEC switches through hot cuts. Verizon has not demonstrated that it has the technical ability to accomplish such a task. Verizon has not

explained its development of such a hot cut process through the hearing process. Verizon must demonstrate this before the PUC can make any finding of non-impairment.

OCA also emphasizes that, regardless of any non-impairment finding that the PUC may make, Verizon continues to be required to provide unbundled switching because of its unbundling obligations pursuant to section 271 and its prior commitments under Chapter 30. Such unbundling obligations exist independent from the impairment based unbundling obligations pursuant to section 251.

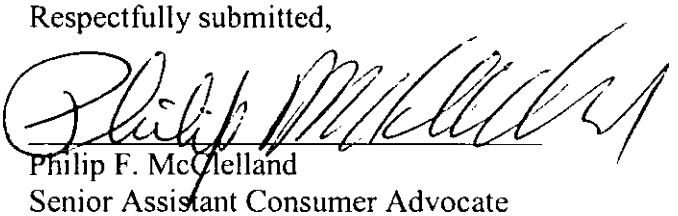
When considering all of these issues, and in light of Verizon's failure to prove that its proposed batch hot cut remedy effectively eliminates hot cut impairment, the Commission can come to no other conclusion but that Verizon has not met its burden to show that non-impairment exists within the MSAs. The OCA has further articulated in detail why Verizon has failed to show non-impairment within these geographic market areas in the Direct Testimony of OCA witnesses Loube and Curry. OCA St. 1.0 at 38-40. More specifically, the OCA has provided substantial evidence of record that demonstrates that those CLECs, which Verizon claims as satisfying its burden under the TRO trigger analysis, have not met any trigger requirements in relevant geographic market areas. First, the PUC must reject the Verizon line counts for the reasons explained above. Second, even if the line counts could be used and the failure of the hot cut process overlooked, the CLECs lines identified by Verizon must be rejected. Verizon's line counts are flawed because the CLECs identified either 1) do not actively serve both residential and small business customers; 2) are a subsidiary or affiliate of an ILEC; 3) are a cable provider; 4) do not own or operate their own switch; or 5) have a *de minimis* number of mass market customers in the market.

When applying the analysis articulated in the TRO, none of the Density Cells 1, 2 or 3 within the MSAs has three or more trigger candidates. Thus, there is no evidence of CLEC non-impairment. Therefore, the Commission must find that mass market switching continues to be impaired throughout the Verizon service territory and must reject Verizon's Petition.

IV. CONCLUSION

WHEREFORE, the Office of Consumer Advocate respectfully requests that the Commission deny Verizon Pennsylvania's Petition concerning mass market impairment.

Respectfully submitted,



Philip F. McClelland
Senior Assistant Consumer Advocate
Barrett C. Sheridan
Joel H. Cheskis
Shaun A. Sparks
Assistant Consumer Advocates

For: Irwin A. Popowsky
Consumer Advocate

Office of Consumer Advocate
555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048

Dated: February 17, 2004
78055.doc

Appendix A

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 02-C-1425 - Proceeding on Motion of the Commission to Examine the Process, and Related Costs of Performing Loop Migrations on a More Streamlined (e.g., Bulk) Basis

RULING ON EVIDENTIARY OBJECTIONS AND ESTABLISHING BRIEFING SCHEDULE

(Issued January 26, 2004)

ELIZABETH H. LIEBSCHUTZ, Administrative Law Judge:

During the course of evidentiary hearings held January 13 and 14, 2004, Verizon objected to two exhibits and two sections of pre-filed direct testimony proffered for admission into the record. I heard arguments on these objections during the course of the hearings and during the course of a telephone conference call with the parties held January 15, 2004, but I reserved ruling at that time. Moreover, because one of these evidentiary issues had implications for the briefing schedule in the case, the parties and I discussed only a hypothetical briefing schedule but delayed finalizing it, pending the outcome of the evidentiary ruling.

On January 16, 2004, I notified the parties that I would a) sustain Verizon's objection to Exhibit 9-P; b) overrule Verizon's objections to Conversent's prefiled testimony and exhibit; c) set February 6 and 17 as the dates for initial and reply briefs, respectively; and d) set February 17 as the date for briefs on confidential treatment of information in the record; with a written ruling to follow.

Before this written ruling was issued, however, Verizon submitted a letter on January 23, 2004 proposing a new, compromise solution to the controversy regarding Exhibit 9-P. AT&T submitted a response by letter on January 23, 2004; Verizon replied by letter on January 25, 2004; AT&T sur-replied on January 26, 2004, and MCI commented by letter on January 26, 2004. This ruling now re-iterates the preliminary ruling

communicated to the parties on January 16, but takes into account as well the latest round of submissions since that time.

Exhibit 9-P

During the course of its cross-examination of Verizon's panel of witnesses, AT&T marked for identification Exhibit 9-P, consisting of AT&T's response to Verizon's interrogatory VZ-ATT-5. This interrogatory, sent to AT&T on October 29, 2003, questioned AT&T regarding the back-up documentation for the statement on page 18 of its pre-filed initial direct testimony that 99 percent of AT&T's orders for hot cuts "flow through" electronically, without manual intervention. In its initial testimony, AT&T's panel had stated it receives its Firm Order Commitment (FOC) for its orders "within minutes," indicating flow-through of orders. However, in its response to VZ-ATT-5, AT&T wrote that Broadview (which serves as AT&T's agent for submission of hot cut orders in New York) had analyzed a representative sample of orders for the past six months and found that, in the vast majority of cases, an FOC was received "within two hours," which indicated that the order achieved flow-through.

In its own responsive testimony, pre-filed on December 26, 2003, Verizon noted the inconsistency between AT&T's initial testimony stating that an FOC was received "within minutes" and the VZ-ATT-5 response stating that the FOC was received "within two hours." According to Verizon's responsive testimony, the difference is critical, because many manually-processed orders can result in an FOC generated within two hours.

According to AT&T, it was only upon a reading of Verizon's responsive testimony that AT&T was made aware of the discrepancy between the interrogatory response and AT&T's initial testimony. AT&T then undertook to re-analyze its data regarding hot cut orders. After conducting this review, AT&T corrected its response to VZ-ATT-5. The correction is dated January 12, 2004, the day before hearings in this case, and it appears that counsel for Verizon did not become aware of the correction until it was in fact proffered at the hearing on

January 13, 2004. In its correction, AT&T changes the reference to "two hours" to "within minutes". AT&T's correction goes on to clarify that, "Although we believe this to be the case based on our experience, the only data that we have directly relating to the fall out rate is based on the two hour criterion. See, VZ-ATT-61."

Verizon does not object to AT&T's introduction of the corrected interrogatory response as described and quoted above. Instead, Verizon's objection is directed solely to additional information included in the response. After stating the correction as summarized above, AT&T's interrogatory answer goes on to describe a new analysis of its data regarding hot cuts ordered from Verizon. Pursuant to this analysis, AT&T's response recites the percentage of time Verizon queries AT&T hot cut orders and, among those queries, the percentage which are manual versus system-generated electronic queries. AT&T states these results are based on a review of a limited one-month sample and that AT&T will supplement the response with data from a larger sample as soon as it becomes available on January 14, 2004. It is the additional information regarding the query rates to which Verizon objects.

Verizon protests that it has had no opportunity for discovery or cross-examination of this new information. Verizon asserts that this information is in the nature of rebuttal testimony, which was precluded under prior procedure rulings issued in the case. Instead, parties agreed to limit themselves to initial and responsive testimony by all parties, with no third round of rebuttal. According to Verizon, there are other issues raised in the responsive testimony of adverse parties, to which Verizon would have liked to respond through the introduction of additional testimony or exhibits by way of rebuttal. Verizon argues it is unfair for AT&T alone to be able to select this one addition to the record while denying other parties the same opportunity.

In response, AT&T argues it was only upon receipt of Verizon's responsive testimony that AT&T was made aware of the challenge to its own testimony and the error giving rise to an

apparent discrepancy. It notes the records of its hot cut orders to Verizon are not new; rather, they form the basis for the initial testimony. Moreover, AT&T asserts that Verizon has access to the same information regarding the Broadview-Verizon transactions and can analyze that information itself. AT&T has simply looked at the information in a different way, prompted by Verizon's challenge. AT&T notes its obligation to correct and supplement interrogatory responses as information becomes available and asserts, therefore, that its January 12, 2004 correction to the interrogatory response is required under the rules of discovery. It also notes the information regarding queries is directly pertinent to the question asked by Verizon regarding AT&T's proof of its flow-through experience.

While AT&T may be correct in its assertion that the supplementation of its interrogatory response is required by the rules of discovery, those rules do not dictate any result as to the admissibility of the proffered response into evidence in the record in this case. Verizon's objection embodies two criticisms, one regarding the reliability of the information, and the other regarding procedural fairness, both of which I find to be valid. Given the current schedule of this proceeding, there is not a workable way to solve these problems, either as posed in the original objection or as presented in the follow-up letter proposal and responses.

First, because no party had any opportunity to conduct discovery or cross-examination of the AT&T witness who provided the response, the reliability and credibility of the additional information are subject to challenge. This defect might be cured by further hearings, during which AT&T's witness could be questioned under oath by Verizon and any other party regarding the query back data. Indeed, AT&T indicated it would gladly make its witness, Mr. Hou, available for such a procedure.

However, the opportunity to cross-examine Mr. Hou does not satisfy Verizon's further objection regarding the fundamental fairness of the process. The nature of the data added to AT&T's interrogatory response fits squarely into the definition of rebuttal testimony. It is additional analysis

that was performed in response to Verizon's responsive testimony for the express purpose of rebutting that testimony. Although AT&T asserts it was only Verizon's responsive testimony that highlighted the need for it to do additional analysis, there was in fact no impediment to AT&T's conducting this analysis to bolster its initial testimony in this proceeding.

Because AT&T's analysis of its query-back rate appears to be relevant, it has the potential to be a valuable addition to the record. However, allowing this selective addition by AT&T is unfair to other parties. The only remedy would be to allow all parties a similar opportunity for limited updates to the record. When I suggested a limited rebuttal procedure to the parties, only Verizon expressed interest in such further proceedings. The CLECs, including AT&T, expressed doubts that any further round of proffered evidence could be limited in a meaningful way. They fear that any further evidentiary process would open Pandora's Box and the schedule would thereby be unacceptably delayed. It is clear that a prompt resolution in this proceeding has a higher value to the competitive parties, including AT&T, than does a more complete record that might be developed through rebuttal-type information. I am persuaded that this remedy for the procedural unfairness of allowing AT&T's selective rebuttal is unworkable.

By letter dated January 23, 2004, Verizon proposes to withdraw its objection under specified circumstances. Specifically, Verizon proposes that the AT&T analysis of query rates be allowed in, but that Verizon be allowed to submit as well an analysis of the Broadview-Verizon transaction data showing what percentage of hot cut orders failed to flow through Verizon's ordering systems and therefore required manual handling by Verizon. It proposes that both its and AT&T's analyses be submitted through witness affidavits and be taken into account "for whatever they may be worth." It asserts that this solution advances the goals of a complete record and avoids concerns about excluding potentially relevant evidence or re-opening the entire record.

AT&T objects to this proposal, "for precisely the reasons" argued by Verizon initially. AT&T notes that, under Verizon's proposal, neither study will be subject to discovery or cross-examination, and therefore "neither study will be remotely credible." Rather, the two studies will undoubtedly conflict and no one will have an opportunity to explore how or why.

In reply, Verizon notes that the Commission often considers studies and similar materials that have not been subjected to cross-examination, as do the FCC and other state commissions. This defect need not be fatal, but should merely be a factor in evaluating the value of the material. Verizon re-asserts that its primary objection was the inability to respond to AT&T's information via testimony, and Verizon asserts that its proposal adequately addresses that concern. Verizon notes that it is merely doing precisely what counsel for AT&T invited in colloquy on the objection -- that is, relying on the same data to confirm or deny AT&T's analysis. Finally, Verizon notes that the flow-through rate for AT&T hot cut orders is a vital issue in this case and that admission of the additional evidence would be helpful to a resolution of this case.

In sur-reply, AT&T takes issue with some of the statements in Verizon's reply letter and warns against accepting into evidence any Verizon document "without the fullest possible scrutiny for factual accuracy and analytical rigor." MCI submits a letter asserting, "Whatever value, if any, might be added by AT&T's additional evidence or Verizon's, that value is substantially outweighed by the risk of introducing untested post-hearing evidence."

As I notified the parties, I have delayed issuance of this ruling to consider carefully Verizon's proposal and the many arguments surrounding it. The decision is a difficult one, because both studies appear to be relevant to an important issue in the case. Nevertheless, I agree with MCI's assessment that the potential value of the evidence is outweighed by the procedural considerations discussed herein. Verizon's proposal does not adequately address the reliability concerns surrounding

the lack of discovery or cross-examination of the material, particularly as to Verizon's study, which would be the "last word" on the subject. Moreover, this unreliable "rebuttal" process would be a selective one, to the detriment of other issues and other parties who might raise them. If, ultimately, it appears that there is an inadequate record in this proceeding on which I can make a recommendation or the Commission can render a decision, we can consider additional procedures that will remedy the defect while ensuring fairness to all parties and appropriate testing of the information.

Based on these considerations, I sustain Verizon's objection as originally asserted, and I decline to adopt its letter proposal of January 23, 2004. Therefore, the final paragraph and the last sentence of the penultimate paragraph of Exhibit 9-P marked for identification will be stricken. Moreover, AT&T will not be allowed to further supplement the record with additional analysis and data as referenced in the stricken paragraph. AT&T is directed to submit a revised Exhibit 9-P consistent with this ruling.

Conversent Exhibit 23-P and Related Testimony

In its initial pre-filed testimony, AT&T submitted a cost study regarding a bulk hot cut process, which it proposed as the basis for setting rates in this proceeding. Following submission of that testimony, Conversent sent an interrogatory to AT&T, identified as CONV-ATT-1, in which Conversent asked, "Can the AT&T cost model be used or modified to calculate the TELRIC cost of an individual hot cut? If so, please provide the calculations using the AT&T cost model. Please provide all supporting materials. Document all assumptions." In response, AT&T stated the cost model could be used, with certain specified modifications, and it provided the calculations and underlying documentation. Following receipt of this discovery response, Conversent included it as Attachment AA/SM-5 to its responsive testimony, pre-filed on December 26, 2003. Moreover, Conversent's panel testifies about the AT&T results on pages 21 to 22 and 112 to 116 of that same testimony.

At the hearing, Verizon objected to the introduction of both the pre-filed attachment, marked for identification as Exhibit 23-P, and the pages of testimony discussing it. Verizon argues that, pursuant to prior procedural rulings, parties were required to submit their cost studies in the initial round of testimony, rather than the second round. Therefore, Verizon asserts, if AT&T desired to introduce evidence regarding the cost of an individual hot cut, it was required to do so in the initial round of testimony and precluded from doing so in its responsive testimony. Here, the AT&T-prepared estimate instead finds it way into the record through Conversent's testimony. Verizon asserts it is fundamentally unfair for Conversent to thus introduce material that AT&T could not.[1] As a result, Verizon asserts, it was denied an opportunity to prepare testimony responsive to this individual hot cut cost estimate as envisioned by the prior procedural rulings in this case.

In response, Conversent protests that its interests are not necessarily aligned with those of AT&T. Conversent asserts it had no idea what the response to its interrogatory would be when the question was posed to AT&T. When the answer was received, Conversent regarded it as supportive of Conversent's position and elected to include it in responsive testimony. ChoiceOne also argues in favor of inclusion of the evidence. It asserts the smaller CLECS, such as itself and Conversent, do not have the resources to conduct independent cost studies and must necessarily rely on the larger parties, such as Verizon and AT&T, which have the resources to produce such studies in this proceeding. They must similarly rely on the ability of those larger parties to manipulate their studies in response to queries from the small CLECS, as Conversent did in presenting this exhibit and testimony.

---

[1] Although Verizon does not accuse Conversent and AT&T of outright collusion in arranging for this information to be introduced in Conversent's testimony, it contends that AT&T and Conversent are aligned in their interests as opposed to Verizon.

Verizon's objection is overruled. There is no evidence of any attempt by the parties to collude improperly to violate a requirement of introducing cost studies in the first round. Rather, Conversent's evidence is in the nature of a response to the initially-filed studies of AT&T and Verizon, by seeking a modification of the model to fit Conversent's own litigated position. It is true Verizon had no opportunity for further rebuttal testimony, but that is true as to any and all points raised in the responsive testimony. Verizon did have ample opportunity for additional discovery and cross-examination of both Conversent's and AT&T's witnesses. Instead, Verizon chose to waive cross-examination of both parties. Under the circumstances, any perceived disadvantage to Verizon is outweighed by the good-faith need of the other parties to rely on this type of information.

Briefing Schedule

The briefing schedule in this case must necessarily reflect a balance between the time required for parties to produce effective briefs (i.e., those that are both thorough and concise) and the desire for a prompt resolution of this proceeding. In this case, both concerns are heightened: on the one hand, the record is large and complex; on the other hand, this case is proceeding with due regard for the fact that, on March 1, 2004, the negotiated rate of $35 per hot cut included in Verizon's Incentive Plan will have expired and the tariff rate of $185 will go into effect. Under no circumstances will this matter be able to be presented to the Commission at its only remaining regularly scheduled session prior to March 1, 2004, which will be held on February 11, 2004, less than three weeks from today. Consequently, absent some other procedural mechanism that is beyond the scope of my authority, such as an agreement among all parties for a different rate, the establishment by the Commission of temporary rates, or the scheduling of an extraordinary Commission session, the higher $185 rate will go into effect for some period of time.

With these considerations in mind, the parties and I discussed a briefing schedule for the case on January 15, 2004. A final schedule was not established, however, because I had not yet ruled on the objection to Exhibit 9-P, which might have involved additional evidentiary procedures, as discussed above. I will now establish the following schedule: Parties' initial briefs will be due by close-of-business on Friday, February 6, 2004; reply briefs are due Tuesday, February 17, 2004 at 12:00 noon. I will accept electronic service by those dates and times, provided a hard copy is mailed concurrently. Parties are reminded of their obligation to file hard copies with the Secretary of the Commission, pursuant to Rule 4.8 of the Commission's Rules of Procedure.

There is the additional matter of briefing each party's claim for confidential trade secret treatment of all testimony and exhibits that have been marked as proprietary, consistent with the protective order entered in this case. Any party making such a claim must review the record and either waive such preliminary claims or brief the reasons why the information should be treated as confidential trade secret material to be excluded from the public record. As requested by several parties, briefs on this issue may be prepared and filed separately from the initial and reply briefs on substantive issues referred to above. The briefs on confidential information must be submitted and served on all parties, electronically with hard copy to follow, by 12:00 noon on Tuesday, February 17, 2004.

(SIGNED) ELIZABETH H. LIEBSCHUTZ

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 03-C-0821 - In the Matter of the Implementation of the Federal Communications Commission's Triennial UNE Review Decision.

PRE-CONFERENCE RULING

(Issued September 11, 2003)

JOEL A. LINSIDER, Administrative Law Judge:

This ruling serves two purposes: to set and promptly announce, in advance of further discussion at next week's conference, a few short-term deadlines; and to identify a non-exhaustive list of other items to be considered at the conference.

Deadlines

Any ninety-day inquiry into unbundled switching for enterprise customers would involve efforts by CLECs to call into question the FCC's finding of no impairment. Any CLEC planning to request commencement of a ninety-day inquiry should file a brief statement of its intention by October 2, 2003. (If no such statement is filed by then, no ninety-day inquiry will be undertaken.) A more detailed initial presentation by any filing CLEC would be due by October 24.

The nine-month inquiry into certain other unbundled elements will involve, conversely, efforts by ILECs to challenge the FCC's findings of impairment. Staff believes ILECs have sufficient information to determine where triggers might be satisfied, and ILECs, accordingly, should identify, by October 2, the geographic territories with respect to which they plan to mount such challenges. This filing should assist all parties in their efforts to focus the application of their resources, at least as a preliminary matter.

Electronic filing may be used to satisfy the foregoing deadlines. It should be followed up with hard copy to the

Secretary (original and fifteen copies), to me, and to all active parties.

Other Matters to be Considered

I list here other matters that, in my judgment, warrant discussion at the September 16 forum and conference, along with preliminary conclusions that Staff and I have reached on some of them, subject to further discussion. The list is not exhaustive and I may add items to it; parties likewise may add items to it and I will invite such additions at the start of the conference.

1. Information Gathering. The initial information gathering process will be more efficient if led by Department of Public Service Staff. Staff will compile, in consultation with the parties, a uniform set of questions; parties should be prepared to have representatives available to meet with Staff on the afternoon of September 16 for an initial discussion of such matters.

To facilitate the exchange of information, I will issue, as soon after September 16 as possible, a ruling adopting a protective order for information claimed to be proprietary. The protective order will be in the form used in many recent cases; any party wishing to propose changes should be prepared to present and discuss them at the conference.

2. Relationship of this proceeding to others that are pending. The bulk hot cuts proceeding (Case 02-C-1425) will continue as a separate proceeding on its present schedule. It should be concluded in time for its results to be factored into this proceeding.[1]

With respect to the DSL proceeding (Case 00-C-0127), Staff and I are continuing to review the various arguments and alternatives. Parties wishing to comment further will be permitted to do so briefly at the conference.

---

[1] I speak of "this proceeding" in the singular only for convenience, implying no prejudgment of how many separate proceedings should, in fact, be conducted.

Finally, it appears that the no-facilities proceeding (Case 02-C-1233) should be closed; parties may comment on any attendant matters.

3. Process in general. It appears reasonable to begin with a collaborative effort to define relevant geographic markets, the first step in many of the analyses to be conducted. Parties should be prepared to discuss that issue, among others.

4. Housekeeping. I expect to revise the active parties list following the conference. In accordance with recent practice, parties should designate no more than two individuals (and no more than one at any one postal address) to receive hard-copy service of documents filed by other parties; all other individuals appearing on behalf of any one party may receive electronic service only.

As I mentioned, this list is not exhaustive and I may add to it, as may the parties.

(SIGNED) JOEL A. LINSIDER

CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Main Brief in Proprietary and Non-Proprietary versions, upon counsel for parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 17th day of February, 2004.

SERVICE BY E-MAIL & INTER-OFFICE MAIL

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

SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

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

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

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

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

Robert C. Barber, Esq.
AT&T Communications
3033 Chain Bridge Rd., Rm. 3-D
Oakton, VA 22185

Michelle Painter, Esq.
MCI
1133 19th Street, NW
Washington, DC 20036

Charles V. Gerkin, Jr.
Regulatory Counsel
Allegiance Telecom, Inc.
9201 North Central Expressway
Dallas, TX 75231

Russell M. Blau
Robin F. Cohn
Philip Macres
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007

Renardo L. Hicks, Esq.
Anderson, Gulotta & Hicks, PC
1110 North Mountain Road
Harrisburg, PA 17112

Richard U. Stubbs, Esq.
Cavalier Telephone Mid-Atlantic, LLC
965 Thomas Drive
Warminster, PA 18974

Tom Koutsky
VP Law & Public Policy
1200 19th Street, NW
Suite 500
Washington, DC 20036

Ross Buntrock
Steve Augustino
Enrico Soriano
Kelley, Drye & Warren, LLP
1200 Nineteenth Street, NW
Washington, DC 20036-2423

Philip F. McClelland
Senior Assistant Consumer Advocate
Barrett C. Sheridan
Joel H. Cheskis
Assistant Consumer Advocates
Counsel for
Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048 *77517

CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Main Brief in Proprietary and Non-Proprietary versions, upon counsel for parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 17th day of February, 2004.

SERVICE BY E-MAIL & INTER-OFFICE MAIL

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

SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

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

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

Robert C. Barber, Esq.
AT&T Communications
3033 Chain Bridge Rd., Rm. 3-D
Oakton, VA 22185

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

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

Michelle Painter, Esq.
MCI
1133 19th Street, NW
Washington, DC 20036

Charles V. Gerkin, Jr.
Regulatory Counsel
Allegiance Telecom, Inc.
9201 North Central Expressway
Dallas, TX 75231

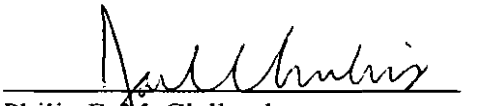
Russell M. Blau
Robin F. Cohn
Philip Macres
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007

Renardo L. Hicks, Esq.
Anderson, Gulotta & Hicks, PC
1110 North Mountain Road
Harrisburg, PA 17112

Richard U. Stubbs, Esq.
Cavalier Telephone Mid-Atlantic, LLC
965 Thomas Drive
Warminster, PA 18974

Tom Koutsky
VP Law & Public Policy
1200 19th Street, NW
Suite 500
Washington, DC 20036

Ross Buntrock
Steve Augustino
Enrico Soriano
Kelley, Drye & Warren, LLP
1200 Nineteenth Street, NW
Washington, DC 20036-2423



Philip F. McClelland
Senior Assistant Consumer Advocate
Barrett C. Sheridan
Joel H. Cheskis
Assistant Consumer Advocates
Counsel for
Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048 *77517

ORIGINAL

Robert C. Barber
Senior Attorney

Room 3D
3033 Chain Bridge Road
Oakton, VA 22185
703 691-6061
FAX 703 691-6093
EMAIL rcbarber@att.com

February 17, 2004

DOCUMENT

BY OVERNIGHT MAIL

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

RECEIVED

FEB 17 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: Investigation Into Obligations Of Incumbent Local Exchange Carriers To Unbundle Network Elements
Docket No. I-00030099

Dear Mr. McNulty:

Please find enclosed for filing in the above-captioned proceeding the original and nine (9) copies of the public version of the Main Brief of AT&T Communications of Pennsylvania, LLC. **Please note that an additional copy of the proprietary version of that brief, containing information that has been designated as proprietary in this case, is being provided under seal.**

Please do not hesitate to contact me with any questions regarding the enclosures.

Very truly yours,

Robert C. Barber

Enclosures

cc: (w/ encl)
The Honorable Michael Schnierle
The Honorable Susan Colwell
Service List (w/ encl)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

INVESTIGATION INTO THE OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS TO UNBUNDLE NETWORK ELEMENTS	**Docket No. I-00030099**

MAIN BRIEF OF AT&T COMMUNICATIONS OF PENNSYLVANIA, LLC.

Robert C. Barber, Esq.
Ivars V. Mellups, Esq.
Michael McRae, Esq.
AT&T Communications of Pa., LLC.
3033 Chain Bridge Road
Oakton, VA 22185
(703) 691-6061

Of counsel:
Mark Keffer, Esq.

Attorneys for AT&T Communications of Pennsylvania, LLC.

Dated : February 17, 2004

PUBLIC VERSION

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

CASES

ADMINISTRATIVE DECISIONS AND REPORTS

STATUTES AND REGULATIONS

INTRODUCTION

This Commission has a long standing commitment to ensuring that competitors have access to the unbundled network elements they need to compete effectively for residential and small business customers in Verizon's local exchange market in Pennsylvania. The foundation of these efforts has been the establishment of the unbundled network elements platform ("UNE-P") as a mechanism for offering customers a meaningful competitive choice.

In fact, in the 1999 Global Order the Commission, declaring that the "importance of a CLEC's ability to obtain UNEs as a 'platform' cannot be overemphasized," rejected Verizon's efforts to constrain the availability of unbundled network switching and the UNE platform.[1] Instead, the Commission, applying the standards established in the Telecommunications Act of 1996 and relying on a massive evidentiary record, held that "UNE-P is the only effective way for CLECs to begin immediately offering competitive local exchange services to a broad range of customers, particularly residential and small business customers," and directed Verizon to make UNE-P immediately available.[2]

That prediction has been proven in the Pennsylvania marketplace. The record in this case shows that Pennsylvania CLECs are serving over **[BEGIN PROPRIETARY]**

---

1 *Joint Petition of Nextlink Pennsylvania, Inc., et al.*, Docket Nos. P-00991648 and P-00991649, Sept. 30, 1999 ("Global Order"), at 87.

2 *Id.* The Commonwealth Court subsequently held in rejecting Verizon's challenge to this determination that the Commission's decision to make UNE-P available was "clearly in accordance" with the requirements of both federal and state law. *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania PUC*, 763 A.2d 440, 513 (Pa. Cmwlth. Ct. 2000).

[END PROPRIETARY] are being used to provide service to residential customers.[3]

And it is undoubtedly that success that has put UNE-P in Verizon's cross-hairs in this case. Specifically, and consistent with this Commission's previous determination, the FCC, applying the market-opening principles of the Telecommunications Act of 1996 ("The Act"), determined in its *Triennial Review Order*, or "*TRO*", that, on a national basis, CLECs are impaired in serving mass market customers without access to unbundled local switching.[4] The FCC also found impairment with respect to dedicated transport and high capacity loops.[5] Nevertheless, the FCC delegated to this Commission the role of determining whether an exception to the national impairment finding should be made for any particular geographic market in Pennsylvania, and identified "trigger" tests to be used in evaluating those markets.

The *TRO* makes clear that application of the triggers test – for example, as in the case of determining whether CLECs are "impaired" without access to unbundled switching – is not a simplistic counting exercise. To the contrary, it involves, at a minimum, a critical analysis of the relevant geographic market in which the test is to be applied, and of the CLECs that are identified as satisfying the trigger. That the *TRO* would require this exacting approach makes perfect sense, especially given the risks that an erroneous decision poses to existing – and future – competition in Pennsylvania. Only through the rigorous application of the trigger standards can the Commission be sure that consumers will not be harmed by the elimination of the UNE-P option.

---

3 AT&T Stmt. 1.0 at 59.

4 *In the Matter of Review of the Section 251 Unbundling Obligations of the Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Further Report and Order on Remand and Further Notice of Proposed Rulemaking, Aug. 21, 2003 ("*Triennial Review Order*" or "*TRO*"), ¶ 502.

5 TRO ¶¶202 (high capacity loops), 359 (dedicated transport).

In contrast, Verizon has demonstrated since the inception of this proceeding that it is not at all interested in the Commission's reasoned and fully-informed application of the "triggers" established in the *TRO*, much less in the adverse effect that Verizon's incorrect and mechanistic application of the "triggers" would have on Pennsylvania's consumers. Rather, pushing its "count to 3 and pull the trigger" approach, Verizon has attempted to distort the *TRO*'s "brightline" test into a "blindfold" test. In this case, however, it is not the intended victims – consumers and CLECs – that Verizon would have wear the blindfold. Rather, Verizon wants the Commission, armed only with unreliable data and faulty assumptions, to blindly eliminate UNE-P while ignoring such critical factors as the nature of the trigger candidates, the full extent of unbundled loop ("UNE-L") competition, and, ultimately, the competitive consequences of the triggers analysis.

That is a course that the Commission must not take, not only because it is antithetical to the purposes of the Act and the *TRO* – as well its own precedent -- but because such a result is directly at odds with the evidence developed in this record. The objective evidence of competitive entry in Pennsylvania contradicts Verizon's contention that competitors are not impaired in the absence of unbundled switching. As AT&T witnesses Kirchberger and Nurse demonstrated in their testimony, and is detailed further below, Verizon has not met its burden of proving that any of the "geographic markets" it identified possesses three qualifying self-provisioning switch-based carriers that provide UNE-L service to both the business and residential segments of the mass market.[6] Indeed, Verizon's evidentiary support for its claims of CLEC competitive presence is so riddled with inaccuracies and inconsistencies that it warrants the outright dismissal of Verizon's petition. In any event, the record plainly demonstrates that

---

[6] AT&T Stmt. 1.0 at 35-57.

Verizon's request for a finding of non-impairment for unbundled local switching in its Pennsylvania markets thus must be denied.

The same holds true for Verizon's petition with respect to dedicated transport. That prayer for relief is built on a foundation of misplaced assumptions that run aground on the evidence of actual CLEC deployment. In fact, Verizon's effort to portray AT&T as a "operationally ready" to self-provide dedicated transport on routes in Pennsylvania utterly fails to account for the millions of dollars Verizon collects from AT&T for providing special access services on those same routes. Similarly, Verizon has not proven its case with respect to the triggers for high capacity loops in Pennsylvania. Verizon's petition for a finding of non-impairment with regard to those elements thus should be denied as well.

ARGUMENT

I. VERIZON HAS FAILED TO OVERCOME THE FCC'S NATIONAL FINDING THAT CLECS ARE IMPAIRED WITHOUT ACCESS TO UNBUNDLED MASS MARKET SWITCHING IN PENNSYLVANIA.

A. The Demonstrated Unreliability Of Verizon's Claims Regarding The Extent To Which CLECs Are Self-Providing Switching To Mass Market Customers In Pennsylvania Warrants The Outright Dismissal of Verizon's Petition.

Given the FCC's national finding that carriers are impaired without access to unbundled local switching, this Commission, in its October 3, 2003 Procedural Order, tentatively concluded that there is impairment in Pennsylvania.[7] The Order then directed that "any ILEC desiring to contest the presumption of impairment must bear the burden of proving non-impairment."[8] Verizon has thus been on notice since the inception of this case that it bears the burden of proving that the requirements of the trigger analysis established in the TRO have been fully

---

[7] *Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements*, Docket No. I-00030099, Procedural Order, Oct. 3, 2003. 3, 2003, at 12.

[8] *Id.*

satisfied – that "three or more unaffiliated competing carriers each is serving mass market customers in a particular market with the use of their own switches"[9]-- in each of the geographic markets it identifies in Pennsylvania.

Verizon has failed miserably in that task. The record in this case shows that, even using Verizon's data, a properly conducted trigger analysis – that is, one that excludes those CLECs that do not legitimately "count" --shows that there are no wire centers, much less MSAs, where at least three CLECs are using their own switches to serve mass market customers.[10]

The problems with Verizon's case do not end there, however, but run to the very heart of its effort to eliminate UNE-P. The centerpiece of Verizon's "proof" is a document that was submitted as Attachment 5 to the Rebuttal Testimony of Verizon Witnesses West and Peduto. That document shows the carriers Verizon has identified as trigger CLECs in each of the eight MSAs Verizon designated as a "geographic market" for purposes of the triggers analysis, and, most critically, the number of "mass market" DS0 lines that Verizon claims each carrier is serving through its own switching. To that end, Verizon witness West unqualifiedly asserted early in his cross-examination that all of the lines included in the "Verizon Count" column in Attachment 5 were used to serve the mass market.[11] In its written testimony, Verizon, again without qualification, represented that the data it had acquired concerning TelCove – listed as Adelphia in Verizon's trigger count – and included in Attachment 5 identified "the number of DS0s that [TelCove] is providing to mass market customers using Verizon's loops in the markets where Verizon is seeking relief."[12]

---

[9] TRO ¶501.

[10] AT&T Stmt. 1.0, Exhibits 1-8.

[11] Tr. 118-19.

[12] VZ Stmt. 1.2 at 22-23 n.5.

That representation was not true. Indeed, by the close of his cross-examination Mr. West was forced to acknowledge huge errors in the characterization of the data Verizon had presented to the Commission as mass market lines, agreeing with Administrative Law Judge Schnierle, for example, that **[BEGIN PROPRIETARY]**

[END PROPRIETARY] that Verizon had attributed to that company in the City of Harrisburg alone.[13]

The Adelphia data underscore the problems in Verizon's evidence. Claiming that it was the "only way to interpret" the TelCove data responses, Verizon's Attachment 5 attributed thousands of previously undiscovered lines to that company in MSAs throughout Pennsylvania, including **[BEGIN PROPRIETARY]**

.[14] **[END PROPRIETARY]**

Yet, Verizon Witness West made no apparent effort to investigate this obvious discrepancy,[15] and consequently, none of the TelCove lines were excluded from Verizon's submission.[16]

As the hearings quickly made evident, however, these could not reasonably have been interpreted as mass-market loops. To begin with, TelCove's data responses did not even characterize its data as DS0s. Rather, perhaps because the Commission's original interrogatory had requested a count of "voice grade equivalents," TelCove's responses simply provided a count of "lines."[17] And the extraordinary number of "new" lines listed in that response could only plausibly be explained by the fact that Adelphia holds the telecommunications contract for

---

[13] Tr. 337.

[14] See VZ Stmt. 1.2, Attachment 5.

[15] Tr. 119.

[16] Tr. 351.

[17] See ALJ Exhibit 1 (Exhibit 2, Attachment C) (listing "PA On-Switch Lines.")

the state government – something Verizon witness West did not know until he was in the midst of cross-examination.[18] Thus, thousands of lines that Verizon had represented to the Commission as mass market DS0s in fact were attributable to service to an enterprise customer.[19]

Unfortunately, Adelphia is not the only example of the serious – and unexplained – discrepancies in Verizon's data. For example, Verizon counts RCN as a trigger candidate in the Reading and Scranton/Wilkes-Barre MSAs with just **[BEGIN PROPRIETARY]**

[END PROPRIETARY] Moreover, the number of DS0 loops which XO claims varies substantially from the number Verizon attributes to that company.[21] In fact, XO denied having any DS0s at all in several wire centers in the Philadelphia MSA in which Verizon identified it as trigger candidate.[22] Mr. West refused to acknowledge that the difference in the XO data could be the result of including DS1 lines in Verizon's count,[23] suggesting instead that variations could be the result of "timing" or interpretation. However, given that Verizon made no effort to investigate these differences – which, in Lancaster, for example, dropped XO from **[BEGIN PROPRIETARY]**

[END PROPRIETARY] – those explanations simply amount to idle speculation.

Indeed, Verizon's overall response to the issues surrounding the credibility of its data amounted to a shrug of the shoulders. Mr. West in fact rationalized that, in the case of Adelphia,

---

[18] Tr. 351-52.

[19] See Tr. 118 (Mr. West) (describing state government as "typically . . an enterprise customer.")

[20] VZ Stmt. 1.2, Attachment 5.

[21] See VZ. Stmt. 1.2, Attachment 5; AT&T Cr. Exh. 1.

[22] Tr. 115-17.

[23] Tr. 115.

for example, Verizon "had no choice but to just take their line counts verbatim . . . ."[24] This effort to pass Verizon off as the "victim" of the CLEC's data responses rings hollow. Verizon did have a choice. It could have investigated the data in an effort to reconcile the obvious inconsistencies, and presented an accurate depiction of the state of competition. Instead, consistent with its "don't look behind the numbers" approach to applying the triggers, Verizon simply filled up the spreadsheet with numbers, submitted it as evidence, and left it to the Commission to sort out – or better yet, hope that the Commission simply accepted it at face value.

This does not come close to meeting Verizon's burden of proof. More fundamentally, it calls into question the reliability of Verizon's entire evidentiary presentation. The Commission cannot base its decision in this case on Verizon's "best interpretation" of the data,[25] especially when that interpretation appears to have led to the automatic inclusion of a "line" in the trigger analysis, no matter how suspect the information about it. The stakes for consumers and competitors in this case are too high to risk a decision of this consequence on data that are demonstrably incorrect. Accordingly, the Commission should dismiss Verizon's petition. Moreover, before permitting Verizon to file a new petition, the Commission should establish a technical conference to address methods of collecting and compiling relevant data to ensure that, in any future case, all of the information that the Commission needs not only is available, but also is accurate and reliable.

---

[24] Tr. 334.

[25] See Tr. 333-334.

B. In Assessing Verizon's Effort To Eliminate Unbundled Switching – and UNE-P Competition – in Pennsylvania Under the "Triggers" Test, The Commission Must Be Guided By The Pro-Competitive Goals of the Act and the *TRO*.

In resolving the critical questions presented in this proceeding, the Commission must bear in mind the fundamental purpose of the Telecommunications Act of 1996 -- to irrevocably open local exchange telephone service to full and fair competition. Indeed, the 1996 Act effected a sea change in telecommunications regulatory principles, abandoning the historic policy of protecting consumers by preventing incumbent monopolists from exercising their monopoly power in favor of a policy of *enabling competition*. As AT&T witness Dr. Mayo testified, the Act's approach requires a more affirmative set of actions than any regulatory paradigm employed in the past.[26] Not merely is competition to be permitted, or tolerated, or even accommodated. Instead, this Commission is directed to seek ways to affirmatively open Verizon's local exchange market to competition.

The Supreme Court confirmed the pro-competitive intent behind the Act in its 2002 *Verizon* decision, finding that it established "*an entirely new objective of uprooting monopolies*" with a policy charge "*to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers*."[27] Thus, there can be no doubt the Act requires this Commission to undertake policies that enable competition to become effective. As the Court stated, "the Act appears to be an explicit disavowal of the familiar public-utility model . . . in favor of novel rate setting designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property."[28]

---

[26] AT&T Stmt. 2.0 at 7.

[27] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 488-489 (2002) (emphasis added).

[28] *Verizon*, 535 U.S. at 489.

In pursuit of this aim, the Act requires that incumbent local exchange companies like Verizon provide other telecommunications providers with nondiscriminatory access to unbundled network elements. The provision of UNEs is guided by Section 251(d)(2), which indicates that "[in] determining what network elements should be made available ...the Commission shall consider at a minimum, whether – (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Where such "impairment" exists, ILECs are required to provide access to UNEs.

In its *Triennial Review Order*, the FCC made a national finding that CLECs are impaired in serving mass-market customers without access to unbundled local switching.[29] The *TRO* recognizes that "incumbent LECs [must] make an element available so long as requesting carriers would be impaired without it."[30] Specifically with regard to unbundled circuit switching, the FCC found "on a national basis, that competing carriers are impaired without access to unbundled local circuit switching for mass market customers."[31] Thus, any impairment analysis for mass market switching must begin with the FCC's finding of nationwide impairment.

While making its national finding of impairment, the FCC delegated to this Commission the role of determining whether an exception to the national impairment finding should be made for any particular geographic market in Pennsylvania. While the TRO identifies two tests states

---

[29] *TRO* ¶ 502.

[30] *TRO* ¶ 117.

[31] *TRO* ¶ 459.

are to use in making that determination, [32] Verizon is relying in this case entirely on the so-called "trigger" test.

The purpose of the trigger analysis is to provide an accurate signal of the absence of substantial entry barriers. But it cannot do so unless the trigger analysis is conducted with care and caution. Thus, the Commission must be certain that in cases in an ILEC asserts that the trigger test is satisfied -- that is, where it claims that the evidence shows CLECs are not impaired in the absence of unbundled switching –that the removal of the UNE-P option will not lead to any significant diminution in competition that has already evolved in the affected market. Only then can the Commission be assured that the "clear and measurable benefit to consumers" standard has been met,[33] and that consumers will not be harmed if it finds that a trigger has been met.

This consideration is of critical importance in Pennsylvania, given the breadth of UNE-P competition that already is occurring here. The record shows that CLECs today are using UNE-

---

[32] The FCC identified two processes the states are to use for making this investigation. The first, which is at issue in this case, is a streamlined determination of whether certain "triggers" have been met. The other, the so-called "potential deployment" case, is a more nuanced analysis of the economic and operational barriers CLECs face in attempting to serve mass market customers without access to unbundled local switching. *Id.* ¶¶ 462, 463. The "potential deployment" test considers whether existing conditions would allow an efficient CLEC to profitably enter a market without access to unbundled switching. Under the test, "states must consider evidence of actual competitive deployment of local circuit switches, operational barriers to competitive entry, and economic barriers to competitive entry." *Id.* ¶ 463. Thus, under this test, states examine whether CLECs *could* overcome operational and economic barriers to serve portions of the market that CLECs are not already serving.

Both the "triggers" analysis and the :potential deployment" analysis are intended to – and indeed must – reach the same answer to the same question, *i.e.*, whether the defined geographic area supports multiple, viable entrants that can serve mass market customers using non-ILEC switching. Both processes are part of the broader analysis to determine "whether lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers that are likely to make entry into a market uneconomic." Id. ¶ 56. Critically, both tests, as with all unbundling decisions, must yield results that are "economically rational." Id. ¶ 78.

[33] See *TRO* n. 1332.

P to serve consumers throughout the MSAs where Verizon is challenging impairment. In fact, CLECs are serving consumers using UNE-P in each wire center within those MSAs. And more than 70 percent of those UNE-P arrangements are residential – that is, UNE-P is being used to meet the needs of **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** residential customers within those MSAs alone.

And that number is growing. Verizon itself predicts that UNE-P competition **[BEGIN PROPRIETARY]**

[END PROPRIETARY]

This underscores the critical consumer welfare component embodied in the triggers test. This Commission cannot find that the trigger has been met in a given market and, therefore, that Pennsylvania consumers will no longer be able to receive competitive telephone service from CLECs using UNE-P, unless and until the Commission first finds that consumers throughout the market already have at least three other facilities-based options available. Put more simply, an appropriate application of the trigger test cannot meet the "clear and measurable benefit to consumers" standard unless they already have widely available multiple alternatives.

Consistent with that principle, the FCC described as the "key consideration" of the self-provisioning trigger whether the self-providers used in the trigger analysis "are ***currently*** offering and able to provide service, and ***are likely to continue to do so***."[35] The actual presence of switching self-providers under this test is intended to "show . . . whether new entrants, as a

---

[34] AT&T Stmt 1.0, Exhibit 9.

[35] *TRO*, ¶ 500.

practical matter, ***have surmounted barriers to entry*** in the relevant market."[36] Thus, before the Commission determines that the trigger is met, it must require firm proof that the market *is already supporting* at least three switch-based carriers that are *currently offering* meaningful competitive alternatives for all segments of the mass market, and it must be confident that that market will *continue to support* that level of facilities-based competition in the future if access to UNE-P were eliminated.

In applying the triggers, the Commission should also be mindful of the substantial additional barriers and costs facing any CLEC attempting to compete against Verizon through a UNE-L strategy. Any CLEC hoping to serve customers using a combination of its own switching and Verizon loops must overcome substantial operational and economic barriers to do so. Taken together, the costs of establishing collocation arrangements, plus the costs of installing and operationalizing the necessary electronics, plus the costs of implementing the necessary trunking arrangements between the collocation and the CLEC switch, collectively create substantial costs and operational challenges for the CLEC – challenges and costs Verizon does not face, and which it very much wants this Commission to ignore. Moreover, these are the costs a CLEC incurs *before* it begins paying Verizon to "hot cut" loops over to the CLEC's collocation space.[37]

---

[36] *TRO*, ¶ 93. This is consistent with the use of abbreviated versions of analysis in other legal contexts, which is justified only by a demonstration that the use of a "short form" analysis does not impact the reliability of results.

[37] AT&T witnesses Kirchberger and Nurse' testimony describes the substantial cost disadvantages facing CLECs attempting to use a UNE-L entry strategy, as well as of the network architectural differences that cause those disadvantages. AT&T Stmt. 1.0, at 70-81.

C. The Commission May Use MSAs As The Relevant Geographic Markets For Analyzing Verizon's Triggers Case, But Should Reject Verizon's Efforts To Unduly Narrow The Market Definition.

The first step in the Commission's analysis of Verizon's "triggers" case is to define a "geographic market," a process that the FCC recognizes must entail the gathering and analysis of detailed data.[38] In this case, Verizon has proposed to define the relevant geographic markets as being "Metropolitan Statistical Areas," or "MSAs," less those wire centers located in Density Cell 4 within those MSAs.[39] Although AT&T believes a much larger geographic area than the MSAs is warranted,[40] it does not oppose the use of that geographic market definition in this case.

At the same time, the Commission should reject Verizon's efforts to unduly narrow the market definition, especially insofar as it seeks to exclude the Density Cell 4 wire centers.[41] It is clear that Verizon wants to foster an impression that a greater portion of "the market" it has defined is being served by CLECs using their own switches. But Verizon's approach is not supportable.[42] The TRO's trigger analysis requires a showing that at least three CLECs are using their own switches to serve customers *throughout* the relevant market.[43]

---

38 *TRO* ¶ 495.

39 VZ Stmt. 1.0 at 11-13; Tr. 295.

40 Because the Commission must use the same market definition in applying both the trigger and potential deployment aspects of the impairment analysis, it is appropriate to view the area in which a CLEC would serve the mass market generally if it were economically and operationally feasible to deploy and use its own switch.

41 See VZ Stmt. 1.0 at 13 ("Within MSAs, the Commission may choose to define the market more narrowly, by differentiating among the pricing Density Cells within those MSAs."); Tr. 295 (Mr. West) ("Our proposal is to show that we meet the triggers in the MSA, but then to apply it to Density Cells 1, 2 and 3.")

42 Moreover, the attempt to carve out that area, which represents relatively sparsely populated areas in the state, leaves a separate "market" (*i.e.*, Density Zone 4) fails another requirement of the *TRO*. That is, under the *TRO*, markets may not be defined so small that a competitive carrier *serving that area alone* would not be able to take advantage of available scale and scope economies from serving a wider market. *TRO* n.1536 (emphasis added)

43 See *TRO* ¶ 495.

Within the Philadelphia-Camden-Wilmington MSA, however, 27 of 97 the Pennsylvania wire centers are in Density Zone 4. Within the Pittsburgh MSA, some 54 of 99 are in Zone 4.[44] The numbers in the smaller markets are equally telling, and equally problematic. In the Allentown-Bethlehem-Easton MSA 14 of the 20 wire centers are in Zone 4. For the Harrisburg-Carlisle MSA, 5 of the 15 of the wire centers are in Density Cell 4. In the Lancaster MSA 2 of the 6 wire centers are in Zone 4. For the Lebanon MSA, 6 of the 7 wire centers are in Zone 4. For the Reading MSA, it is 8 of 13. The Scranton-Wilkes-Barre MSA has 11 Density Zone 4 wire centers out of 20.[45]

This evidence casts a less than flattering light on Verizon's already bankrupt case. In seeking to exclude these wire centers, Verizon is implicitly acknowledging there are not three independent, facilities-based CLECs providing voice service to mass-market consumers there. Those consumers deserve no less consideration from this Commission than the ones in the more populous density zones.

The Commission also should reject Verizon's suggestion that it narrow the market definition by "differentiating" among the pricing density zones within the MSAs.[46] Density Zones are used to demarcate geographic areas where loop costs differ and do not reflect "markets" as such. And it is important to recognize that in many instances, the wire centers associated with a particular Density Zone are so dispersed across an MSA that a CLEC could not market to that Zone effectively.

More to the point, it is not at all clear why Verizon would even make this suggestion for Pennsylvania. Even a cursory review of the Verizon's trigger data reveals no large variations in

---

[44] AT&T Stmt. 1.0 at 12.

[45] AT&T Stmt. 1.0 at 13.

[46] VZ Stmt. 1.0 at 13.

the proportion of CLEC lines between Zones 1 or 2 or 3.[47] For Verizon to argue that the Density Zones "take into account 'variations of factors affecting competitors' ability to serve each group of customers'" is thus contrary to what its own data show.[48] In fact, as shown in detail below, Verizon's own data prove the triggers are not being met in any Density Zone or MSA. [49].

D. Contrary To Verizon's Mechanistic "Count To Three" Approach, The Commission Must Carefully Screen The Alleged "Trigger CLECs" In Order to Conduct A Proper Trigger Analysis.

The second critical step that the Commission must undertake to apply the switching trigger in a rational manner is to adopt an explicit set of standards with which to review the CLECs that Verizon has identified as trigger candidates, and determine whether those entities can properly be counted toward satisfying the trigger test. This is necessary because the *TRO* specifically states that the FCC "believe[s] that any reasonable application of the impairment standard and unbundling requirements should be economically rational."[50]

As a threshold matter, any carriers relied upon in the self-provisioning trigger analysis must be unaffiliated with Verizon and with one another.[51] Assuming the affiliate test is met, a qualifying competitive switch provider must be using its own self-deployed, "separate switches"

---

47 AT&T Stmt. 1.0 at 14.

48 See VZ Stmt. 1.0 at 13.

49 Finally, it is not at all clear how Verizon can propose to use Density Zones to define markets at the same time it is elsewhere urging the Commission to *combine* Density Zone 3 with Density Zone 4. See Verizon Pennsylvania, Inc.' Petition for Reconsideration, Docket No. R-0016683, Generic Investigation Re: Verizon Pennsylvania, Inc.' Unbundled Network Element Rates, December 26, 2003, at 7. Combining these Zones as Verizon proposes would only increase the demonstration of impairment because, as AT&T noted in its response to Verizon's proposal, merging the two cells would not make Density Cell 4 more attractive to CLECs; rather, it would make Cell 3 less attractive. Although the Commission rejected Verizon's petition in an Order issued on February 3, 2003. Opinion and Order, Docket No. R-00016683, Feb. 3, 2004, at 11-12, Verizon is likely to continue to pursue this proposal in the technical conference convened at Docket No. M-00041790.

50 *TRO*, ¶ 78.

51 *Id.* ¶ 499.

to "actively provid[e]" voice service to mass market customers.[52] Thus, for example, a carrier that is using its own switching only to serve "legacy" customers and not adding significant numbers of new UNE-L customers cannot be deemed to be "actively" providing service. Critically, any candidate CLEC also must be "currently offering and able to provide service, and [be] likely to continue to do so."[53] All three "trigger" carriers must be "serving mass market customers in a particular market with the use of their own switches."[54] And, each such provider must be a "true alternative" to Verizon.[55]

Any indication that a nominated carrier serves only a unique subset of customers or that it cannot sustain its market presence in a way that places competitive pressure on Verizon casts substantial doubt on its viability as a "trigger" company. Similarly, the mere fact that a CLEC's tariff purports to offer local telephone service in a given geographic area cannot automatically qualify that CLEC as a trigger candidate. Under a trigger analysis, the focus is on where CLECs are *actually serving*, not on where they wish to serve, or where they plan to serve, or where they claim to be offering service but have no customers and no ability to provision service to customers in a timely manner. Just because a CLEC has filed a tariff saying it "offers" service in a particular area (or even statewide) or to a particular group of customers does not mean the CLEC is *actually providing* service.[56]

The *TRO* trigger criteria thus have both *quantitative* and *qualitative* considerations. Simply counting the number of self-providing CLECs does not satisfy the Commission's obligations under the *TRO*. Some CLECs, for example, may have in the past purchased only a

---

[52] *Id.*

[53] *Id.* ¶ 500.

[54] *Id.* ¶ 501.

[55] *Id.* at ¶ 499.

[56] AT&T Stmt. 1.0 at 23-24.

limited number of unbundled analog loops to serve a small number of customers that constitute a market niche. In fact, the FCC's test of economic impairment is based on a comparison between an efficient CLEC's costs and the "typical revenues gained from serving the average customer in the market."[57] Thus, a legitimate trigger firm must be one that offers an alternative to the mass market in general, not to any specific subset of customers within that market.

Therefore, the presence of a CLEC that serves only a niche is not sufficient to determine if "average" mass market POTS customers in a locale both have and will continue to have competitive choices if access to unbundled switching were eliminated. Accordingly, the Commission also needs to employ a qualitative analysis that considers the current *extent* of a trigger candidate's service (both geographically and in terms of the number of residential and small business customers served), the *maturity* of the competition in the market, and each trigger candidate's ability to *continue* to provide service in the future is necessary to establish the criteria the Commission will use to review the "objective" data that underlie a trigger finding.[58]

Verizon, not surprisingly, suggests that the Commission has no ability whatsoever to engage in this qualitative analysis. In Verizon's witness West's words, Verizon views the application of the triggers test "as a very straightforward counting exercise."[59] But Verizon's attempt to constrain the Commission to mindlessly "counting to three" runs afoul of the *TRO* itself. In fact, and contrary to Verizon's interpretation, the TRO expressly contemplates that this Commission will undertake a proactive and comprehensive examination of the trigger candidates.

---

[57] *TRO*, ¶ 472.

[58] AT&T Stmt. 1.0 at 21-22.

[59] Tr. 93.

As a predicate matter, the FCC expressly rejected ILECs' arguments that "evidence of facilities deployment by competitive CLECs" must or even can be treated as "conclusive or presumptive of a particular outcome ***without additional information or analysis***."[60] Thus, although evidence of actual facility deployment by CLECs "may indicate a lack of impairment," the FCC expressly disagreed with ILEC assertions that such evidence should be "dispositive of [or create] a rebuttable presumption of no impairment."[61] Instead, the FCC acknowledged that "[i]n deciding what weight to give this evidence" -- and thus whether it is probative of a claim of non-impairment -- a Commission must consider factors such as "***how extensively carriers have been able to deploy*** such alternatives, ***to serve what extent of the market***, and ***how mature and stable*** that market is."[62]

Moreover, the FCC found that evidence that competitors who use their own switches for other purposes, but who have not converted them to serve mass-market customers, bolsters its findings that significant barriers make use of CLEC switching to serve such customers uneconomic.[63] Thus, Verizon's claim that the trigger analysis is simply a matter of counting switches or CLECs must be soundly rejected.

---

[60] *TRO*, ¶ 94 (emphasis added). The FCC expressly declined to presume, for example, that the facilities deployment levels sufficient to support a grant of pricing flexibility in a market would require a finding of lack of impairment. *Id.* ¶ 104.

[61] *Id.* ¶ 94.

[62] *Id* (emphasis added). Significantly, this paragraph is in Part V of the order. The FCC specifically directs the states, in the context of considering whether an intermodal carrier should count toward the triggers, to determine whether such carriers meet the requirements of Part V of the *TRO*. *TRO* fn. 1549. This confirms that even intermodal carriers must be evaluated in light of factors such as "how extensively carriers have been able to deploy such alternatives, to serve what extent of the market, and how mature and stable that market is." *TRO* ¶ 94. Moreover, it demonstrates that the *TRO* anticipated that the trigger analysis should incorporate the principles in Part V of the Order, and not serve as just a rote counting exercise.

[63] *Id.* n. 1365 & n. 1371. Thus, a CLEC that operates an "enterprise" switch – one that is predominately used to serve enterprise, rather than mass market customers -- does not qualify as a trigger firm.

To the contrary, the *TRO* gives this Commission wide latitude and ample authority to exercise its sound discretion in interpreting and applying the trigger aspect of the impairment analysis for mass market switching. Indeed, in assigning the state commissions the responsibility of reviewing and applying the triggers, the FCC is looking squarely to the states to gather the "additional information" and to apply state commission judgment and perspective to the "analysis" required to determine whether a trigger has been met.[64]

This conclusion is further reinforced by the fact that the FCC recognized that state commissions are best positioned to "gather and assess the necessary information"[65] to make the "granular" reviews required by its decision and the D.C. Circuit's prior ruling.[66] In short, it not only is proper, but essential, that the Commission apply its expertise and judgment to a rational set of criteria in reviewing the proposed "trigger" data, so that it can be assured that its decision based on those limited data will yield the same result as a full economic and operational impairment analysis.[67]

This is borne out by still other provisions of the TRO. For example, Paragraphs 495 and 496 address the need for the Commission to examine explicitly the characteristics of the CLECs that are used as triggering firms. Although the characteristics outlined in those provisions of the

---

64 See *TRO* ¶ 94 ("As we examine the evidence of facilities deployment by competitive LECs in the specific UNE discussions, we will give it substantial weight, but we do not agree that we must find it conclusive or presumptive of a particular outcome *without additional information or analysis*.") (emphasis added).

65 *TRO* ¶ 188.

66 *Id.* ¶ 493.

67 AT&T Stmt. 2.0 at 23-24. Notwithstanding its assertions in this case, Verizon cannot reasonably be heard to argue otherwise. In filings with the Court of Appeals objecting to the FCC's decision, USTA, Verizon, BellSouth and SBC claimed that the impairment analysis in the *Triennial Review Order* represented a "blank check abdication" by the FCC of the unbundling determinations to the state commissions. Further, Verizon and the other ILECs vigorously challenged whether the FCC's "competitive triggers" provide "meaningful limits" on the discretion of state commissions. Reply Brief in Support of Petitions for Writ of Mandamus to Enforce the Mandate of this Court, *United States Telecom Assoc. v. FCC*, Nos. 00-1012, 00-1015, pp.1, 9 and n.4 (Oct. 16, 2003).

TRO are described as factors that may be considered in defining the relevant geographic markets, AT&T witness Dr. Mayo testified that the two issues -- market definition and qualifying factors -- are very much related.[68] As he described, there is a trade-off between the scope of the geographic market definition employed and the stringency of the requirements used to qualify non-UNE-P CLECs as triggering firms. Specifically, he noted that the broader the geographic market definition, the more stringent the qualifying requirements must be, lest the Commission reach an unsupported conclusion.

The reason for this trade-off is straightforward. Because the FCC has adopted a fixed number of three switch-based CLECs as the self-provisioning trigger,[69] the broader the geographic market that is chosen, the more likely Verizon may be able to identify three CLECs using their own switches within the region.

Such a *pro forma* count, however, cannot ensure that it is reasonable to infer that there are no substantial entry barriers for non-UNE-P competitors.[70] Before the Commission can reasonably be assured that such an inference is valid, it must carefully examine market data regarding the nominated CLECs and ensure itself that their entry is of a sufficient magnitude and scope to demonstrate that they (and other CLECs) are not impaired. The broader the geographic market used, the more stringent these qualifying factors must be to ensure the validity of that inference.

And the *TRO* again envisions just such a stringent examination of each company proffered as satisfying the trigger. For example, far from directing the Commission to mechanistically include each and every "intermodal" carrier as counting towards the trigger, the

---

[68] AT&T Stmt. 2.0 at 24.

[69] *TRO* ¶501.

[70] AT&T Stmt. 2.0 at 24-25.

TRO states that the Commission must decide whether to count such companies, based on considerations of the extent "services provided over these intermodal alternatives are comparable in cost, quality and maturity to incumbent LEC services."[71] Moreover, in directing the Commission to consider the appropriateness of including intermodal carriers under the requirements set forth in Part V of the Order,[72] the *TRO* necessarily was including for consideration factors such as "how extensively carriers have been able to deploy such alternatives, to serve what extent of the market, and how mature and stable that market is."[73]

Similarly, and contrary to Verizon's claim that the Commission must consider all lines attributable to an ICO affiliate, the *TRO* makes clear that "**some** of this competitive deployment **could be considered**" by the Commission in determining whether the trigger has been satisfied, necessarily implicating this Commission's judgment as to whether, and if so, how much, of such ICO deployment should be counted.[74] And, most tellingly, the *TRO* states that the "key consideration" to be examined by this Commission in determining whether a particular CLEC should be counted toward the trigger "is whether providers are currently offering and able to provide service, **and are likely to continue to do so."**[75] Taken either individually or as a whole, these provisions evince a clear direction to this Commission to examine the characteristics of each company that Verizon has put forward as a trigger CLEC.

Unfortunately, the Commission will receive no assistance in that important endeavor from Verizon. As Verizon witness West conceded, Verizon has provided no evidence that would assist this Commission in conducting a qualitative analysis of the companies Verizon has

---

71 *TRO* n.1549.

72 See *TRO* n.1549 (states shall also consider carriers . . .that meet the requirements of these triggers ***and part V above.***" (emphasis added).

73 *TRO* ¶94.

74 *TRO* n. 1352 (emphasis added).

75 *TRO* ¶500 (emphasis added).

identified as meeting the triggers.[76] Nevertheless, Verizon's refusal to consider the appropriateness -- or better put, the lack thereof – of its proffered trigger candidates or supporting data must not prevent the Commission from applying appropriate criteria to screen these CLECs to determine whether they should, in fact, be counted towards the triggers. As described below, when applied in this case, those criteria demonstrate that the Commission must exclude from the trigger analysis the overwhelming majority of CLECs Verizon has identified.

E. Especially In View Of The Broad Market Definition To Be Applied In This Case, There Are A Number Of Factors That Disqualify CLECs From Counting Towards The Self-Provisioned Switching Trigger.

As noted above, the CLECs Verizon identified as trigger candidates must be carefully screened and assessed – under a set of both quantitative and qualitative criteria – to determine whether they can appropriately be counted in the triggers analysis. There are a number of circumstances in which a CLEC may be "identified," but should not be included toward satisfying the triggers. These criteria include, at a minimum, the following:

(1) Carriers that are not providing service to residential customers. The *TRO* defines the "mass market" as consisting of both residential ***and*** small business customers that are served using DS0 level loops.[77] It acknowledges that there are "differences" between the two related to, among other things, the types and levels of services and the levels of revenue each generates.[78] Thus, in any instances where a CLEC has been able to serve only small business customers using its own switching facilities, but has not been able to serve appreciable volumes

---

[76] Tr. 99-100. ("I don't think in this case it's Verizon's job to do that.") See also Tr. 268.

[77] *TRO* ¶ 127 ("Mass market customers consist of residential customers **and** very small business customers.") (emphasis supplied); *TRO* n. 1402 ("Mass market customers are residential **and** very small business customers – customers that do not, unlike larger businesses, require high bandwidth connectivity at DS1 capacity and above. . . .") (emphasis supplied).

[78] *TRO* n. 432.

of residential customers (a point the *TRO* acknowledges as generally true nationwide[79]) – or, as the data shows for many of the carriers Verizon identified, **no residential customers at all** -- it is serving only a small segment of the mass market. Thus, its presence does not demonstrate that it has been able to surmount the barriers to serving the mass market generally, or that it would be able to survive by serving "typical" customers who generate only average revenues.[80]

This requirement is fundamental to the purposes of the *TRO* and the trigger analysis. Again, the trigger test is a surrogate for the results that would be obtained in a full review of operational and economic barriers faced by carriers serving the "mass market," which includes both residential and small business customers. A trigger analysis that relies primarily on evidence of competing switch providers that serve only small business lines (with average revenues exceeding those of all mass market customers on average) does not provide an economically rational view of the impact of determining that the trigger is met for the mass market as a whole, which predominantly includes residential customers. Thus, without convincing proof that three viable competitors are using their own switches today to serve residential customers generally, the Commission should not find that the trigger has been met. Indeed, the "clear and measurable benefit to consumers" unbundling standard cannot be met if *either* residential *or* small business customers as a class are disregarded when applying the triggers.[81]

Ignoring the plain language and intent of the *TRO*, however, Verizon contends that there is "no such requirement" that trigger CLECs serve residential customers.[82] Verizon thus

---

[79] *TRO* ¶ 438 (acknowledging that "only a small percentage of the residential voice market" is being served over CLEC switches, and that even those data may be "significantly inflated.").

[80] See *TRO* ¶¶ 472, 483.

[81] See *TRO* n.1332.

[82] VZ Stmt. 1.2 at 15.

essentially construes the *TRO*'s determination that the mass market consists of "residential **and** very small business customers"[83] into a requirement that a carrier need only serve residential **or** business customers through self-provided switching. In fact, Mr. West conceded that, under Verizon's interpretation of the *TRO*, the switching trigger could be met –and UNE-P thus eliminated entirely – on the basis of three carriers that provided UNE-L service exclusively to business customers.[84]

This extreme position is not only contrary to the text and purposes of the *TRO*, but it fails to take into account marketplace realities. As Mr. West acknowledged, the majority of Verizon's retail market in Pennsylvania --some 4 million lines, or about 80 percent of the market – is comprised of residential customers.[85] This is consistent with the fact that carriers are using UNE-P in Pennsylvania to serve more residential than business customers.[86] In contrast, the vast majority of the UNE-L lines provisioned to CLECs in Pennsylvania are used to serve business customers.[87]

Thus, Verizon would have this Commission eliminate the availability of a UNE-P, the entry vehicle that has proven most successful at providing competitive alternatives to the mass market in general and to residential customers in particular – who represent the majority of the mass market in Verizon's territory — on the basis of UNE-L service that is being used predominately to serve limited numbers of business customers. This result is not only nonsensical, but patently anti-competitive.

---

[83] *TRO* n. 1402 (emphasis added).

[84] Tr. 131.

[85] Tr. 129, 262.

[86] Tr. 130-131.

[87] Tr. 130.

Verizon nevertheless tries to cloak its position in an order issued by the Ohio Public Utilities Commission, which purports to count business-only carriers in the trigger analysis.[88] Mr. West acknowledged, however, that the order did not reflect the final resolution of the triggers case in Ohio, but was in fact preliminary to a full triggers analysis.[89] In any event, whatever the Ohio Commission may have determined to be appropriate as a market definition at the early stages of that proceeding does not, and certainly should not, dissuade this Commission from doing what the *TRO* and common sense require here in Pennsylvania. The Commission should require that, before a trigger candidate can be counted in the trigger analysis, it must serve residential customers using self-provided switching.

(2) CLECs that do not offer service via non-ILEC switching over a significant share of the geographic area at issue. Each carrier that "counts" toward the trigger must be "serving mass market customers in a particular market with the use of [its] own switch[]."[90] Thus, a carrier reaching customers on a facilities basis in an area considerably smaller than the defined geographic market –for example, in a only a small subset of wire centers within an MSA -- does not qualify for purposes of determining whether the triggers are met in a larger area. Otherwise, the consumer welfare mandates of the *TRO* cannot be satisfied, because there is no reasonable expectation that all customers within the defined area will have the benefit of multiple, alternative sources of facilities-based competition.[91]

---

[88] VZ Stmt. 1.2 at 15-16 and Attachment 2.

[89] Tr. 132.

[90] *TRO* ¶ 501.

[91] As AT&T witness Dr. Mayo testified, "If CLECs are currently operating in only a geographically-localized subset of areas (*e.g.*, a few wire centers), it is reasonable to investigate whether they may be able economically to expand to serve customers throughout the market area; that investigation, however, would require the more complete assessment of barriers to entry and expansion facing new entrants that constitutes the FCC's "potential deployment" test. If any presumption is to be made at the stage of applying the trigger test,

This criterion is fully consistent with the effects of the application of the enterprise loop and dedicated transport triggers, which were unanimously agreed upon by the entire FCC and are the model for the switching triggers.[92] When those triggers are met, there is no question that all retail customers at a particular location (for high capacity loops) have a reasonable opportunity to obtain loop facilities from alternative suppliers.[93] Similarly, when the transport trigger is met, all CLECs needing to transport traffic along a particular route will have actual access to meaningful competitive alternatives to unbundled ILEC facilities.[94] Notably, in that context as well, the FCC expressed concern that if the triggers are met carriers must "remain capable of serving end-user customers in all areas."[95] Thus, if the Commission were to use a less exacting standard in applying the mass market switching triggers, the results would not be consistent with those that flow from the application of the loop and transport triggers, they would neither be "economically rational,[96] nor comply with the "clear and measurable benefit to consumers" standard,[97] because consumers would be left unprotected from Verizon's market power.[98]

---

without further analysis, the natural presumption is that there are economic barriers to further expansion." AT&T Stmt. 2.0 at 28.

[92] The FCC majority emphasized that its approach to triggers for mass market switching is "essentially identical" to what the entire Commission agreed to with respect to the triggers for high capacity loops and dedicated transport. *TRO* n. 1315.

[93] The FCC's insistence that each end user should have the benefit of competitive alternatives is evident, for example, in its requirement that wholesale high-capacity loop providers have access to the entirety of a multiunit customer premises and that they offer alternative facilities on "a widely available wholesale basis." *TRO* ¶ 337.

[94] *Id.* ¶¶ 329, 400-401.

[95] *Id.* ¶ 407.

[96] *Id.* ¶ 78.

[97] *TRO* n. 1332.

[98] Contrary to Verizon's claims, the Errata the FCC issued subsequent to the publication of the *TRO* did not undermine this requirement. The FCC issued the Errata following outcries from Verizon and other ILECs complaining that the original language in Paragraph 499 of the *TRO* would have required that *each* unaffiliated self-provider counted for a trigger be economically and operationally capable of serving *each and every* customer within the defined geographic area. This extreme reading of the original language, which assumed a requirement of four facilities-based competitors (including the incumbent) of "carrier of last

A less exacting standard, however, is precisely what Verizon would have the Commission apply. Verizon's "evidence" is littered with alleged trigger candidates who, to the extent they have any presence in a geographic market at all, are limited to a few wire centers **[BEGIN PROPRIETARY]**

[END PROPRIETARY]

Indeed, Mr. West, while calling it an "extreme hypothetical," conceded that, under Verizon's interpretation of the *TRO*, a carrier with just one mass-market loop would count toward the trigger.[100] He is only half-right – it is certainly an "extreme" position, but, as Verizon's own submission shows, it is anything but a hypothetical. The Commission should reject it.

(3) CLECs that offer "intermodal" competition. That is, CLECs using non-wireline telephone local networks, such as cable providers. The FCC defines "intermodal" as referring generally to facilities or technologies "other than those found in traditional telephone networks"[101] and confirms that it does "not find the presence of intermodal alternatives dispositive in our impairment analysis. . . ."[102] Thus, providers of cable telephony services should not be counted toward the trigger aspect of the impairment analysis unless they are shown

---

resort" size in order to meet the trigger was hyperbolic. The Errata addressed that concern, but it does not and cannot turn the entire order on its head. Indeed, Verizon itself has argued to the FCC that the errata procedure itself, which made unexplained ministerial textual changes in an already issued order, cannot, under FCC rules, be relied upon to make substantive changes. *See* Ex Parte Letter from Joseph Mulieri, Verizon, to Marlene Dortch, FCC (filed CC Docket 94-157, July 21, 2003). Nor, as a matter of basic logic, could the removal of a few sentences change the entire import of a 500-page order. Thus, all of the standards enumerated and discussed above remain in full force and effect.

99 See VZ Stmt. 1.2, Attachment 5.

100 Tr.94.

101 *Id.* n. 325.

102 *TRO* ¶ 97.

not only to provide "alternatives [that] are comparable in cost, quality, and maturity to incumbent LEC services, "[103] but also to meet the requirements set forth in Part V of the *TRO*[104] – including such factors as "how extensively carriers have been able to deploy such alternatives, to serve what extent of the market, and how mature and stable that market is."[105] All proposed trigger candidates that supply voice services using other than circuit switches must also be reviewed under these criteria.[106]

And therein lies one of the fatal flaws in Verizon's reliance on intermodal competition in this case – it conducted no such analysis. Verizon witness West conceded that Verizon had not studied, nor presented any evidence concerning, the "cost, quality and maturity" of the services provided by any of the cable telephony providers it had proffered as trigger candidates.[107] As far as Verizon was concerned, the fact that those carriers were serving customers was evidence enough.[108]

But that position is contrary to the *TRO*, and for good reason. The FCC found that "[c]able telephony and cable modem service, for example have developed because cable operators have been able to overlay additional capabilities onto networks ***that they built for other purposes***, often under government franchises, and therefore have ***first-mover advantages*** and ***scope economies*** not available to other new entrants, which lower their incremental costs of providing the additional services."[109] Thus, the FCC correctly stated that it "may give less

---

[103] *Id.* and n. 1549.

[104] See *TRO* n. 1549 (directing the Commission to consider intermodal candidates "that meet the requirements of these triggers and Part V above.).

[105] *TRO* ¶ 94.

[106] *Id.*¶ 97 ("[W]e do not find the presence of intermodal alternatives dispositive in our impairment analysis, as some commentators suggest") .

[107] Tr. 103-105; 268.

[108] See Tr. 268.

[109] *TRO* ¶ 98 (emphasis added).

weight to intermodal alternatives that do not provide evidence that self-deployment of such access is possible to other entrants. In addition, if the record evidence shows that there are limitations on the number or types of customers that can be served by a particular technology, we will consider whether an entrant could use this technology profitably to target only those customers that can be served by the alternative technology."[110]

This is consistent with the FCC's directive that "when one or more of the three competitive providers is also self-deploying its own local loop, this evidence may bear less heavily on the ability to use a self-deployed switch as a means of accessing the incumbent's loop."[111] In fact, the FCC noted that it "may give less weight" to intermodal alternatives that "do not provide evidence that self-deployment of such access is possible to other entrants."[112] Fundamentally, as the *TRO* recognizes, the ability of a competitor to enter using self-deployed switching is different if access to the incumbent's local loops is required.[113] The overwhelming majority of competitors serving the mass market still require connectivity to the incumbent's local loop facilities, a factor that must be accounted for in any impairment analysis. Thus, as the *TRO* concludes, cable telephony facilities deployment "provides no evidence that competitors have successfully self-deployed switches as a means to access the incumbents' local loops."[114]

---

[110] *Id.*

[111] *Id* n. 1560. Moreover, in its analysis of CLEC impairment in the absence of the loop UNE, the FCC concluded, regarding cable systems: "[W]hile these systems are increasingly being used for the delivery of retail narrowband and broadband services (*e.g.*, telephony and high-speed internet access), the record indicates that such systems are not being used currently to provide wholesale local loop offerings that might substitute for access to the incumbent LEC's loop facilities." *Id.*, ¶ 222. Thus, it is clear that the FCC considered cable telephony *not* to provide evidence of a lack of CLEC impairment in the absence of *either* the switching *or* loop UNE.

[112] *TRO* ¶ 98.

[113] *Id.* ¶ 439.

[114] *Id.* ¶ 440.

This finding is key to understanding why intermodal carriers, like cable providers, pose unique problems in the triggers analysis. It is critical to remember that the goal of the impairment analysis – here, triggers – is to determine whether entry barriers remain in the absence of access to any particular UNE. Thus, state commissions must assess claims by prospective entrants that without access to a UNE, their entry would be retarded or impaired. A properly developed triggers analysis must examine the credibility of such claims by determining whether there are actual entrants – ***with considerably similar characteristics to the prospective entrants*** – that have demonstrated that prevailing entry barriers can be overcome. In such a case, the policymaker can be confident that other prospective entrants (with similar characteristics to the firms that have already established a market presence) can also overcome barriers to entry without relying on the availability of unbundled mass-market switching.

In the case of a cable television provider, however, its ability to offer local telephony is ***completely*** predicated on the fact that it has a deployed a network for the provision of cable TV service. Cable providers, moreover, generally cannot – and thus do not -- provide service outside of their limited cable footprint. Therefore, the presence of a cable telephony provider is not probative of the ability of a prospective entrant - other than another cable television provider with an appropriately upgraded digital network within the relevant geographic market – to enter the market. As Dr. Mayo testified, "The very clear implication" of this analysis "is that cable telephony firms must NOT be counted as 'triggering' firms."[115]

(4) CLECs that are serving large enterprise customers from the defined market using non-ILEC switching. A CLEC may be serving large enterprise customers in a defined market and either not be serving mass-market customers at all, or only serving mass-market

[115] AT&T Stmt. 2.0 at 35 (emphasis in original).

customers via UNE-P. In either case, assessing whether it is economically viable for such a CLEC to serve mass-market customers goes beyond the trigger analysis.

For the same reason, a CLEC serving predominantly enterprise customers over digital loops and using its enterprise switch only incidentally to provide a small number of analog lines (*e.g.*, for fax service) should not be counted for purposes of applying a trigger. The business plan of such a CLEC does not demonstrate it is economically feasible to serve typical mass market customers. Indeed, the FCC explicitly concluded that "switches serving the enterprise market do not qualify for the triggers."[116]

Verizon, not surprisingly, argues that such service should be counted towards the trigger analysis, contending that only switches "that serve *exclusively* enterprise customers" are properly excluded from the triggers analysis.[117] One basic problem with this position, however, is that it has no basis in the language of the *TRO* itself. As Mr. West was forced to admit on cross-examination, none of the provisions of the *TRO* that he cited in support of this testimony contain the word "exclusively."[118]

Mr. West nevertheless contended that the fact that a CLEC may have provisioned an analog line out of an enterprise switch – to provide, for example, fax service – "certainly has demonstrated now the capability to serve the mass market."[119] What this statement boils down to, however, is a contention that the enterprise CLEC has shown the **potential** to provide mass market service. But Verizon has not presented a potential competition case, but rather a triggers case. And, as the *TRO* explicitly finds, enterprise switches do not count towards satisfaction of the triggers.

---

[116] *TRO* ¶ 508.

[117] VZ Stmt. 1.2 at 19 (emphasis in original).

[118] Tr. 137.

[119] Tr. 136.

(5) CLECs that serve only a restricted niche of mass-market customers in the defined market using non-ILEC switching. This category encompasses, for example, CLECs serving only high revenue customers or a limited sub-class of customers (for example, only college students living in dormitories, or those located in a subset of wire centers in the geographic area); CLECs with very limited capacity; a CLEC that is principally an enterprise service provider, but may provide some residential service as part of its enterprise offer (*e.g.*, to connect the homes of senior management to an enterprise customer's network); or CLECs that primarily are serving larger business customers within the "mass market."[120]

The evidence in this case certainly demonstrates that the last situation is occurring in Pennsylvania. For example, **[BEGIN PROPRIETARY]**

[END PROPRIETARY] are being provided at locations with more than 24 lines.[121]

This is particularly true for the "downtown" wire centers in Philadelphia and Pittsburgh. In fact, the evidence shows that a sizable percentage of the unbundled loops CLECs have obtained in those wire centers are serving customers with 10 or more lines at a single location.[122] Clearly, these lines are serving fairly sizable businesses. But CLECs that are targeting only a high-volume, high-revenue niche do not represent a CLEC's ability to overcome the barriers to entry to serve "typical" mass-market customers who generate "average" revenues.[123]

---

[120] See AT&T Stmt. 2.0 at 30.

[121] AT&T Stmt. 1.0 at 50.

[122] AT&T Stmt. 1.0 at 51.

[123] AT&T Stmt. 1.0 at 50.

Indeed, a carrier that serves only this niche does not truly demonstrate that it is capable of serving "the mass market." This is particularly important because the FCC's test for economic impairment properly assumes that an efficient CLEC can only expect to earn the "typical revenues gained from serving the average customers" in the mass market.[124] As AT&T witnesses Kirchberger and Nurse testified, this requirement is sensible for many reasons, not the least of which is that any other standard (particularly one based on so-called "cherry-picking") would effectively prevent most mass-market customers from enjoying the benefits of competition.[125] As AT&T witnesses Kirchberger and Nurse testified, although all carriers (including Verizon) reasonably focus on attracting the highest revenue customers, no carrier can expect to win and retain a disproportionate share of the small number of high margin customers.[126] Accordingly, if a proposed "trigger" CLEC only serves customers with high revenues (such as, for example, business customers but not residential ones), its existence clearly does not demonstrate that it can (or would) serve the mass market in general.

(6) CLECs that serve only a *de minimus* number of mass market customers. As noted above, a CLEC that only serves a small number or proportion of customers, or focuses only on a niche within the mass market is not serving a competitively meaningful number of customers. Its presence is not meaningful evidence of non-impairment.[127]

More to the point, a CLEC that lacks adequate scale in its current operations does not demonstrate a significant likelihood that it will be able to "continue" to offer facilities-based

---

[124] *TRO* ¶ 472.

[125] AT&T Stmt. 1.0 at 29-30.

[126] AT&T Stmt. 1.0 at 30.

[127] See *TRO* ¶ 438 (Bell Operating Company claim that three million residential lines were served using CLEC switches as of year-end 2001, even if accepted as true, represents only a small percentage (less than three percent of reported residential voice lines) and does not accurately depict entering competitors' abilities to overcome barriers to entry to serve the mass market using incumbent LEC loops).

service,[128] especially in the mass market, which the FCC correctly recognizes is characterized by both low margins and substantial churn.[129] Scale is critical in the mass market, because competitors cannot rely on long-term contracts to assure that they will recover the additional costs they must incur (a large portion of which are sunk) to provide service for each individual analog loop. Notably, the FCC recognizes that "if scale economies are present, it would be difficult for an entrant with a small market share to achieve costs as low as the TELRIC price."[130]

None of that makes any difference to Verizon, however. According to Mr. West, there is no minimum number of loops below which a CLEC would be disqualified from counting toward the trigger.[131] He attempted to minimize the patent absurdity of that position by characterizing it as a "theoretical construct," whereas, "as a practical matter, the data that Verizon has shown is quite robust."[132] But this explanation is directly at odds with Verizon's evidentiary submission. A case in point is RCN, which Verizon persists in counting as a trigger candidate in both

[BEGIN PROPRIETARY]

[END PROPRIETARY] Verizon's willingness to

---

[128] *See TRO* ¶ 500.

[129] *Id.* ¶¶ 471, 474.

[130] *TRO* n. 379.

[131] Tr. 138.

[132] Tr. 138.

[133] Tr. 139.

[134] VZ Stmt. 1.2 , Attachment 5. And this does not even account for the CLECs, like Cavalier in Allentown and Comcast in Philadelphia, who deny having any lines in those MSAs, but who are included in Verizon's count notwithstanding these assertions, and like Adelphia, who is listed as a trigger in the Lancaster, Lebanon, and Reading MSAs despite the fact that the "Verizon Count" found no lines in those markets. *Id.*

present these companies as legitimate trigger candidates, notwithstanding their negligible competitive presence, simply underscores the intellectual poverty of its entire approach to this case.

(7) **A mixed UNE-L/UNE-P firm.** As AT&T witness Dr. Mayo testified, firms that are using both UNE-L and UNE-P arrangements to provide service in a particular geographic market should not count as triggering firms unless it is affirmatively determined that they could, and would, provide service to their full customer base using UNE-L-only.[135] This is because the purpose of the triggers is to use current market data to glean information about the consequences of removing the UNE-P option. According to Dr. Mayo, if the Commission only observes mass-market firms using a combination of UNE-P and UNE-L, "it is highly suggestive, if not totally dispositive, that the elimination of UNE-P would, in fact impair entry."[136]

Stated another way, the problem with using such a company as a trigger candidate is that the firm's use of UNE-L can mislead the Commission into believing that the entire market is addressable through that entry strategy, when, in fact, the firm cannot provide service to its full customer base using UNE-L-alone. An example of such a CLEC in this case is Broadview, which, although it has been identified as a trigger CLEC in the **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** but which has affirmatively indicated is unable to provide service throughout that market through UNE-L because of the limitations in its network.[137] Accordingly, Broadview has stated that it would be impaired in the absence of UNE-P.

---

[135] AT&T Stmt. 2.0 at 31.

[136] AT&T Stmt. 2.0 at 31.

[137] CLEC Coalition Stmt. 3.0 at 11-12.

(8) CLECs serving data, rather than voice, customers. The FCC was explicit that "the identified competitive switch providers should be actively providing ***voice service*** to mass market customers in the market."[138] This requirement is consistent with the FCC's definition of the mass market, which consists of "analog voice customers that purchase only a limited number of POTS lines, and can only be economically served via DS0 loops."[139] Thus, a carrier that does not offer voice service, or that offers it only incidentally as part of an offer focused on delivery of other services –such as a carrier using a DS0 loop to provide fax service, -- is not serving traditional POTS end users, and is not an appropriate trigger candidate..

Verizon, of course, does not share that view, arguing that even an analog fax line should be counted toward satisfaction of the trigger.[140] The reasons Verizon advances in support of this result, however, do not hold water. First, Verizon witness Dr. Taylor baldly stated he would count such lines "because the *TRO* tells me to . . . ."[141] However, he cited no specific authority for that alleged directive, undoubtedly because there is none. To the contrary, as noted above, the *TRO* limits the triggers analysis to carriers that are actively providing voice services to mass-market customers.

Dr. Taylor also argues that this position "makes sense economically" because the provision of this analog fax lines demonstrates that the CLEC "manage[d] to get through the hot cut process. . . ."[142] Putting aside the problem that this argument again smacks of a "potential competition" analysis, the provision of a single fax line can tell the Commission nothing about

---

[138] *TRO*. ¶ 318 (emphasis added).

[139] *TRO* ¶ 497.

[140] Tr. 241.

[141] Tr. 240-41.

[142] Tr. 241.

the CLECs' overall ability to serve mass-market customers, including residential customers, with self-provided switching throughout the relevant geographic market.

Dr. Taylor's post hoc rationalizations notwithstanding, the most likely reason for Verizon's extreme position is that it does not want the Commission to exclude analog fax lines from the triggers count because that would entail an inquiry into the nature of the services being provided by Verizon's proffered trigger candidates – an inquiry that Verizon does not want the Commission to undertake, and that is probably impossible anyway because of the inherent deficiencies in Verizon's presentation of the data. Neither of those reasons, however, overcomes the dictates of the *TRO*, which requires the exclusion of these services and CLECs.

(9) CLECs that are not "likely to continue" providing service. The *TRO* found that the "key consideration" to be considered by the Commission in determining whether to include a CLEC in the trigger analysis "is whether the providers are currently offering and able to provide service, ***and are likely to continue to do so.***"[143] Absent the "likely to continue" requirement, there is no assurance that the switching self-provider has the sustained ability to serve the mass market economically without access to the incumbent's switching. Accordingly, the Commission cannot reasonably find that a carrier that has not executed a broad-based UNE-L entry strategy is likely to be able to continue to provide a sustainable mass-market alternative to the ILEC, and such a carrier should not qualify in the Commission's analysis.

Verizon claims that in applying the "likely to continue" criterion, "the Commission may look ***only*** at whether a CLEC has affirmatively indicated that it is exiting the market altogether."[144] But this qualifier does not appear in the Order itself. In fact, as Mr. West conceded, the footnote on which Verizon relies as authority for that position cites a CLEC's

---

[143] *TRO* ¶500 (emphasis added).

[144] VZ Stmt. 1.2 at 27 (emphasis added).

filing of a "notice of termination" as just one example of the evidence the Commission should consider.[145] And he also acknowledged that Verizon had not introduced any evidence concerning its trigger candidates' ability to continue providing service in the relevant geographic markets.[146]

Verizon's case includes companies such as Cavalier, which, despite having affirmatively indicated in discovery that it limits its marketing and sales efforts to the Philadelphia MSA,[147] Verizon still counts as a trigger candidate in the Allentown MSA. It also includes companies like Full Service Network as a trigger CLEC **[BEGIN PROPRIETARY**

[END PROPRIETARY] Verizon's refusal to accept these representations and exclude these carriers from the trigger count is yet another example of the extremes to which it is willing to go to eliminate UNE-P competition.

(10) ICO affiliates. Finally, an ILEC using its own switches to serve out-of-territory customers is not a "CLEC" for purposes of the triggers. A qualifying competitive switch provider must be using "separate switches" to "actively provid[e]" voice service to mass market customers.[149] An ILEC engaging in "cross border raids" to connect additional customers to its existing switch is simply looking to take advantage of its unique economies of scale.[150] Those advantages have been compounded in Pennsylvania, given that all of the Pennsylvania ICOs

---

[145] Tr. 98. See *TRO* n. 1556 ("For instance. . . .")

[146] Tr. 98-99.

[147] AT&T Stmt. 1.0, Exhibit 19 (Cavalier Response to OCA I-1).

[148] Tr. 676.

[149] *TRO* ¶499.

[150] AT&T Stmt. 1.0 at 31.

implicated by Verizon's trigger analysis have been insulated from any UNE-based competitive pressure, either by virtue of this Commission suspending its unbundling obligations,[151] or by application of the Act's general rural exemption.[152]

Selectively citing from the *TRO*, Verizon suggests that the order categorically includes all ICO "competitive deployment" in a trigger analysis.[153] But the footnote in the *TRO* on which Verizon relies for this proposition only states that "some" of this deployment "could" be considered in that test.[154] It is thus clearly up to this Commission to decide whether to count an ICO as satisfying the trigger at all – and, if so, to what extent.

Moreover, while relying on the footnote, Verizon completely ignores the main provision in the text to which the footnote relates. In Paragraph 440 of the *TRO*, the FCC specifically noted evidence showing that the millions of residential lines that Verizon and the other RBOCs alleged were being served through competitive switching in fact included lines "served by large, independent incumbent LECs expanding into adjacent areas. . . ." As the FCC described it, this deployment provided "no evidence that competitors have successfully self-deployed switches as a means to access the incumbent's local loops, and have overcome the difficulties inherent in the hot cut process."[155]

---

[151] *Petition of Rural and Small Incumbent Local Exchange Carriers for Commission Action Pursuant to Section 251(f)(2) and 253(b) of the Telecommunications Act of 1996*, Docket No. P-00971177, Opinion and Order, July 10, 1997 (granting suspensions to, inter alia, North Pittsburgh Telephone Company and Denver and Ephrata Telephone and Telegraph Company); *Petition of Buffalo Valley Telephone Company and Conestoga Telephone and Telegraph Company for Commission Action Pursuant to Section 251(f)(2) and 253(b) of the Telecommunications Act of 1996*, Opinion and Order, Docket No. P-00971244, March 26, 1998.

[152] 47 U.S.C. §251(f)(1).

[153] See VZ Stmt. 1.2 at 24.

[154] *TRO* n. 1352.

[155] *TRO* ¶440.

What the FCC found to be the case nationally applies in Pennsylvania as well. The ICOs' opportunistic expansion into Verizon's service territory here cannot serve as "examples of multiple competitive LECs using their own switches to serve mass market customers. . ." [156] Stated another way, it proves nothing about a true CLEC's ability to expand into a market using a combination of its own switching and the ILEC's loops, and thus should be discounted in the Commission's trigger analysis.

F. The Companies Verizon Identified Do Not Qualify as Trigger CLECs

The sixteen CLECs Verizon identified as "trigger" CLECs in Pennsylvania implicate many, if not all, of the exclusions discussed above. The record shows that the vast majority of those companies are using unbundled loops to serve only business customers. Others do not serve mass-market customers at all. Some "CLECs" Verizon identified are actually ILECs serving out-of-territory customers with their ILEC switches, while others are cable telephony providers that should not "count" because Verizon made no effort to show that they provide services comparable in "cost, quality and maturity" to those provided by Verizon. And still others provide such minimal volumes of service -- or are not seeking to add customers at all -- that they cannot be deemed "actively serving" the mass market in the MSAs in which Verizon claims that they should count towards the trigger. Set forth below are the reasons each of Verizon's candidates does not qualify in the trigger analysis:

(1) AT&T. Verizon's problems start with its identification of AT&T as a trigger candidate in the Philadelphia and Pittsburgh MSAs. The fundamental problem with that identification is that AT&T serves **no** residential customers through unbundled loops. AT&T uses all of the UNE loops obtained from Verizon to serve business customers. And even those

---

[156] *TRO* ¶498.

volumes are insubstantial, ranging from a mere handful in some wire center to no more than a few hundred in the largest. This sheds a good deal of light on the problems of a UNE-L entry strategy. More importantly, it shows that AT&T is not a legitimate "trigger CLEC" in either MSA.

(2) MCI. The same holds true for MCI, which Verizon also asserts counts towards the trigger in the Philadelphia and Pittsburgh MSAs. MCI has explicitly indicated in discovery that it does not currently provide any local exchange service to residential customers in Pennsylvania using stand-alone analog voice-grade loops – and, indeed, does not appear to have done so at any time in the past several years.[157] Here again, MCI's UNE-L volumes bear that out. MCI has UNE loops in even fewer wire centers than AT&T in the Philadelphia and Pittsburgh MSAs, and in smaller volumes.

(3) TelCove/Adelphia. This company is a "poster child" for Verizon's gross overreaching in this case. Verizon claims that Adelphia counts towards satisfaction of the switching trigger in all eight of the MSAs Verizon has put at issue in this case.[158] The record, however, shows that they should not count as a trigger CLEC anywhere.

There are any number of reasons to exclude TelCove/Adelphia from the MSAs in which Verizon has placed it, starting with the fact that the companies that appear to implicated under the generic "Adelphia" name in Verizon's data – for example Adelphia Business Systems -- do not provide residential mass-market services. To the contrary, as that company's name itself suggests, Adelphia provides local voice and data services to business customers. The company confirmed in its stipulated submission that **[BEGIN PROPRIETARY]** "

---

[157] AT&T Stmt. 1.0, Exhibit 13 (MCI Response to Joint Parties I-6 and OCA I-1(a)).

[158] VZ Stmt. 1.2, Attach. 5.

[END PROPRIETARY] Thus, Adelphia should not count as a trigger candidate on the ground that it serves only business, and not residential, customers.

But it does not end there. Even under Verizon's "count" of lines, Adelphia should be excluded for serving only a *de minimus* number of customers in several of the MSAs identified by Verizon. In the Pittsburgh MSA, for example, Verizon counts **[BEGIN PROPRIETARY]**

[END PROPRIETARY]

Verizon's excuse for including Adelphia as a trigger CLEC in those locations is that Adelphia's own "count" showed that they possessed substantial numbers of "mass market" lines in each of the MSAs. In fact, Verizon's rebuttal testimony showed massive increases in lines for Adelphia in each of the eight MSAs.[161]

The record, however, demonstrates that these claims are not only unreliable, but verge on the preposterous. To start, the basis for Verizon's new count was TelCove's data responses to the Commission, which were submitted by stipulation in this case as ALJ Exhibit 1. As that submission shows, however, the extraordinary number of "lines" listed by TelCove were identified as just that – "lines."[162] They were not identified as mass market DS0s. Indeed, given that the Commission's data request had sought the number of "voice grade equivalents," these lines plainly reflect DS1s that had been expressed in TelCove's response as DS0 equivalents.

---

[159] ALJ Exhibit 1 (Exhibit 1, Affidavit of Jeffrey J. Heins, at 2).

[160] VZ Stmt. 1.2, Attachment 5.

[161] See VZ Stmt. 1.2 at 22 n.5 and Attachment 5.

[162] See ALJ Exhibit 1 (Exhibit 2, Attachment C) (listing "PA On-Switch Lines.")

That this is the case is supported by another fact that Verizon failed to reflect in its submissions – Adelphia holds the contract for providing telecommunications services to the Pennsylvania state government. It is only that contract that can reasonably explain how Adelphia could suddenly have gone from **[BEGIN PROPRIETARY]**

[END PROPRIETARY] It is also the only reasonable explanation for the substantial increases attributed to Adelphia – in several cases from zero under Verizon's count – in every other MSA.

Unbelievably, this was all news to Verizon's chief sponsor of these data, Mr. West. Although Mr. West admitted on cross-examination that the Pennsylvania state government would "typically" be considered an enterprise customer,[164] he never once questioned the data included in his testimony. This should not come as any surprise, since, as he conceded, Mr. West had not even been aware until cross-examination that Adelphia had the state contract, or that any of those lines were implicated in Verizon's evidentiary submissions.[165] As a consequence, he did not question, much less exclude, any of the TelCove data.[166] Indeed, he admitted on cross-examination that he had no way of knowing how many of the lines that Verizon had included were attributable to the state government contract, because Verizon had not attempted to trace back that information to the CLEC's customers.[167]

Verizon's willingness to accept these data at face value speaks volumes about its lack of concern for the consequences of this case for CLECs and consumers. Mr. West's blissful ignorance of the facts, however, does not change their nature. Contrary to Verizon's assertions,

---

[163] See VZ Stmt. 1.2, Attachment 5.

[164] Tr. 118.

[165] Tr. 351-352.

[166] Tr. 118, 351.

[167] Tr. 119.

these cannot be mass market DS0s. In fact, Mr. West was forced to agree at the hearing that that **[BEGIN PROPRIETARY]**

[END PROPRIETARY] All of these lines thus should be excluded because they are enterprise lines.

Finally, Verizon also claimed that Adelphia met the trigger as a cable telephony provider. As always, it is difficult to follow Verizon's chain of reasoning on this point, since it appears to acknowledge that TelCove, as the parent company, does not own Adelphia Cable.[169] In fact, TelCove's submission to the Commission does not identify any cable entity.[170]

Undeterred, Verizon, in Mr. West's words, "err[ed] on the side of safety" and "rolled them up as one potential CLEC trigger."[171] This is improper, not the least because it fails entirely to account for how this alleged cable entity is self-providing switching. In any event, the volumes that Verizon depicts as "E911 Residence" lines, and which it presumably attributes to Adelphia as a cable entity, are so small that no one could reasonably argue that Adelphia is providing cable telephony. Indeed, for almost all wire centers where Verizon shows "E911" lines for Adelphia, **[BEGIN PROPRIETARY]**

[END PROPRIETARY] This suggests either that (a) Verizon is misreporting the data, or (b) Adelphia is exiting the market or is otherwise not "actively serving" the mass market with cable telephony.

---

[168] Tr. 337.

[169] See VZ Stmt. 1.2 at 23 n.5

[170] ALJ Exhibit 1, at 1 (listing the five TelCove operating companies).

[171] Tr. 120.

(4) XO Communications. XO provides another example of the skepticism that must accompany Verizon's claims that certain CLECs satisfy the trigger. As a predicate matter, XO should be excluded because it does not serve any residential customers. In fact, it is not clear that XO serves any mass market customers at all. XO stated in discovery that it **[BEGIN PROPRIETARY]**

[END PROPRIETARY] Although Verizon contends that this response must be mistaken, it was in fact confirmed by other data in the record. Indeed, XO's response to the Commission's data responses, which were stipulated into the record by Verizon, showed that the bulk of the lines being served by XO in Pennsylvania are DS1s.[173]

These data are at direct variance with Verizon's "count" of XO's lines, which purport to show substantially more DS0 loops than XO claimed. The differences are striking. For example, Verizon ascribed a total of **[BEGIN PROPRIETARY]**

[172] AT&T Stmt. 1.0, Exhibit 11.

[173] XO Exh. 1; AT&T Cr. Exh. 1.

[174] See VZ Stmt. 1.2, Attach. 5.

[END PROPRIETARY]

This data not only shows that Verizon is wrong about the number of DS0 loops being provided to XO, but that in those limited cases in which XO is obtaining DS0s it is making some use of them other than providing voice service to mass market customers. In either case, the data shows that XO's target is business, not residential, customers.

(5) Allegiance. Verizon claims that Allegiance counts towards satisfaction of the self-provisioned switching trigger in three different MSAs – Allentown, Philadelphia, and Pittsburgh.[176] Again, that claim fails in all three markets because Allegiance limits its services to business customers. In fact, Allegiance has stated in discovery that **[BEGIN PROPRIETARY]**

[END PROPRIETARY] Moreover, Allegiance represented to the FCC that its "business model calls for it to use its own switching with unbundled high capacity loops, usually DS1s, to provide innovative integrated access services to small- and medium-sized enterprises."[178] Finally, Allegiance appears to be exiting the marketplace, having recently

---

[175] VZ Stmt. 1.2, Attach. 5.

[176] VZ Stmt. 1.2, Attach. 5.

[177] AT&T Stmt. 1.0, Exhibit 15 (Allegiance Response to Joint Parties I-6(a)).

[178] AT&T Stmt. 1.0 at 47 (citing Allegiance's Reply Comments, CC Docket No. 01-338, filed July 22, 2002 at 39).

announced that it is selling its major assets.[179] This raises serious questions as to whether Allegiance is "likely to continue" serving customers in the markets Verizon claims it counts as a trigger candidate.[180] Thus, because Allegiance does not provide service to the entire mass market, and soon may have no customers at all, it is not a proper trigger candidate.

(6) Choice One. Verizon contends that Choice One should be considered a trigger CLEC in all but the Reading MSA. Once again, however, this contention fails to account for Choice One's status as a business-only service provider, with the evidence showing that Choice One serves **[BEGIN PROPRIETARY] [END PROPRIETARY]** residential customers in Pennsylvania.[181] This is not surprising, given Choice One's exclusive focus on business customers.[182] This focus warrants Choice One's exclusion from the trigger analysis.

(7) Commonwealth/CTSI. Commonwealth is one three of companies Verizon identified– the others are D&E and Penn Telecom -- as satisfying the triggers that, in fact, do not qualify as trigger candidates because they are not serving customers using CLEC switching. Rather, those carriers are adjuncts of Incumbent Local Exchange Carriers, and are simply using their existing base of ILEC switches to serve out-of-territory customers. As discussed previously, a qualifying competitive switch provider must be using its own self-deployed "separate switches" to "actively provid[e]" voice service to mass market customers.[183] An ILEC using its existing ILEC switch to engage in cross-border service does not meet that test and, thus, does not count in the trigger analysis.

---

[179] AT&T Stmt 1.0 at 47. February 13, 2004, news reports confirmed that "XO will purchase the Allegiance assets for $311 million in cash and 45.38 million shares of XO common stock." http://www.crn.com/sections/BreakingNews/dailyarchives.asp?ArticleID=47980

[180] See *TRO*, ¶500.

[181] AT&T Stmt. 1.0, Exhibit 16 (Choice One Response to PUC Preliminary Data Request #5).

[182] Indeed, Choice One's website essentially dismisses residential subscribers a s a distraction. AT&T Stmt. 1.0, Exhibit 17.

[183] *TRO* 499.

Unlike other CLECs, CTSI (as well as Penn Telecom and D&E) are leveraging existing local exchange monopolies – which they enjoy because the Telecommunications Act exempts them from opening their markets in the same way Verizon must – by using their existing switches to serve new customers. In fact, as the FCC itself noted, this activity by the ICOs "provides no evidence that competitors have successfully self-deployed switches as a means to access the incumbents' local loops, and have overcome the difficulties inherent in the hot cut process."[184] The ICOs' use of existing monopoly switching to reach new customers is not evidence of "commercial deployment of particular network elements by competing carriers,"[185] and, thus, does meet the intent of the trigger to show that new firms can sustain entry using new switching investment. In short, their presence is of no value in determining whether CLECs can enter the market with "separate" switches.

This is certainly the case with Commonwealth and its "CLEC" affiliate, CTSI. In fact, that is precisely what ALJ Schnierle previously found when Verizon – then Bell Atlantic – attempted to use competition from CTSI as a basis for deregulating its business local exchange services in Pennsylvania. As ALJ Schnierle stated:

> However, CTSI renders service using portioned switching capacity purchased from Commonwealth Telephone, an affiliated ILEC, to provide service in competition with BA-PA. CTSI is assisted in providing service because it does not need to purchase a costly switch outright and can share a switch with an ILEC. . . . **The presence of CTSI does not establish that, in general, the purchase of unbundled loops for connection to a CLEC switch is a viable method of competing for rural customers.**[186]

---

[184] *TRO*, ¶440.

[185] See *TRO* ¶498.

[186] *Petition of Bell Atlantic-Pennsylvania, Inc. For a Determination of Whether the Provision of Business Telecommunications Services Is Competitive Under Chapter 30 of the Public Utility Code*, Docket No. P-00971307, Recommended Decision of Administrative Law Judge Michael C. Schnierle, July 24, 1998, at 29 (emphasis added) (record citation omitted).

That conclusion holds true for Commonwealth today. That CTSI has been able to rely on its ICO parents' switching – not to mention its brand recognition and monopoly scale and scope – to pick up customers in, for example, the Scranton/Wilkes-Barre MSA, provides no basis for concluding that a true CLEC can enter that market using its own switching and compete successfully for mass market customers. Commonwealth/CTSI thus should be excluded as a trigger CLEC.

Even if Commonwealth/CTSI were not excluded on those grounds, however, it still should not be counted for other reasons. For example, CTSI has indicated that it has no residential UNE-L lines (or residential "on net" lines) in either **[BEGIN PROPRIETARY]** the

[END PROPRIETARY] despite the fact that Verizon has listed it as a trigger candidate in both MSAs. Once again, this business-only focus should disqualify Commonwealth as a trigger CLEC in those markets.

(8) Penn Telecom. *This data regarding this company, which Verizon asserted counts* towards the trigger in the Pittsburgh MSA, suffers from the same deficiencies as Commonwealth. Although Penn Telecom owns a switch, it is not using that switch to serve mass market customers. Instead, according to Penn Telecom's testimony, **[BEGIN PROPRIETARY]**

[END PROPRIETARY] -- a company

[187] AT&T Stmt. 1.2, Exhibit 18 (CTSI Response to OCA 1-1).

[188] Penn Telecom Stmt. 1, at 8.

[189] Penn Telecom Stmt. 1, at 8.

that, like the other ICOs implicated by Verizon's submission, has enjoyed virtual immunity from UNE-based competition.

Thus, the competition Verizon ascribes to Penn Telecom is premised on the protected monopoly switching capacity of its ICO parent. This is not the type of competition that demonstrates that the market is open to new entrants seeking to utilize their own switching capacity to serve mass-market customers in Pittsburgh. Penn Telecom thus should be excluded from the trigger count in Pittsburgh [190]

(9) D&E/CEI. This is also the case with D&E, which Verizon lists as a trigger CLEC in the Harrisburg, Lebanon, Philadelphia, and Reading MSAs. In fact, the record shows that Verizon's inclusion of "D&E" implicates no less than three different ICOs, and, according to Verizon witness West, two "CLEC" affiliates.[191]

As a predicate matter, Verizon's decision to lump all of these lines under a generic "D&E" heading, without detailing the company associated with those lines, or even the switching that allegedly is being used to provide service in the MSAs, underscores the inherent unreliability of its proffered data. Although Verizon actually tries to pass off this tactic as one designed to avoid double-counting, the tactic only serves to engender additional confusion in the record – and, indeed, to mask, albeit temporarily, the deficiencies in Verizon's submission.

Indeed, it is not clear from Verizon's submission just which D&E entity it claimed met the trigger – or how. Clearly, however, it could not be D&E Systems, Inc., which "does not now

---

[190] Interestingly, even with the advantages conferred by its ICO parent Penn Telecom does not apparently trust UNE-L as an initial entry strategy. Instead, according to Penn Telecom's testimony, the company uses UNE-P **[BEGIN PROPRIETARY]**

[END PROPRIETARY]Penn Telecom Stmt. 1, at 12-13.

[191] Tr. 146.

nor has it ever owned a local circuit switch."[192] This assertion, plainly removes that D&E entity from ambit of the self-provisioning trigger.

To the extent that Verizon is ascribing those lines to another D&E affiliate, CEI Networks, this contention, too, runs aground on the facts. As was the case with Penn Telecom, CEI does own a switch. The record suggests, however, that none of the locations in which Verizon has named D&E as a trigger candidate are being served through that switch. That is because the CEI-owned switch is located in **[BEGIN PROPRIETARY]**

[END PROPRIETARY] an impractible distance from the MSAs in which D&E supposedly meets the trigger for self-provisioned switching.

Verizon does not explain how CEI may be using its own switching to provision loops in, for example, Harrisburg, much less Philadelphia. In fact, Mr. West conceded on cross-examination that he was not sure how to determine what switch D&E – or CEI -- was using to provide service in any of the MSAs.[193]

CEI did note that it was leasing capacity on switches owned by **[BEGIN PROPRIETARY]**

[END PROPRIETARY] two rural ICOs that are other D&E entities. Again, Mr. West could not tell whether these switches are in use in any MSA, much less in which MSA they might be employed.[195] Nevertheless, insofar as CEI is relying on leased capacity from its ICO affiliates to provide UNE-L service, it should be excluded from the trigger count for the reasons discussed above.

---

[192] AT&T Stmt. 1.0, Exhibit 20 (D&E response to OCA II).

[193] Tr. 148.

[194] See ALJ Exhibit 6 (response to PaPUC Preliminary Data Request 6).

[195] Tr. 148.

Even if CEI were not excluded because of its use of ICO switching, there are still other reasons it should not be counted towards the triggers in a number of MSAs. For example, CEI indicated in discovery that it is not providing any residential UNE-L service in the Harrisburg, Lancaster or Lebanon MSAs.[196] It thus fails the essential criterion of providing service to all segments of the mass market.

Indeed, CEI's submission shows that it is not serving any customers at all in those three MSAs, despite the fact that Verizon continues to list "D&E" as a "trigger" CLEC in each of those locations. This is not a fact that is readily acknowledged in Verizon's testimony. To the contrary, Mr. West only admitted on cross-examination that the absence of any data in the "CLEC Count" to Attachment 5 to his Rebuttal testimony reflected that CEI had indicated that it had no lines in that market.[197]

Verizon's excuse for continuing to include "D&E" as a trigger CLEC in those locations is that ***its*** count showed lines for D&E, and that the other D&E affiliates had refused to respond to discovery.[198] Verizon's "say so," however, does not merit a presumption that the trigger has been met. The unrebutted evidence of record is that the "other" D&E affiliate Verizon named does not own its own switch, and there is nothing in this record that ties the stray lines Verizon identified to any CLEC switch. Accordingly, the Commission should dismiss Verizon's contention that D&E satisfies the trigger in those three MSAs.

---

[196] AT&T Stmt. 1.0, Exhibit 21 (CEI Response to OCA I-1).

[197] Tr. 347, 350.

[198] See Tr. 349.

(10) Cavalier. Cavalier is listed as a trigger candidate in the Allentown/Bethlehem/Easton MSA – albeit for a handful of loops.[199] The minimal number of loops that Verizon ascribes to Cavalier should alone dispose of its identification as a trigger CLEC.

But there is more. In its responses to discovery in this proceeding, Cavalier did not identify any lines at all in that MSA[200] – much less residential loops. To the contrary, Cavalier indicated that it limits its marketing and sales efforts to the Philadelphia MSA.[201]

That averment is of no moment to Verizon. Mr. West testified that, notwithstanding Cavalier's unqualified – and unrebutted – representation that it is not engaged in any marketing activities in that MSA, Verizon still considers Cavalier to be a valid trigger candidate there.[202] In fact, he testified that this would be appropriate even if Cavalier were the "third" CLEC in the trigger count.[203]

That Verizon would be willing to eliminate the availability of UNE-P in the Allentown/Bethlehem/Easton MSA on the basis of a CLEC that is not even marketing its services there highlights the absurdity of Verizon's position – as well as the lengths it will go to dispose of UNE-P competition. The *TRO* very clearly limits trigger candidates to those "that are currently offering and able to provide service, and are likely to continue to do so."[204] Cavalier plainly does not meet this standard, and thus should be excluded from the trigger count in the Allentown MSA.[205]

---

[199] Tr. 157-58.

[200] Tr. 157.

[201] AT&T Stmt. 1.0, Exhibit 19 (Cavalier Response to OCA I-1).

[202] Tr. 158.

[203] Tr. 158.

[204] *TRO* ¶ 500.

[205] AT&T does not concede that Cavalier meets all of the requirements for a trigger CLEC in the Philadelphia MSA, but for purposes of the analysis of Verizon's submission AT&T did not exclude those lines.

(11) Fibernet. Verizon has identified Fibernet as a trigger CLEC in the Pittsburgh MSA. According to Verizon's own count, however, Fibernet serves just **[BEGIN PROPRIETARY] [END PROPRIETARY],** all of which are located in just one wire center. And even those few loops are used exclusively to provide business services – there are no residential lines.[207]

Given these facts, Fibernet cannot be considered an appropriate trigger CLEC. Obviously, the exclusive focus on business service means that Fibernet is not providing service to all segments of the mass market. Just as important, the small number of loops its serves – and the restricted geography in which it serves them -- means, necessarily, that Fibernet is not serving "the mass market" throughout the Pittsburgh MSA. To the contrary, the trivial numbers Verizon ascribes to Fibernet do not demonstrate anything about whether a CLEC can overcome the many barriers to serving the mass market. Until a CLEC reaches a market penetration level that provides some hope for long term survivability, it cannot be considered "actively serving" the market. Fibernet does not make that grade.

(12) SBC Telecom. The same infirmity requires the exclusion of Verizon's kindred RBOC, SBC, from the list of trigger candidates in the Philadelphia MSA. According to Verizon's count, SBC has just **[BEGIN PROPRIETARY]**

[END PROPRIETARY] The CLEC count is even less -- **[BEGIN PROPRIETARY]**

---

[206] VZ Stmt. 1.2, Attachment 5. According Verizon's "CLEC Count," that number is a still paltry **[BEGIN PROPRIETARY]** . **[END PROPRIETARY]**

[207] VZ Stmt. 1.2, Attach. 7.

[208] VZ Stmt. 1.2, Attachment 5.]

[209] VZ Stmt. 1.2, Attachments 5, 6. The fact that business lines predominate is consistent with the recent pronouncements of SBC's Chairman Ed Whitacre, who stated that "SBC has built out-of-region networks and established itself in 30 markets outside of its 13-state territory" so

[END PROPRIETARY] These insignificant numbers are unsurprising, given that, as CLEC coalition witness Gillan testified, SBC's "entry" into the Philadelphia market was accomplished solely to appease certain conditions that had been established as prerequisites for approval of the company's merger with Ameritech.[210] The data demonstrate that SBC decided to do only the bare minimum to meet those conditions. More important, and as with Fibernet, the extremely small number of loops SBC serves, and the limited geography in which it provides that service, shows that it cannot be seriously considered to be "actively serving" the mass market throughout the Philadelphia MSA.

(13) Full Service Network. Verizon's reliance on Full Service Network to fulfill the trigger requirements in the Pittsburgh MSA is yet another example of the extremes inherent in its reading of the *TRO*. Specifically, Verizon claimed that, based on FSN's responses to the Commission's data requests, **[BEGIN PROPRIETARY]**

[END PROPRIETARY]

---

that SBC is able "[t]o better serve enterprises . . . ." AT&T Stmt. 1.0, at 49 (citing Jan. 7, 2004, *SBC Records Eight Straight Quarter of Broadband Growth*, Phone+, www.phoneplusmag.com/hotnews).

[210] CLEC Coalition Stmt. 1.0, at 49-51.

[211] Tr. 684-87.

[212] Tr. 674-75.

[213] Tr. 676.

Of course, FSN will not have that opportunity if, as Verizon would have it, the company were still counted towards satisfaction of the trigger and UNE-P were eliminated as a consequence. Mr. West made it clear – and his counsel confirmed – that Verizon considered the status of FSN's switch -- or what will happen to FSN's customers --to be irrelevant to the Commission's application of the triggers.[214]

This is absurd. The Commission has before it uncontroverted evidence that even if FSN could properly be considered to be serving the "mass market" through self-provided switching now – and that is a dubious proposition, given the nature of its service – it shortly will not be doing so at all. The record thus clearly demonstrates that FSN is not "likely to continue" providing service that would satisfy the trigger.[215] It should be excluded.

(14) Comcast. Verizon claims that Comcast should count towards the self-provided switching trigger in both the Philadelphia and Pittsburgh MSAs. This Commission should reject this contention for several reasons.

First, Comcast does not satisfy the basic predicate for treatment as a trigger CLEC --it does not own its own switch. **[BEGIN PROPRIETARY]**

[END PROPRIETARY]

---

[214] Tr. 305-308.

[215] See *TRO* ¶ 500.

[216] AT&T Stmt. 1.0, Exhibit 28.

[217] AT&T Stmt. 1.0 at44..

Even if AT&T's provision of switching could properly be attributed to Comcast in the Pittsburgh MSA, it provides no basis for counting Comcast as a trigger candidate in the Philadelphia MSA. There is nothing in Verizon's submissions demonstrating how Comcast is allegedly provisioning the small number of lines Verizon claims it serves there.[218] **[BEGIN PROPRIETARY]**

[END PROPRIETARY] And the cable telephony operations it acquired from AT&T were limited to the Pittsburgh area. There is thus no basis for counting Comcast for the self-provisioned switching trigger in the Philadelphia MSA.

The second problem with Verizon's inclusion of Comcast as a trigger CLEC in the Pittsburgh MSA is that it does not meet the trigger test requirement to be "currently offering and able to provide service, and likely to continue to do so."[220] In fact, shortly after the AT&T transaction was completed, Comcast announced that that is was scaling back its circuit-switched telephony operations and would concentrate instead on new packet-switched technology. Thus, Comcast is not actively adding new customers to its base of circuit switched telephony subscribers, a point conceded in its 2002 Annual Report *Letter to Shareowners*[221]

Even if these considerations did not compel eliminating Comcast as a trigger CLEC, the third, and overarching factor does. Simply stated, Comcast is a cable telephony provider. As such, it should not be counted in the trigger analysis, because, as described previously, it entered the market by simply "overlay[ing] additional capabilities onto networks ***that they built for other purposes***, often under government franchises, and therefore have ***first-mover advantages*** and

---

[218] See VZ Stmt. 1.2, Attach. 5 (listing as a "Verizon Count" **[BEGIN PROPRIETARY]** a **[END PROPRIETARY]**

[219] See ALJ Exhibit 12 (response to PUC Preliminary Data Request 1).

[220] *TRO* ¶ 500.

[221] AT&T Stmt. 1.0 at 44..

scope economies not available to other new entrants. . ."[222] Moreover, the only customers Comcast can serve are ones located in its cable footprint. It has no ability to expand that network outside of its cable franchise to reach customer in other parts of the geographic market.

Fundamentally, Comcast's provision of telephony proves nothing about the ability of true CLECs to provide mass-market service using a combination of their own switches plus Verizon unbundled loops.[223] The FCC acknowledges that states can "give less weight" to intermodal alternatives that "do not provide evidence that self-deployment of such access is possible to other entrants."[224] As the *TRO* concludes, cable telephony facilities deployment "provides no evidence that competitors have successfully self-deployed switches as a means to access the incumbents' local loops."[225]

The *TRO* also instructs the Commission "in deciding whether to include intermodal alternatives for purposes of these triggers," to consider to what extent the services provided over these alternatives "are comparable in cost, quality and maturity" to those provided by Verizon.[226] The Commission certainly cannot look to Verizon for that analysis, however. As Verizon witness West conceded, Verizon had not performed any such analysis of Comcast – or of the other cable telephony providers it asserts meet the trigger in this case.[227]

The evidence that has been presented in this case, however, demonstrates that cable telephony is not presently "comparable in cost, quality or maturity." For example, as AT&T witnesses Kirchberger and Nurse testified, cable telephony generally requires the installation of a backup power source at the customer's premises, because the cable system is not powered in the

---

[222] *TRO* ¶ 98 (emphasis added).

[223] *Id.*

[224] *Id.* ¶ 98.

[225] *Id.* ¶ 440.

[226] *Id.* n. 1549.

[227] Tr. 103-105.

same way as the traditional telephone network.[228] Many customers find that intrusive and inconvenient.

Moreover, in most instances cable telephony customers do not subscribe on a stand-alone basis. Rather, as the data concerning RCN discussed below confirms, they obtain service as part of a larger (and higher priced) package of services that include cable TV and broadband. The fact that cable telephony is seldom provided on a stand-alone basis, but rather as part of a "package" of services, means it is not a "true alternative" to Verizon's local telephone services.[229]

In sum, the record demonstrates that Comcast does not provide a basis for concluding that other CLECs can successfully overcome the barriers to entering Verizon's local exchange market. It plainly enjoys advantages that no true entrant can replicate. Accordingly, the Commission should not count it towards satisfaction of the switching trigger in the Pittsburgh MSA (or, as noted above, in the Philadelphia MSA).

(15) RCN. Verizon claims that RCN counts as a trigger CLEC in four MSAs – Allentown/Bethlehem/Easton, Philadelphia, Reading and Scranton/Wilkes-Barre. It should not be counted in any of these areas.

At the outset, Verizon's willingness to include RCN as a trigger CLEC in the Reading and Scranton MSAs is laughable. Even according to Verizon's unverifiable count, RCN appears to be serving only **[BEGIN PROPRIETARY]**

---

[228] AT&T Stmt. 1.0, at 43.

[229] See *TRO* ¶ 499.

[230] VZ Stmt. 1.2, Attach. 5.

[END PROPRIETARY] Given this evidence, RCN should be excluded from the trigger count in both geographic markets.

As for the Philadelphia and Allentown MSAs, the same considerations that warrant the exclusion of Comcast as a cable telephony provider apply to RCN. Like Comcast, RCN has been able to leverage its cable franchise to provide telephony services, an advantage no other CLEC can replicate. Indeed, RCN has acknowledged that in the two markets its serves **[BEGIN PROPRIETARY]**

[END PROPRIETARY] This evidence demonstrates that the cable telephony services RCN provides are not only incidental to its general cable television operations, but that they, again, do not serve as a "true alternative" to Verizon's mass market local telephone services.[232]

(16) Broadview. Verizon identified Broadview as a trigger CLEC in the Philadelphia MSA. AT&T witnesses Kirchberger and Nurse did not exclude Broadview from their analysis of the trigger count. As they found, however --and as will be detailed further below – even with the inclusion of Broadview Verizon has not shown that it meets the trigger requirements in any wire center in the Philadelphia MSA, much less in the MSA as a whole.[233]

That is not to say that AT&T concedes that Broadview is an appropriate trigger candidate. Broadview's own witness, Ms. Sommi, rejects that characterization on a variety of grounds, including the fact that Broadview's existing network can reach only a relatively small

---

[231] AT&T Stmt. 1.0, Exhibit 12 (RCN Response to Joint Parties I-7)

[232] See *TRO* ¶ 499.

[233] AT&T Stmt. 1.0, Exhibit 5.

percentage of the wire centers and customers in the geographic market within the Philadelphia MSA.[234] Moreover, even though Broadview serves residential and business customers through UNE-L, the majority of its UNE-L loops -- **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** -- are business lines.[235]

Finally, Broadview is what AT&T witness Mayo described as a "mixed UNE-L/UNE-P firm" – that is, a CLEC that uses both UNE-P- and UNE-L to serve customers in the relevant geographic market.[236] Broadview in fact demonstrates the problem with using such firms as a trigger candidate -- the firm's use of UNE-L can mislead the Commission into believing that the entire market is addressable through that entry strategy, when, in fact, the firm cannot even provide service to its full customer base using UNE-L-alone. As Ms. Sommi testified , Broadview cannot provide service throughout the Philadelphia MSA through self-provided switching. To the contrary, Ms. Sommi testified that Broadview would be impaired in its ability to serve customers in that market – including those located in its collocation footprint – without UNE-P.[237] The Commission thus should be extremely reluctant to accept Verizon's bald assertion that Broadview be counted towards satisfaction of the switching trigger.

G. The Trigger Is Not Met In Any Wire Center In Any Of Pennsylvania's Eight Metropolitan Switching Areas At Issue.

The *TRO* requires a state to "find 'no impairment' when three or more unaffiliated competing carriers each is serving mass market customers in a particular market with the use of their own switches."[238] Relying on its count of the data, Verizon claims that

---

[234] CLEC Coalition Stmt. 3.0, at 18.

[235] AT&T Stmt. 1.0, Exhibit 22 (Broadview Response to OCA I-1).

[236] AT&T Stmt. 2.0 at 31.

[237] CLEC Coalition Stmt. 3.0 at 11-12.

[238] *TRO* ¶501.

condition is met in eight different MSAs in Pennsylvania.[239] A proper analysis of the evidence, however, contradicts that assertion. Even using Verizon's data, a properly conducted trigger analysis – that is, one that excludes those CLECs that do not "count" from the trigger analysis --shows that there are no wire centers , much less MSAs, where at least three CLECs are using their own switches to serve mass market customers.

Indeed, the analysis performed by AT&T witnesses Kirchberger and Nurse shows that there are no "qualifying" CLECs at all in the 5 "Zone 3" wire centers of the Reading MSA, and none in the 4 in the Lancaster MSA. The same is true in the Harrisburg-Carlisle MSA, where none of the 10 Zone 3 wire centers has three facilities-based CLECs. None of the 9 Scranton MSA wire centers has three self-providing CLECs, nor are there three CLECs serving mass market customers in the one Lebanon MSA Density Cell 3 wire center. The same is true of the 6 Allentown-Bethlehem-Easton MSA Zone 3 wire centers. And even in Pennsylvania's two largest metropolitan statistical areas, there are no wire centers where three qualifying CLECs are serving mass market customers. In the Pittsburgh MSA, none of the 44 Zone 1, 2, and 3 wire centers have three or more qualifying self-providing CLECs. Nor are there any in the Philadelphia MSA's 70 Zones 1, 2 or 3 wire centers.[240]

A summary of the results for each of the eight MSAs follows: **[BEGIN PROPRIETARY]**.

---

[239] VZ Stmt. 1.1, Exhibit B; VZ Stmt. 1.2, Attachment 5.

[240] See AT&T Stmt. 1.0, Exhibits 1-8.

[241] Tr. 164.

[242] *TRO* ¶440.

[243] Tr. 164-65.

[244] AT&T Stmt. 1.2, Exhibit 18 (CTSI Response to OCA 1-1).

[245] AT&T Stmt. 1.0, Exhibit 1.

[246] Tr. 166.

[247] See *TRO* ¶*440.*

[248] AT&T Stmt. 1.0, Exhibit 21 (CEI Response to OCA I-1).

[249] AT&T Stmt. 1.0, Exhibit 2.

[250] Tr. 175-76.

[251] AT&T Stmt. 1.0, Exhibit 21 (CEI Response to OCA I-1).

[252] AT&T Stmt. 1.0, Exhibit 3.
[253] AT&T Stmt. 1.0, Exhibit 21 (CEI Response to OCA I-1).
[254] VZ Stmt. 1.2, Attachment 5.
[255] AT&T Stmt. 1.0, Exhibit 4.

[256] AT&T Stmt. 1.0 at 51.

[257] See ALJ Exhibit 12 (response to PUC Preliminary Data Request 1).

[258] AT&T Stmt. 1.0, Exhibit 5.

[259] AT&T Stmt. 1.0 at 51.

[260] Tr. 674-76.

[261] See *TRO*, ¶500.

[262] Penn Telecom Stmt. 1, at 8.

[263] AT&T Stmt. 1.0, Exhibit 6.

[264] VZ Stmt. 1.2, Attachment 5.

[265] AT&T Stmt. 1.0, Exhibit 7.

[266] *Petition of Bell Atlantic-Pennsylvania, Inc. For a Determination of Whether the Provision of Business Telecommunications Services Is Competitive Under Chapter 30 of the Public Utility*

[END PROPRIETARY]

In sum, the evidence of record, taken both collectively and on an MSA-by-MSA basis, demonstrates that there is no MSA in Pennsylvania where the self-provisioning trigger is met, because there is no MSA where at least three CLECs are serving mass market customers throughout the MSA using their own switches.

Indeed, even this data overstates the extent of CLEC presence in the relevant geographic markets. As has been discussed, Verizon has sought to exclude the Density Cell 4 wire centers from consideration. Including the information from those wire centers, however, only underscores the lack of CLEC presence in the market being examined. In contrast, the evidence shows that UNE-P entry is widespread across the MSAs. Exhibits 1 through 8 to AT&T witness Kirchberger and Nurse's testimony show, for example, that UNE-P competition is present in virtually every wire center in every MSA, for both business and residential customers. In the MSAs Verizon has placed at issue UNE-P is being used to serve **[BEGIN PROPRIETARY]**

[END PROPRIETARY] Thus, unlike with

Code, Docket No. P-00971307, Recommended Decision of Administrative Law Judge Michael C. Schnierle, July 24, 1998, at 29 (record citation omitted).

[267] AT&T Stmt. 1.0, Exhibit 8.

UNE-L, CLECs are using UNE-P to meet the telecommunications needs of large numbers of residential consumers, scattered widely across virtually all wire centers in the MSAs at issue.

The import of this evidence for the decision the Commission must confront in this case cannot be overstated -- as AT&T witness Kirchberger and Nurse put it, "The data raise a huge red flag."[268] Before the Commission "pulls a trigger" and takes away the benefits of UNE-P competition from any of the thousands of Pennsylvania consumer who currently receive it, it needs to be absolutely sure those consumers have readily available the three alternatives the trigger test requires. As the record shows, that is not the case in any of the geographic markets in which Verizon is seeking to eliminate UNE-P. Accordingly, the Commission should reject Verizon's petition, and sustain the FCC's finding of impairment in each of those MSAs.

H. The Commission Should Determine That There Is No Definitive "Crossover" Point Between DS0 And DS1 loops; Consumers, Rather Than Regulators, Should Decide How Their Service Arrangements Should Be Configured.

In the *TRO*, the FCC directed state commissions to "determine the appropriate cut-off for multi-line DS0 customers as part of its more granular review."[269] Rather than proposing a specific crossover, however, Verizon argues that the Commission need not establish any particular cutoff point at all. Rather, according to Verizon, "it is the objective behavior of the CLEC that should drive the determination of whether or not it 'makes economic sense' for the CLEC to serve particular customers over DS1 loops."[270] Following this premise, Verizon asserts that "[i]f the CLEC has made the economic decision to treat the customer as a mass market

---

[268] AT&T Stmt. 1.0 at 39.

[269] *TRO* ¶497.

[270] VZ Stmt. 1.0 at 17.

customer and to serve the location using voice-grade loops, then the DS0 lines at that customer location should be counted as such for purposes of the switching impairment analysis."[271]

Put simply, Verizon's position is that the CLECs (and by necessary inference their customers) determine whether a customer is "mass-market" or "enterprise," depending upon whether the customer is to be served over DS0 or higher capacity loops.[272] There is no need, according to Verizon, for the Commission to establish a fixed DS0/DS1 crossover point. Instead, Verizon's proposal -- described by AT&T witnesses Kirchberger and Nurse as Verizon's "Self-Decided" market definition[273] -- is that each CLEC (and its customers) determine their own crossover points based on their own business needs.

AT&T does not object to Verizon's approach. Even a simplified analysis shows that the appropriate cross-over point between DS0 and DS1 loops is sufficiently high such that there is no practical need for the Commission to draw a line at some arbitrarily low number.

Nevertheless, should the Commission adopt the Verizon approach, it must ensure that it applies it consistently – and require Verizon to adhere to it consistently. Indeed, the *TRO* provides that "[T]he state commission must use the same market definitions for all of its analysis."[274] What that means is that Verizon's "Self-Decided" approach to the mass market definition is not, as Verizon would appear to suggest, a "one way street" that is only applicable to the determination of how many UNE-L DS0 loops a CLEC may use to serve its customers.

---

[271] VZ Stmt. 1.0 at 18.

[272] Although Verizon focuses on the CLEC's supposed "choice," AT&T witnesses Kirchberger and Nurse noted that in fact customers principally make these decisions. As they testified, it is customers who must decide whether they want to allow new CPE to be deployed at their premises and whether they are willing to go through the cutover of their service from DS0 loops to higher capacity facilities. AT&T Stmt. 1.0 at 65 n. 111.

[273] AT&T Stmt. 1.0 at 65.

[274] *TRO* ¶ 495.

Rather, this is a market definition that must apply to the provisioning of other Verizon services as well – including UNE-P.

Thus, adoption of Verizon's "Self-Decided" definition means that, once the Commission determines – as the evidence shows it must – that CLECs continue to be impaired in the absence of unbundled switching (and UNE-P), then a CLEC must be able to provision as many UNE-P arrangements at a single location as the CLEC found to be economically and/or operationally feasible. As in the UNE-L context, it would be entirely the CLEC's (and its customers') decision.[275]

This would override the FCC's tentative suggestion in its *UNE Remand Order* that, under certain conditions, an ILEC might be relieved of its obligation to make UNE-P lines available at locations served by four or more lines in density zone one in the top 50 MSAs.[276] As the *TRO* explains, where the states use their authority "to determine the appropriate cross over point," the UNE Remand Order's suggested four-line limitation would not apply.[277]

As AT&T witnesses Kirchberger and Nurse testified, this would not be a change for Verizon. Although the UNE Remand Order afforded it the opportunity to do so, Verizon to date has not enforced any limits on the number of UNE-P arrangements a CLEC could obtain at an individual location.[278] Under the "Self-Decided" market definition that Verizon proposes here, that would continue to be the case, i.e., the status quo would simply remain in place. However, the Commission should not allow Verizon to manipulate its proposal to support a claim that, if a

---

[275] AT&T Stmt. 1.0 at 66.

[276] *In the Matter of 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 ("UNE Remand Order"), Decision FCC 99-238, released November 5, 1999, ¶ 278 and 281.

[277] *TRO* ¶ 497 and n. 1546.

[278] AT&T Stmt. 1.0 at 66.

CLEC serves only a market niche of multi-line business customers, it may be found to be a viable trigger firm under the trigger analysis.[279]

Paragraph 497 of the *TRO* directs that "a state must determine the appropriate cut-off for multi-line DS0 customers . . . " This Commission should fulfill that obligation by making an affirmative finding that customers, rather than regulators, will decide the number of DS0 loops each customer wants to obtain at a particular location. Such a finding will also necessarily mean that, in those markets where UNE-P remains available, customers will also be able to obtain as many UNE-P arrangements at a single location as are necessary to meet the customers' needs.

II. VERIZON DOES NOT SATISFY EITHER THE SELF-PROVISIONING OR COMPETITIVE WHOLESALE FACILITIES TRIGGER FOR DEDICATED TRANSPORT WITH RESPECT TO AT&T'S FACILITIES.

In the *TRO* the FCC made a finding that CLECs are impaired without access to DS1, DS3 and dark fiber dedicated transport.[280] After extended proceedings and after evaluating an enormous factual record, the FCC determined that competitive carriers are impaired nationwide in their ability to provide local telecommunications services without access to dedicated transport, assessed on a route-specific and capacity-specific (DS1, DS3 and dark fiber) basis, subject to defined limits.[281] The FCC found that "[d]eploying transport facilities is an expensive and time-consuming process for competitors, requiring substantial fixed and sunk costs."[282]

---

[279] Should the Commission nevertheless decide to establish a definitive crossover point, the evidence shows that it should be set at a level greater than 14-16 lines. AT&T Stmt. 1.0 at 67-69, Exhibit 24. As Messrs. Kirchberger and Nurse testified, the analysis used to derive that result is contemplated in Footnote 1544 of the *TRO*. As they explain, however, that result in understated, because the FCC's approach did not take into account all costs that a CLEC will incur in provisioning a multi-line customer by means of a DS1 facility.

[280] *TRO* ¶ 359.

[281] *TRO* ¶¶ 359, 381-93. The FCC emphasized that it assessed impairment on a capacity basis "[b]ecause a carrier using higher capacity levels of transport has a greater incentive and broader revenue base to support the self-provisioning of transport facilities." *TRO* ¶ 377 (footnote omitted). The FCC concluded that, to avoid impairment, competitive carriers will continue to require access to unbundled dark fiber transport, DS3 transport (up to a maximum

Verizon has failed to make the granular showing necessary to overcome the FCC's national finding. First, Verizon attempts to obscure the distinction between "dedicated transport" as defined by the FCC and the "entrance facilities" that AT&T and other CLECs typically use to bring traffic to their networks. This is based on the assumption that CLECs with *physical* facilities at various Verizon wire centers will always establish interconnections between those wire centers in the same way Verizon does.[283] But CLECs have a different switching topography and thus a different transport network architecture than Verizon, and have little need to deploy dedicated connections between their collocations at Verizon wire centers, which is the FCC-defined "dedicated transport" at issue in this proceeding.

Second, Verizon piles a series of other generalized assumptions and speculations on top of that fundamental misconception, attempting to shift the burden of coming forward with evidence -- and by implication, the burden of persuasion – onto AT&T and the other CLECs. Verizon seeks to turn this proceeding on its head by attempting to force AT&T and other CLECs to prove the proverbial negative, and do so on route-specific and speed-specific terms, in the face of general assumptions and speculations that do not address the issues on a route-specific and capacity-specific basis in the first place.

The fact of the matter is that AT&T, for one, does not provide "dedicated transport," as defined by the FCC in the *TRO*, between its collocation arrangements at Verizon wire centers, on either a retail or a wholesale basis. Nor is AT&T "operationally ready" to provide such dedicated transport. Thus, AT&T must be removed from Verizon's list of dedicated transport trigger candidates in Pennsylvania.

---

of twelve unbundled DS3 transport circuits along a single route) and DS1 transport. ¶¶ 359, 388.

[282] *TRO* ¶ 371.

[283] VZ Stmt. 1.2 at 76.

A. The FCC Found that Competitive Carriers Are Impaired Without Unbundled Access To Dedicated Transport.

First, it is critical to define what specifically is in issue here. In common industry usage, "dedicated transport" is any carrier transmission facility that is for the exclusive use of a particular customer for the provision of telecommunications services. This type of transport is "always on" and immediately available to the customer. It is contrasted to "common" or "shared" transport, which is a facility that may be shared among a number of customers and is dedicated to none. While common or shared transport may be switched, dedicated transport by definition never is, because when a circuit is switched it ceases to be dedicated to the use of a particular customer.

However, for purposes of this impairment proceeding, "dedicated transport " has a far narrower meaning. In the *TRO*, the FCC redefined dedicated transport to be "transmission facilities connecting incumbent LEC switches and wire centers within a LATA."[284] This definitional change means that "only those transmission facilities *within* an incumbent LEC's transport network, that is, the transmission facilities between incumbent LEC switches," fall within the incumbent LEC's unbundling obligation.[285] This new definition explicitly excludes "backhaul" facilities between an ILEC wire center and a CLEC location, such as a CLEC switching office, which CLECs use to aggregate and "backhaul" their traffic. These are sometimes known as "entrance facilities."[286]

Verizon repeatedly obfuscates the distinction between backhaul or entrance facilities and "dedicated transport" as redefined by the FCC. It asserts that AT&T has physical fiber "facilities

---

[284] *TRO* ¶ 365 (footnote omitted).

[285] *TRO* ¶ 366 (emphasis in original).

[286] Thus, whenever the term "dedicated transport" is used herein, it refers to the transport encompassed by the FCC's *TRO* redefinition, not to the broader sense generally used. Also, "wire center" and "central office" may be used interchangeably.

that provide connections between Verizon wire centers" and are "used to transport traffic."[287] The only "connection," established in the record, however, is through a switch at an AT&T node, which cannot qualify as dedicated transport under any definition.

Verizon also claims that AT&T and other CLECs are arguing that backhaul facilities "are not to be considered when applying the FCC's transport triggers."[288] But that is not AT&T's position. Rather, the point is that the AT&T network is configured almost entirely for backhaul, and not for dedicated transport between Verizon wire centers, and therefore AT&T is not operationally ready to provide dedicated transport to itself or others.[289]

B. The FCC Delegated to the State Commissions the Task of Making Findings Whether ILECs Could Be Relieved of Obligations to Provide Unbundled Access to DS1, DS3 or Dark Fiber Facilities for a Given "Dedicated Transport" Route at TELRIC Rates.

In making its national findings of impairment, the FCC recognized that there might be specific routes where CLECs might not be impaired if dedicated transport at specific capacities were available as UNEs. The record before the FCC, however, did not permit the FCC to determine where, if anywhere, such routes might be. The FCC thus delegated to the states the task of determining, upon a petition from an ILEC, whether that ILEC could be relieved of its obligation to provide unbundled access to its DS1, DS3 or dark fiber facilities at TELRIC rates for a given "dedicated transport" route.

---

[287] VZ Stmt. 1.2 at 76.

[288] VZ Stmt. 1.2 at 79-81.

[289] Unlike Verizon, which has switches in every end office and a considerable "community of interest" between their end office switches, CLECs have *no* switches in Verizon central offices, but rather have a centralized local switch (in a tandem-like location). While direct end office trunking allows ILECs to avoid tandem switching, it is impossible for CLECs to avoid such centralized switching; accordingly ILECs tend to build, and CLECs not to build, the end office-to-end office trunking at issue here.

To guide state determinations, the FCC set forth two "trigger" criteria that could be used to establish exceptions to the incumbent LEC's dedicated transport unbundling obligations in particular cases.[290] The triggers are, first, the "self-provisioning" trigger, which "identifies *existing examples of deployment* by multiple competitive LECs on a route-specific basis."[291] The second is the "competitive wholesale facilities" trigger, which "ensures that transport can readily be obtained from a firm using facilities that are not provided by the incumbent LEC."[292] The FCC also granted states analytical flexibility to assess the market on a "potential deployment" basis that would allow the states to address the *potential* ability of CLECs to deploy dedicated transport, depending on market characteristics, if the triggers are not met.[293]

Verizon proceeded solely under the "triggers" analysis. This puts the entire focus upon what dedicated transport facilities CLECs have *actually* self-provisioned between Verizon wire centers (the "existing examples of deployment") and are operationally ready use for themselves or to wholesale to other carriers.

Verizon also is the party with the responsibility to introduce the triggers evidence into the record, and ultimately bears the burden of persuasion. The Commission only needs to make such a determination for routes for which Verizon has presented "relevant evidence" that competing carriers would not be impaired if access to UNE dedicated transport were eliminated.[294] In other words, the FCC's impairment findings for dedicated transport are controlling unless Verizon has introduced sufficient evidence to overcome the FCC's affirmative findings of impairment and enable the Commission to make an affirmative finding of non-impairment.

---

[290] *TRO* ¶ 400.

[291] *TRO* ¶ 405 (emphasis supplied).

[292] *TRO* ¶ 412.

[293] *TRO* ¶ 410.

[294] *TRO* ¶ 417.

1. The Self-Provisioning Trigger.

The FCC's self-provisioning trigger requires three or more unaffiliated competing carriers (in addition to the ILEC) each to have deployed dedicated transport facilities on a specific route, with a "route" defined as a specific pair of ILEC wire centers at which a CLEC has collocation arrangements.[295] This trigger applies only to DS3 and dark fiber dedicated transport -- it does not apply to DS1 transport, because the FCC specifically found that CLECs cannot economically self-provision dedicated transport at the DS1 capacity level.[296] To qualify as "trigger-eligible," each self-provisioned facility on the route must be operationally ready to provide transport between specific ILEC central office pairs at each of the DS3 and dark fiber capacities.[297] Performing the self-provisioning trigger analysis requires the Commission to apply a number of key criteria, discussed below.

a. ***Providers Must be Unaffiliated*** – Alternative self-providers of transport must be unaffiliated with each other and with the ILEC.[298]

b. ***Providers Must Own Facilities*** -- There are two ways to demonstrate CLEC ownership of such facilities: (1) the carrier can have legal title to the facilities or (2) the carrier can have a "long-term" dark fiber indefeasible right of use ("IRU"), provided the carrier has attached the optronics (to which it has legal title) necessary to provide service or to "light" the fiber.[299]

c. ***Capacity-Specific Review*** -- The trigger analysis must be performed for each particular capacity of transport (*i.e.*, DS3 and dark fiber). The FCC organized its transport

---

[295] *TRO* ¶ 405.
[296] *TRO* ¶ 409.
[297] *TRO* ¶ 406.
[298] *TRO* ¶ 414.
[299] *TRO* ¶ 408.

impairment analysis based on capacity level "because it is a more reliable indicator of the economic abilities of a requesting carrier to utilize third-party alternatives, or to self-deploy."[300] The relevant capacity level for this self-provisioning trigger inquiry ranges between a floor of 1 DS3 up to no more than 12 DS3 circuits.[301]

It is essential that the equipment being used for OCn-level services be economically distinguished from the circumstances of providing DS3 transport services. As the FCC determined, carriers generally provision transport facilities over OCn-level facilities, even when providing DS3 services. The FCC noted that the economics of serving more than 12 DS-3s would likely produce the revenue necessary to support investment in the underlying OCn facilities. However the variation on the inverse, which Verizon proposes, is not necessarily true. The presence of OCn facilities that carry more than 12 DS3s of traffic does *not* evidence that provisioning 12 or fewer DS-3s would be economic on a transport route.[302]

d. ***Route-Specific Review*** -- The FCC requires that the transport trigger analysis must be performed on a route-specific basis. ¶ 401. It defines a transport route as a complete "*connection* between [ILEC] wire center or switch 'A' and [ILEC] wire center or switch 'Z.'"[303] The example given by the FCC is that "if, on the incumbent LEC's network, a transport circuit from 'A' to 'Z' passes through an intermediate wire center 'X,' the competitive providers must

---

[300] *TRO* ¶ 376; see *also* ¶¶ 380-393 (setting forth "Capacity-Based Impairment Analysis" for dedicated transport). As the FCC also explained, the requirement of a separate application of the trigger analysis for each capacity level of transport means that if impairment at a particular capacity of transport on any one specific route is no longer found, transport at other capacities may still be available. *TRO* ¶ 407.

[301] The lower bound (one DS3) of this range reflects the fact that the self-provisioning trigger does not apply to dedicated transport at the DS1 level. *TRO* ¶ 409. The upper bound (12 DS3s) reflects the FCC's view that above that level of capacity the economics would allow self-provisioning by a CLEC. *TRO* ¶ 388. Verizon's claim that no ceiling applies (Verizon Rebuttal Testimony at 85) does not reflect the FCC's findings. Under Verizon's notion, there would have been no reason for the FCC to exclude DS1s from the trigger analysis.

[302] *See TRO* ¶ 388.

[303] *TRO* ¶ 401 (footnote omitted, emphasis supplied).

offer service connecting wire centers 'A' and 'Z,' but do not have to mirror the network path of the incumbent LEC through wire center X."[304]

However, the links between collocation A and AT&T switch X, and between collocation Z and AT&T switch X – can not be *switched* together at the location of switch X to constitute a route from A to Z. A switched route does not fit the definition of "dedicated" transport, certainly not as the FCC defined it, nor as it is commonly understood in the industry, or for that matter, by Verizon itself. The inclusion of a switch in the middle of a transport circuit makes the connection between two points on opposite sides of the switch "switched" or "common" or "shared" transport. If the facilities that actually connect Points A and Z terminate on (and thus physically pass through) Switch X, there are (at least) *two* routes that meet end-on-end at the switch. The "end points" of those routes are A and X and X and Z.

Verizon argues that the FCC rule, read literally, says that the a route "may pass through one or more intermediate wire centers or switches."[305] However, the FCC rule cannot be divorced from the FCC's discussion of this issue in the *TRO*, where the FCC stated clearly that "[e]ven if, on the incumbent LEC's network, a transport circuit from 'A' to 'Z' passes through an intermediate wire center 'X,' the competitive providers must offer service connecting wire centers 'A' and 'Z,' but do not have to mirror the network path of the incumbent LEC through wire center 'X.'"[306] It is evident that the FCC was discussing switch *locations*, rather than intermittent switches themselves, when it was discussing intermediate points on "dedicated transport" routes. Read in context, the rule makes sense. Any other result would be irrational.[307]

---

[304] *TRO* ¶ 401.

[305] VZ Stmt 1.2 at 77-78. *See* 47 C.F.R. § 51.319(e).

[306] *TRO* ¶ 401.

[307] *See* Tr. 466-467 (Nurse).

This is not merely "an old fashioned engineering definition" as Verizon claims, but simple common sense.[308] Indeed, Verizon's witness Mr. Peduto, on cross-examination on this point, called the concept of a switched OC-48 dedicated transport route (commonly used for network provisioning) "laughable."[309] Indeed it is. No carrier would utilize a local or tandem circuit switch to permanently connect OC-48s to one another. Such "nailed up" 24-hour-a-day connections would quickly exhaust the switch's call completion capacity and lead to massive call blocking, because *one* OC-48 contains 32,256 voice grade equivalents, (672 x 28) and the dozens of OC48s at issue here would surpass the capacity of the largest Class 5 switch by an order of magnitude.[310]

e. ***The Dedicated Transport Must Be Operationally Ready*** - To be counted as trigger-eligible, a self-provisioned facility "must be operationally ready to provide transport into or out of an incumbent LEC central office."[311] This means that the facility must begin *and* "terminate in a collocation arrangement" in an ILEC wire center, and that the collocation must be fully provisioned (*i.e.*, with both space and power) before the facility is considered complete.[312] It also means that the self-provider "must *offer service* connecting wire centers 'A' and 'Z'...."[313]

Although the existence of CLEC facilities is obviously a prerequisite to the provision of service, the mere existence of such facilities in itself does not demonstrate that the CLEC is operationally ready to provide the service that would satisfy the trigger, that the CLEC is providing service at the requisite capacity level, or that the CLEC has performed the necessary

---

[308] Verizon Rebuttal Testimony at 78.

[309] Tr. 535 (Paduto).

[310] Tr. 466-467 (Nurse).

[311] *TRO* ¶ 406.

[312] *TRO* ¶ 406, fn. 1256.

[313] *TRO* ¶ 401 (emphasis supplied).

engineering, provisioning, and administrative tasks to ensure that service can be provided at all, or in a commercially reasonable manner.[314]

2. The Competitive Wholesale Facilities Trigger.

The wholesale trigger for a finding of non-impairment is met "when there is evidence that two or more competing carriers, not affiliated with each other or the ILEC, offer wholesale transport service completing that route."[315] The FCC emphasized that the two types of triggers are separate and distinct.[316] Obviously, if every wholesale carrier also counted as a "self-provisioner" solely by virtue of the fact that it owns facilities, or *vice versa*, it would eliminate the distinction between these two triggers. Yet, Verizon simply assumes that "the same pairs of Verizon wire centers that meet the self-provisioning trigger also meet the wholesale trigger."[317] Determining whether the wholesale facilities trigger is met not only requires the Commission to apply many of the same criteria as exist for the self-provisioning trigger, but also several additional criteria. These include:

a. ***The wholesalers must own the facilities they use.*** However, for purposes of DS1 and DS3 transport only, carriers offering wholesale dedicated transport at those capacity levels through the use of unbundled dark fiber obtained from the incumbent will count as wholesale providers, but only "if they activate and operate the unbundled dark fiber with their own

---

[314] Further, facilities that terminate in so-called "collocation hotels" are outside the ILEC's network and therefore do not qualify. Verizon's collocation survey does not account for the fact that fiber leaving a collocation may terminate in such a collocation hotel — it just assumed that it does not. This is another reason why a fiber facility would not constitute a trigger as between wire centers "A" and "Z" even if it collects traffic from both: So long as it does not terminate traffic in "A" and "Z" it is not operationally ready to provide transport services between those two wire centers. AT&T Stmt. 1.0 at 100.

[315] *TRO* ¶ 412.

[316] *TRO* ¶ 399 fn. 1239.

[317] VZ Stmt. 1.2 at 45.

electronic equipment."[318] Carriers with rights to ILEC unbundled dark fiber do not count as providers of wholesale dark fiber for purposes of the wholesale trigger for dark fiber transport. *Id.*

b. ***The carrier must be operationally ready and willing to sell the particular capacity of transport wholesale along the route in question.*** The critical points here are: (1) if the transport facility is not working and not "immediately" available, it does not count for purposes of a trigger analysis; and (2) if the carrier does not generally offer access to other carriers, it does not count.[319] Thus, for example, if the purported wholesaler cannot connect with CLEC customers through CLEC-to-CLEC cross-connects at the Verizon central offices, or if CLECs cannot terminate their UNE loops directly with the purported wholesaler, then the wholesaler is not operationally ready to provide a real alternative to ILEC transport.[320]

c. ***The wholesale services must be widely available.*** For example, a carrier that sells transport to only one or two other companies on an individual case basis or in a capacity swap, but does not make its services widely available, would not qualify as a wholesaler.[321]

---

[318] *TRO* ¶ 414 fn.1277.

[319] *TRO* ¶ 414. The FCC emphasized that the operational readiness test for wholesalers "safeguards against counting alternative fiber providers that may offer service, but do not yet have their facilities *terminated or collocated* in the incumbent LEC central office, or are otherwise unable to *immediately* provision service along the route." *Id.* (emphasis added).

[320] *TRO* ¶ 414 fn.1279: The ostensible offer of wholesale transport must satisfy the FCC's collocation rules, which clarify "nondiscriminatory principles including the right to interconnect with other collocated competing carriers by cross-connection." A carrier that cannot offer cross-connection that satisfies these requirements does not qualify as a wholesaler for purposes of the trigger, because "the wholesale trigger counts only wholesale offerings that are readily available." *Id.* Similarly, a purported wholesaler's dedicated transport is not operationally ready if the wholesaler lacks the operations support systems ("OSS") needed to support CLEC use of the facilities in a commercially reasonable manner. This Commission's adoption of Carrier-to-Carrier Guidelines and a Performance Assurance Plan ("PAP") to measure and properly incent Verizon's wholesale performance testifies to the critical role that properly functioning OSS plays in the provision of adequate wholesale services.

[321] *TRO* ¶ 414.

Individual contract-type arrangements do not evidence widely available wholesale services, and therefore cannot qualify for the wholesale trigger.

C. AT&T Is Not a Self-Provider of Dedicated Transport Between Verizon Wire Centers.

AT&T is identified by Verizon as a self-provider trigger candidate for dedicated transport on a substantial number of routes in Pennsylvania.[322] But the fact of the matter is that AT&T does not self-provision DS3 dedicated transport or dark fiber between Verizon wire centers. AT&T's network is deployed principally to concentrate and backhaul traffic from ILEC serving wire centers to AT&T's switches, or to terminate interconnection trunks.

The provision of transport along routes that terminate at each end in AT&T collocation arrangements in Verizon wire centers would not be economical for AT&T. This is so because AT&T would be forced to purchase high capacity loops from Verizon at each end of the dedicated transport route, along with the requisite cross-connects in both wire centers, in order to provide a dedicated transport service (at either retail or wholesale).[323] Further, there is not likely to be much revenue available to AT&T for dedicated transport traffic between Verizon wire centers.[324]

Instead, when there is demand for a high-capacity service that requires AT&T to carry traffic between Verizon wire centers, AT&T typically purchases such transport from Verizon as special access, despite the cost of such access. Indeed, Verizon currently bills AT&T $258,620 per month, or in excess of $3.1 million annually for special access between the Verizon wire

---

[322] VZ Stmt. 1.1, Exhibit 3 Attachments A and B; Exhibit 6 Attachments A and B.

[323] Tr. 464 (Nurse).

[324] Tr. 459-461 (Nurse). Unlike Verizon, a CLEC does not have switches at the Verizon wire centers and is unlikely to have a strong community of interest between the wire centers. Verizon has admitted that it has no record of ever having bought transport from a CLEC between its wire centers, even when Verizon was at facilities exhaust. Tr. 87-88 (Peduto). Thus, there is not much of a business case for a CLEC for transport between Verizon wire centers, and it is not surprising that AT&T does not provision its facilities for such transport.

center pairs in Pennsylvania on which Verizon claims that AT&T is either a self-provider or a wholesaler of dedicated transport.[325] If it were as trivial to provide such services over AT&T's fiber as Verizon suggests, there would be no reason for AT&T to incur these substantial special access costs.

To reach its erroneous result, Verizon makes a number of unwarranted assumptions and speculations that are grounded upon its simplistic view that if a CLEC has collocations at two Verizon wire centers (with apparently powered equipment in place) and with non-Verizon fiber optic cable going into the collocations and leaving the Verizon wire centers, then the CLEC is self-provisioning and wholesaling "dedicated transport" as redefined by the FCC.[326] As far as AT&T's fiber facilities are concerned, this is nonsense.

1. Verizon's *assumption* that all fiber-optic based AT&T collocations in a market are connected either directly or indirectly to each other is wrong.

Verizon is wrong because it assumes that every CLEC collocation with fiber must necessarily and always be connected to each and every other CLEC collocation.[327] But if the dedicated transport triggers case were simply a matter of listing collocations with fiber -- and since substantively all on-net collocations are fiber based -- then it would have been completely within the FCC's ability to find that all possible routes between CLEC collocations were deemed

---

[325] Tr. 550-552. AT&T Hearing Exhibits 3 and 4 show the routes identified by Verizon where AT&T is a purported self-provider or wholesaler, on which AT&T purchases special access from Verizon in order to satisfy AT&T customer demand. The first two columns identify the pair of wire centers by CLLI code; the third column shows the type of special access service; the fourth column shows the number of such circuits; the fifth column displays the monthly charge for the circuits; and the last column indicates from which Attachment to VZ Stmt. 1.1 the wire center pairs are derived.

[326] VZ Stmt 1.0 at 46.

[327] VZ Stmt. 1.0 at 47-48. As a subset of this assumption, Verizon also assumes without saying so that simply because fiber is pulled into the collocation all elements of that fiber must be "terminated" in that collocation, or have the appropriate electronics, multiplexing, etc. attached and ready to provide services. However, a CLEC will terminate and install only the electronics that it immediately requires to provide services and accommodate a reasonable forecast of future demand.

not impaired. Instead, the FCC delegated this matter to the Commission for route-specific, capacity-specific fact finding. That delegation would have been superfluous if the FCC had acted in reliance on Verizon's assumption.

The fact is that AT&T's network is not intended or designed to provide "dedicated transport." All LECs necessarily build their *switched* networks so that switched traffic can flow to all parts of their network, as well as directly or indirectly to the networks of other carriers. However, this case is not about switched traffic but rather about "dedicated transport." AT&T's fiber network is not principally configured to flow traffic from one ILEC wire center collocation to another ILEC wire center collocation. Rather, the AT&T network is configured as a hub and spoke arrangement, hauling local traffic from AT&T's collocation to its local switch. Indeed, AT&T has testified without contradiction that the typical fiber "ring" in Pennsylvania touches one or at most two AT&T collocations at Verizon wire centers plus the AT&T switch.[328]

This network architecture reflects the realities of the CLEC business. A CLEC could never expect to carry the same volume of traffic as Verizon does between the Verizon wire centers, even if it built such facilities and Verizon were at facilities exhaust.[329] While Verizon can avoid tandem switching by installing direct end office trunks when there is sufficient demand (while using the tandem only for overflow), a CLEC with a centrally located (tandem-like) local switch backhauls *all* calls to its switch, regardless of the originating and terminating call flows. Thus, the CLEC's transport network architecture is fundamentally different from Verizon's because the CLEC's switch architecture is fundamentally different from Verizon's. Each carrier designs its transport architecture to serve its respective switching topology. Verizon seems to forget this.

---

[328] Tr. 463 (Nurse).

[329] Tr. 459-461 (Nurse).

In the limited instances with two collocations on the same ring, there may well be AT&T physical cable running to two Verizon wire centers. But that does not establish electrical connectivity between such wire centers. And even from a purely physical perspective, the mere existence of a fiber cable running past (or even through) two points proves nothing with regard to its use to provide direct (non-switched) connectivity between those points. Although a cable may "run through" both Verizon office A and Verizon office Z, the two offices may not even be connected to the same fiber, much less to fiber in the same bundle. If the two Verizon offices have not been configured to provide termination of the same fiber pairs on an optical multiplexer in each office, then AT&T does not (and cannot) have electrical connectivity between the two locations unless a grooming and cross-connection function is provided at a third physical location or node, such as an AT&T switch location or point of presence ("POP"). Even if the two AT&T collocations at Verizon wire centers are both equipped with an optical multiplexer that terminates common fibers, one cannot conclude that AT&T is operationally ready to establish connectivity between the two points.

2. Verizon's *assumption* that the fiber transport facilities deployed by other carriers are necessarily used for DS1 and DS3 transport is wrong.

AT&T's network in Pennsylvania is typically provisioned at the OC48 level. While Verizon says that OCn fiber facilities are "capable of operating at various levels of capacity,"[330] that is far from saying that AT&T does so on any particular route identified by Verizon in its testimony. In this triggers case, it is not the *capability* of channelization but the *actual* channelization of facilities at the DS1 and DS3 levels – separately and on a particular route -- that is the keystone of the FCC's dedicated transport self-provisioning trigger analysis.[331]

---

[330] VZ Stmt 1.0 at 49.

Indeed, Verizon seems to have forgotten that it has filed a triggers case and not a *potential deployment* case. This triggers case requires evidence of what exists *now*, not speculation as to what could exist in the future.

While it is uncontested—but largely irrelevant—that CLECs typically provision DS-3s over fiber transport facilities, that is not the test. The trigger test examines whether a CLEC has provisioned a facility based on the amount of DS3s that it could otherwise obtain as a transport UNE. For example, AT&T has facilities in Pennsylvania that are served by fiber at the OC48 level. But OCn capacity is not the issue here. The FCC has already found, on a national level, that OCn transport should not be an UNE because "requesting carriers are not impaired without access to unbundled OCn transport facilities."[332] If the existence of OCn transport were to sufficient to evidence non-impairment for DS3, DS1, and dark fiber dedicated transport, then the FCC's nationwide finding of non-impairment regarding OCn transport automatically would have applied nationwide to DS3, DS1, and dark fiber – which it clearly did not. Such an interpretation is squarely inconsistent with the FCC's analysis in the *TRO*. Thus, a showing that capacity exists at the OCn level, without more, proves nothing of relevance to this proceeding.

---

[331] Verizon mistakenly asserts that the FCC's only requirement is that "a carrier have transport facilities and fully provisioned collocation arrangements in place." VZ Stmt 1.2 at 83. But as previously noted, the FCC declared that the self-provider "must *offer service* connecting wire centers 'A' and 'Z'...." *TRO* ¶ 401 (emphasis supplied). The FCC also requires that the CLEC be "immediately capable and willing to provide" (*TRO* ¶ 400) and "[a]ble immediately to provision service" (*TRO* ¶ 414). The FCC described the requirement as being "readily available," only requiring the installation of a cross connect jumper cable. *See TRO* ¶ 414 fn. 1279. Verizon's reference to the "routine network modifications" that the FCC requires of ILECs in the provision of high capacity *loops* (VZ Stmt 1.2 at 84) is inapposite to the requirements that the FCC laid down for this non-impairment inquiry on dedicated transport.

[332] *TRO* ¶ 359. The FCC went on to "find that requesting carriers are not impaired without lit transport beyond twelve DS3s on a route due to the ability to self-provision transport facilities, or to self-provision optronics equipment necessary to activate unbundled dark fiber." *TRO* ¶ 389.

3. Verizon's *assumption* that AT&T is operationally ready to self-provide dedicated transport between Verizon wire centers is wrong.

In point of fact, AT&T does not offer dedicated transport between Verizon wire centers, nor is it operationally ready to do so. Operational readiness requires more than simply having physical fiber between two Verizon wire centers and a couple of collocations, as Verizon mistakenly assumes. As already noted, AT&T's network is designed principally to backhaul traffic to AT&T's switch. It is not designed to haul transport traffic between Verizon's wire centers. To change that network orientation is not a trivial matter, as already explained above.

Moreover, there is nothing in the nature of a SONET ring architecture that supports Verizon's assumptions. A SONET ring is a common configuration for metro-based CLEC fiber facilities, and while quite useful in terms of providing redundancy, SONET rings are limited in the number of nodes that can be placed economically on a particular ring configuration, and the maximum distance that can exist between any two nodes. Thus, the capacity available to any node on the ring would be substantially reduced as AT&T adds more nodes to the ring, that would be necessary to self-provision multiple transport routes between nodes serving multiple AT&T collocation arrangements at Verizon wire centers. Accordingly, AT&T's "rings" are logically (electrically) hub and spoke arrangements, typically with one (or at most two) AT&T collocations per ring homing on an AT&T network node.[333]

Furthermore, if a larger number of separate logical SONET rings are used, as is the case in AT&T's fiber network, it becomes increasingly inefficient to provide ring-to-ring pathways necessary to connect to Verizon wire centers on two different rings. Verizon's suggestion of ubiquitous connectivity would require considerable any-ring-to-any ring interconnectivity, an undertaking without much reward, given the absence of a business case that there would be

[333] Tr. 463 (Nurse).

substantial revenue-producing traffic flowing between such Verizon central offices. If AT&T were operationally ready to undertake such a network expansion its special access charges from Verizon would plummet. Thus, while AT&T would have a financial incentive to do so if it were practical and economic, such has not been the case.

There remains the theoretical possibility of cross-connection of A-X and X-Z links at an AT&T node. Whether in fact AT&T is operationally ready to provide dedicated transport between any of the Verizon wire center pairs that Verizon has identified on that basis, given the current AT&T network configuration, depends upon how much investment, engineering, and product management must be incurred and how much activity performed, including associated collocation augmentation. To become operationally ready to provide dedicated transport between any of the collocation pairs Verizon has identified could require investment in engineering and associated equipment augmentation. The extent of these activities and investments would depend upon the vendor make and model and utilization of the equipment already on site, the availability of spare capacity and capability on the existing facilities, such as a digital cross connection system ("DCS").[334]

Finally, Verizon simply *assumes* that because a CLEC generally provides information on a website or in advertising material about DS1, DS3 and other services it offers at retail, that this is granular evidence that the CLEC is operationally ready to provide dedicated transport on each specific wire center-to-wire center routes, at each of the specific capacities, and that the transport

---

[334] Verizon's claim that the Commission "need not evaluate what, if any, reconfiguring would be required" for AT&T to provide dedicated transport between Verizon wire centers is predicated upon the erroneous assumption that "[t]he FCC does not require a dedicated circuit" – that is, that a switch in the middle provides the requisite connectivity for dedicated transport. VZ Stmt 1.2 at 82. As Verizon's witness Peduto stated, that is "laughable." Tr. 535 (Peduto).

is operationally ready on a widely available basis, as the *TRO* rules require.[335] A claim in CLEC advertising that it is willing to provide transport generally says nothing about its ability to provide such transport on a route between Verizon wire centers, which is, after all, the whole point of the FCC's triggers and this exercise. In fact, AT&T for one is not operationally ready to do so on any of the routes Verizon has identified.[336]

D. AT&T Is Not a Wholesaler of Dedicated Transport Between Verizon Wire Centers.

Verizon identifies AT&T as a wholesale trigger candidate for DS1, DS3 and dark fiber on **[BEGIN AT&T PROPRIETARY]**

END AT&T PROPRIETARY in Pennsylvania.[337] That is simply wrong, for AT&T does not provide dedicated transport at wholesale between AT&T collocations at Verizon wire centers, at any capacity level.

First, Verizon has ignored AT&T's responses to the Commission's discovery questions, wherein AT&T explicitly denied being a wholesaler of dedicated transport.[338] And that remains

---

[335] VZ Stmt 1.0 at 50.

[336] AT&T offers retail dedicated interoffice channels at DS1, DS3 and other speeds, but these are available only between two AT&T Central Offices or points of connection or combinations thereof, on AT&T's fiber network, *see*, for example, AT&T Communications of Pennsylvania, LLC, Pa. PUC No. 19, § 8.2.1 (ACCUNET T45 Interoffice Channel). For another retail example, see *Id.*, § 11.1.1, offering AT&T Private Line Interoffice Channel SONET Services at various speeds, "configured by combining service components at designated AT&T Central Offices." Notably, these tariffs do not offer such channels between Verizon (or any other ILEC) wire centers, since such wire centers are by definition not AT&T Central Offices. Thus, AT&T does not hold out in these tariffs that it offers dedicated transport between ILEC wire centers. AT&T Stmt. 1.0 at 120 and n. 161.

[337] VZ Stmt. 1.0, Exhibit 3 Attachments C and D; Exhibit 4 Attachment C; Exhibit 5 Attachment C; and Exhibit 6 Attachments C and D. Verizon does not even pretend to separate out DS1 and DS3 dedicated transport, simply assuming that where one speed is provided so is the other. This flies in the face of the FCC's finding that "DS1 transport is not generally made available on a wholesale basis." *TRO* ¶ 392. Verizon's simplistic assumption that DS1 follows DS3 and other wholesale offerings fails to overcome the specific findings by the FCC in the *TRO*.

[338] Question 6, related specifically to transport, asked AT&T to "[i]dentify and describe any arrangements into which you have entered with another entity for such other entity's use of

the case. AT&T does not self-provide or provide on a wholesale basis "dedicated transport" between Verizon wire centers in Pennsylvania.

Second, Verizon concedes that there is no route or capacity specificity in its wholesale provider trigger candidate count, because it simply assumes that "the same pairs of Verizon wire centers that meet the self-provisioning trigger also meet the wholesale trigger."[339] This assumption is wrong for two reasons: It ignores the requirement of a granular showing; and it turns the FCC distinction between self-provisioning and wholesale provisioning — and importantly the lower number of required trigger candidates for wholesale provisioning — on its head. If all self-providers were wholesalers the separate trigger requirements would be redundant.

Third, Verizon's assumption that AT&T holds itself out as a wholesale supplier of dedicated transport between each of the Verizon wire center pairs associated by Verizon with AT&T is predicated upon a misreading of AT&T's Network Interconnect Services tariff. Verizon cites to AT&T PUC No. 17, § 10 for the proposition that "AT&T offers private line services at all speeds up to OC192, including DS3."[340] However, that citation does not support Verizon's claim that AT&T provides dedicated transport between any Verizon wire centers at wholesale, at any speed.[341] Finally, Verizon does not even claim that AT&T offers wholesale

---

transport facilities in Pennsylvania that you own or control, on a lease or other basis." This question was clearly designed to address the issue of CLEC wholesale wire center-to-wire center dedicated transport activity, and AT&T took it as such. In response, AT&T answered "None." ALJ Exhibit 4.

339 VZ Stmt. 1.0 at 45.

340 VZ Stmt. 1.0 at 50.

341 What AT&T actually offers under the cited tariff is Network Interconnection Services that "is available only in connection with the termination of Local Traffic to End Users to whom [AT&T] is able to terminate calls using Access Services as provided elsewhere in this tariff." AT&T Communications of Pennsylvania, LLC, Pa. PUC No. 17, § 10.1. The service interconnects a CLEC's network to AT&T's network, rather than transporting between two

dedicated transport to Universal Access, Inc., or is listed in the New Paradigm CLEC Report 2003 as offering dedicated access transport, or has a CATT arrangement in any Verizon wire center.

E. Verizon Has Failed To Carry Its Burden Of Coming Forward With "Relevant Evidence."

Based upon its set of assumptions, Verizon claims it has "come forward with evidence" and now seeks to shift the burden onto the trigger CLECs to prove that they do not either self-provide or not offer at wholesale capacity on a specific route at the specific capacities that the FCC found relevant to an impairment analysis. The standard is clear and Verizon falls short. Verizon cannot simply speculate or assume critical facts on a broad basis and then demand that CLECs prove the negative on a specific basis. If the analysis were as simple and ministerial as counting common collocations, without more as Verizon assumes, then there would be no point to this proceeding. Rather, the Commission has been delegated federal authority and charged with reaching findings of fact as the *TRO* specifies—not making guesses. The Commission must develop a record of factual evidence that each route at each capacity is competitive, before it considers declaring that the FCC's finding of impairment on that route is overcome. That record does not exist here.

III. VERIZON DOES NOT SATISFY EITHER THE SELF-PROVISIONING OR COMPETITIVE WHOLESALE FACILITIES TRIGGER FOR HIGH-CAPACITY LOOPS

Although competitive carriers prefer to self-deploy high-capacity loop facilities where they can, the FCC found, as a general matter, that such self-deployment is economically and operationally feasible only for the largest enterprise customers, *i.e.*, those requiring an OC3 loop

---

wire centers on the Verizon network. The Points of Interconnection ("POI") for the provision of the Network Interconnection Services must be "at [AT&T's] End Office, and at any other reasonable point on [AT&T's] network." *Id.*, § 10.2.2. AT&T Stmt. 1.0 at 119-20.

or higher.[342] Thus, the FCC, in making a national finding of impairment, has required ILECs to continue to provide competing carriers with access to unbundled DS-1 loops, DS-3 loops (up to a maximum of two DS-3s per customer location), and dark fiber loops.[343]

The FCC also recognized, however, that there may be particular locations where an ILEC could potentially show that competing carriers were not impaired, either because they could self-deploy facilities necessary to replace high capacity loop UNEs or could obtain them from wholesale providers other than the incumbent LEC. Because the record was not sufficiently granular for a detailed analysis, the FCC delegated to the states the task of determining whether that ILEC should be relieved of its obligation to provide unbundled access to its loop facilities for a given location.

As with mass market switching, the *TRO* gives ILECs the opportunity to demonstrate non-impairment through either a potential deployment presentation or through a triggers showing.[344] And, as with mass market switching, Verizon is advancing a "triggers-only" hi-cap loop case, asserting that it "has evidence" that 63 customer locations meet one or both of the FCC triggers in Pennsylvania.[345] Verizon's case, however, is built on a very large number of assumptions and a very small number of facts.

A. Verizon Fails to Meet the "Self Provisioning" Trigger for DS3 and Dark Fiber Loops

The purpose of the "self-provisioning" trigger is to identify customer locations where two independent CLECs have already demonstrated, through their own self-provisioning of loops to that location, that it is feasible to self-provision the high capacity facilities – DS-3 and dark fiber

---

[342] *TRO* ¶¶ 299, 315, 342, 348. Generally, "[i]n most areas, competing carriers are unable to self-deploy and have no alternative to the incumbent LEC's facility." *Id.* ¶ 314.

[343] *Id.* ¶¶ 311, 324, 325, 328.

[344] *Id.* ¶ 335.

[345] VZ Stmt. 1.1 at 22 (Exhibit 7).

loops – that would otherwise be available as UNEs.[346] To meet this trigger, (1) the providers must be unaffiliated and own the loop facilities;[347] (2) the loop capacity must be specifically identified; (3) a location-specific review must be conducted; and (4) the providers must be serving customers via the specified facilities.[348] Verizon asserts that 57 locations meet the self-provisioning trigger for dark fiber loops and 61 locations meet the self-provisioning trigger for DS3 loops.[349]

1. Self-Provisioned Dark Fiber Loops

A requesting carrier is not impaired without access to a dark fiber loop at a specific location where two or more unaffiliated competitors have deployed their own dark fiber facilities at that location.[350] In this instance, Verizon did not affirmatively determine that specific CLECs offered dark fiber at particular locations. It did not investigate any of the specific locations it has identified. It did not engage in discovery to determine, specifically, where dark fiber has been deployed, at what capacities, and in what configurations. Rather, Verizon is asking the Commission to accept a generalized presumption:

---

[346] The self-provisioning trigger does not apply to DS1 loops. The FCC found so "little record evidence demonstrating that carriers construct facilities to serve customers *exclusively* at the DS-1 level, as well as the lack of economic evidence showing that such self-deployment is possible," that it determined "the Self-Provisioning Trigger *will not* be applied to DS-1 loops." *TRO* ¶ 334 (emphasis in original).

[347] The FCC went on to note, however, that "when a competitive carrier has obtained dark fiber on a long-term indefeasible-right-of-use (IRU) basis, that dark fiber facility can be counted as a separate, unaffiliated facility for self-provisioning determination purposes." *Id.* ¶ 333.

[348] *TRO* ¶ 332. The FCC found that "[w]here two or more competitive LECs have self-provisioned loop transmission facilities, either intermodal or intramodal facilities, to a particular customer location *at the loop capacity level* for which the state impairment analysis is being conducted, competitive LECs are not impaired without access to unbundled incumbent LEC loops *at that capacity level* at those particular customer locations." (emphasis added; footnotes omitted).

[349] VZ Stmt. 1.1 at 22 & Exhibit 7.

[350] 47 C.F.R. § 51.319(6)(ii).

> Absent evidence to the contrary, it reasonably can be assumed that all self-provisioned loop facilities have dark fiber. Since 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, . . . all fiber loop facilities, regardless of the capacities at which they now operate once consisted entirely of dark fiber. Put differently, evidence of "lit" fiber is also evidence that a carrier has self-provisioned dark fiber.[351]

This argument is a house of cards. It *assumes* that CLECs have deployed excess fiber capacity. It *assumes* that excess capacity has been terminated in a manner that makes it immediately useful. It *assumes* that such excess capacity is present at every one of the buildings it has identified. It *assumes* that the CLECs have full access to each of the 57 locations listed it its Exhibit 7. The trigger test, however, is based on facts, not assumptions.

Even Verizon's own witnesses concede they do not have the facts. They hedge that, in their opinion, "*the vast majority* of self-provisioned fiber loop facilities will have spare dark fibers."[352] The *vast majority*, however, is something less than all. And, truth to tell, Verizon's witnesses do not know whether spare dark fiber is available at the *vast majority* of locations, or just some locations, or any at all. They simply do not have the facts. Absent hard evidence – and not mere *assumptions* – that at each of the 57 loop locations at least two CLECs have self-provisioned dark fiber (as the FCC has defined dark fiber loops), the Commission cannot make the requisite finding that two CLECs deployed "the specific type of high-capacity loop" – dark fiber loops – for which Verizon seeks a finding of non-impairment.[353]

Perhaps the most egregious of Verizon's many assumptions is that a CLEC's deployment of dark fiber into a building automatically gives the CLEC access to the entire building.[354] A

---

[351] VZ Stmt. 1.1 at 24-25.

[352] *Id.* at 25 (emphasis added).

[353] *TRO* ¶ 328.

[354] The FCC recognized that "if the entity or individual controlling access to the premises does not allow a competitor to reach its customer residing therein (or places unreasonable burdens

"substantial majority" of AT&T's high capacity loops nationwide can only be used to serve a particular floor or floors of a building.[355] Here in Pennsylvania, of the 52 AT&T dark fiber loop "locations" Verizon identified on its Exhibit 7, AT&T lacks access to the whole building in 21 of them.[356] Moreover, Verizon has presented no evidence that the other CLECs it identified have access to the entire building location. Taking away the high-capacity loop UNE for an entire large building when CLECs are able to access only a fraction of the building's customers is starkly at odds with the purpose of the *TRO*'s trigger test.

Finally, under the FCC's own definition, dark fiber must "connect two points within the incumbent LEC's network" and be "installed and easily called into service."[357] Here, however, Verizon provides no evidence that the purported dark fiber loops are "terminated" and, thus, easily called into service. Indeed, on cross examination, Verizon admitted that it had not visually inspected the specific high capacity loop locations and failed to get any information from the building owners.[358]

2. Self Provisioned DS3 Loops

As with the dark fiber loops, Verizon's case is built on assumptions, not facts. Verizon testified that "based on one CLEC's representation that all customer locations identified in response to the Commission's loop discovery questions contain at least one OCn loop, Verizon *assumed* that each loop facility identified as serving the CLEC's retail customers can do so at the

---

on the competitive LEC as a condition of entry), the competitive LEC may be unable to service its customer via its own facilities." *Id.* ¶ 305.

[355] AT&T Stmt. 1.0 *citing* AT&T Reply Comments in CC Docket Nos. 01-338, 96-98, 98-1247, at 176; *see,* also, *TRO* ¶¶ 303-05 & nn. 889, 890, 895-97 (discussing building access problems and citing repeatedly to AT&T Reply Comments at pp. 174-79).

[356] *See* AT&T Stmt. 1.0 at Exhibit 26 (modified Verizon Exhibit 7 showing loop locations where AT&T does not have access to the whole building).

[357] *See TRO* ¶ 201 n.628 *citing UNE Remand Order*, 15 FCC Rcd at 3771, ¶ 162 n.292.

[358] Tr. 82-83, 344. Verizon's witness could not affirmatively state that Verizon had any knowledge of arrangements building owners may have had with carriers. Tr. 82-83.

DS1 or DS3 level."[359] Such an assumption is plainly insufficient under the FCC's rule implementing the *TRO*.[360]

Verizon's *assumptions* are not facts. Verizon does not provide any proof that the two trigger candidates have deployed the "specific type of high-capacity loop," for which Verizon is seeking a finding of non-impairment.[361] It has provided no hard evidence of "facilities in place *serving* customers at that location *over the relevant loop capacity level*."[362] A self-provisioning trigger candidate for DS3 loops must be providing service at the DS3 level, but limited to only one or two DS3s of demand. This is for the simple reason that the FCC found that carriers requiring 3 or more DS3s of demand are not impaired in providing their own loops. Thus, the existence of two or more unaffiliated carriers serving a given location with their own *OC3* (or higher-capacity) loop facilities is irrelevant to the question of whether the *DS3* self-provisioning loop trigger is met.[363] It is for this reason that the FCC limited the availability of unbundled DS-3 loops "to a total of two DS3s per requesting carrier to any single customer location."[364] Absent detailed and specific evidence – the kind of evidence Verizon *assumes*, but has not presented – that two carriers have each self-provisioned a maximum of two, DS-3 loops each at a given location, the DS3 self-provisioning trigger is not met.

---

[359] VZ Stmt. 1.1 at 23 (emphasis added).

[360] If the trigger operated as Verizon supposes, then satisfying the trigger for dark fiber would automatically satisfies the trigger for at least DS-3 loops and, by extension, DS-1 loops as well. This, of course, is not the case.

[361] *TRO* ¶ 328.

[362] *Id.* ¶ 332. *See also id.* ¶ 329 (trigger satisfied only by "facilities at the relevant loop capacity level").

[363] Providers of OC-level facilities may, however, qualify under the wholesale trigger if they provide service at the relevant levels and meet the other requirements of that trigger.

[364] *Id.* ¶ 324; *see also* ¶¶ 315-19 & nn. 931, 955 (explaining why carriers are not impaired without access to unbundled OCn lit loops, the smallest of which (OC3) is equivalent in capacity to three DS-3s).

Verizon attempts to skirt the "specific facility" issue by relying, once again, on an unsupported assumption. Verizon argues that the Commission should find that "CLECs who have deployed fiber optic loop facilities have provisioned DS1 and DS3 circuits – unless a carrier shows, for a particular customer location, that it does not have any DS1 or DS3 circuits at that location."[365] This *assumption* about the way that fiber loop facilities are "commonly" constructed and operated, however, falls well short of establishing, through verifiable facts, that trigger candidates have constructed loops *at that level of service* to the location in question.[366]

Finally, Verizon has not even attempted to demonstrate that customers are being served over CLEC loops deployed at each location Verizon has identified. A qualifying self-provisioner must have "*existing* facilities in place *serving* customers at that location."[367] The FCC's self-provisioning trigger emphasizes the importance of ensuring that any proposed self-provisioner is operationally ready; otherwise, it could not be actually "serving customers" at the customer location under review. Here again, Verizon has made no such showing.

B. Verizon Has Failed to Show that the "Competitive Wholesale" Trigger for DS1 and DS3 Loops Has Been Met at Any Location.

The competitive wholesale facilities trigger is designed to identify customer locations where competing carriers can offer service using loops obtained from wholesale suppliers, and thus do not need to depend either on obtaining UNEs from the incumbent LEC or on their own

---

[365] VZ Stmt. 1.1 at 24.

[366] As with the dark fiber loops, Verizon has not established that the CLECs have access to the whole building for each of the buildings identified. In addition, the Commission should not overlook Verizon's not-so-subtle attempt to shift the burden of proof in this matter; Verizon's assumptions-based approach attempts to shift its burden onto the CLECs – something the *TRO* does not permit it to do, nor should this Commission.

[367] *TRO* ¶ 332 (emphasis added).

construction. The wholesale facilities trigger applies to both DS1 and DS3 loops.[368] The trigger is met where:

> the relevant state commission determines that two or more unaffiliated alternative providers, including alternative transmission technology providers that offer an equivalent wholesale loop product at a comparable level of capacity, quality, and reliability, have access to the entire multiunit customer premises, and offer the specific type of high-capacity loop over their own facilities on a widely available wholesale basis to other carriers desiring to serve customers at that location.[369]

Verizon contends there are three customer locations where the DS1 wholesale trigger is met and 36 customer locations where the DS3 wholesale trigger is met.[370] Accepting that contention, however, requires the Commission to make a leap of faith. It would require the Commission to accept, for example, Verizon's suggestion that "[i]f a carrier is willing to offer loops at some customer locations, the Commission should assume that it is willing to do so at all customer locations – unless a carrier indicates that it is not."[371] Assumptions, of course, are no substitute for evidence.

---

[368] *See id.* ¶¶ 328, 329, 334, 337, 338. Thus, the key criteria set forth above for the self-provisioning trigger also apply to the wholesale trigger. In addition, the wholesale trigger specifically includes the requirement that trigger firms be able to serve *every customer* in buildings where the trigger is alleged to have been met. *Id.* ¶ 337. That the criteria for a self-provisioner and a wholesaler should be similar is appropriate because, in some circumstances, a wholesaler will also count as a self-provider under the FCC's rules. For example, a carrier unaffiliated with the ILEC that offers CLECs access to loops over its own facilities will qualify as both a self-provider and a wholesaler. In contrast, a carrier that obtains unbundled dark fiber from the ILEC, attaches its own optronics, and then offers wholesale "lit" loop capacity may satisfy the wholesale trigger, but will not satisfy the self-provisioning trigger. *Id.* ¶ 329 & n. 973.

[369] *Id.* ¶ 337. The FCC noted that a wholesaler (unlike a self-provisioner) is deemed to satisfy the "own facilities" requirement for dark fiber if that carrier has not only obtained it from the incumbent LEC through an IRU, but also if that carrier has obtained "on any other lease/purchase basis," including as a dark fiber UNE. *Id.* ¶ 337, n 987. Of course, in order to operate as a wholesaler the carrier must have "attached its own optronics to 'light' the dark fiber in order to make 'lit' fiber loops available to competitive LECs on a wholesale basis." *Id.*

[370] VZ Stmt. 1.1 at 22.

[371] *Id.* at 26.

It would also require the Commission to accept as fact "general language" from CLEC national websites as a commitment to provide wholesale services in specific locales within the Commonwealth. Verizon went so far as to assert that, if a carrier holds itself out to be a wholesale provider anywhere in the country "and does not limit its representations to particular locations or to exclude loops," those carriers could be counted as wholesale providers.[372] Marketing puffery, however, is "hardly the location-specific, fact-specific analysis mandated by the FCC."[373] Promotional language gleaned from the websites "does not provide any persuasive evidence that the specific facilities are available at any, much less *each*, of the locations denoted by Verizon in its Exhibit 7."[374] Some CLEC's marketing claim seeking to offer wholesale capacity anytime, anywhere, is no more persuasive of actual facilities deployment than is, say, Verizon marketing claims about widespread DSL availability.[375]

Verizon is also asking the Commission to *assume*, that a wholesaler's presence is a building means the wholesaler has access to the entire building. The wholesale facilities trigger is not satisfied unless the wholesaler has "access to the entire multiunit customer premises" since a competitor cannot compete effectively for all potential customers at a given location without such access.[376] Verizon argues that "it is reasonable to assume that a carrier with fiber optic facilities into a large commercial building has access to the entire building."

---

[372] VZ Stmt. 1.1 at 27.

[373] AT&T Stmt. 1.0 at 149.

[374] *Id.*

[375] Tr. 76-77.

[376] *TRO* ¶ 337. AT&T Statement 1.0 at 138. The FCC's rule requires that a competing provider have "access to the entire customer location, including each individual unit within that location." 47 CFR § 51.319(a)(4)(ii)(B). In multi-tenant buildings, this includes facilities that provide access to each individual unit as well as the same common space, house and riser and other intra-building wire as the ILEC.

The problem, of course, is that Verizon has no facts to support its assumptions. Indeed, the facts cut against Verizon. The simple fact that AT&T --which, in any event, does not make high capacity DS1 and DS3 loops available on a wholesale basis --does not have full access to over one-third of the buildings where Verizon has identified AT&T as a provider of high-capacity loops demonstrates why the Commission should reject Verizon's assumption. As AT&T witnesses Kirchberger and Nurse testified, "[i]t is very likely that other CLECs – like AT&T – would have access limitations in more than a handful of the identified customer locations."[377]

Moreover, Verizon failed to establish that its identified wholesalers offer loops on "a widely available wholesale basis."[378] The FCC recognized that some carriers may have (or be thought to have) spare capacity at a particular location, and may have even entered into an arrangement to provide some of that spare capacity to another carrier, but may have no intention of making its spare capacity "widely available."[379] In those circumstances, other competitors cannot, as a practical matter, gain access on a wholesale basis to that alleged wholesaler's loop capacity. Such a wholesaler plainly should not and would not count to fulfill the trigger test. Rather, for a wholesale service to be "widely available," its facilities should be immediately available through a contract, tariff, or other standard common carrier arrangement.[380] Verizon provided no evidence that its claimed wholesalers identified are offering DS3 or DS1 loops on a widely available basis. At best, Verizon presumed, wholly without support, that if a carrier holds itself out as a wholesale provider *anywhere* in the country, such as on a national website, Verizon

---

[377] AT&T Stmt. 1.0 at 151.

[378] *See TRO* ¶ 337.

[379] *Id.*; *cf. id.* ¶ 407 n.1260.

[380] Mere offers to negotiate or to provide individual rate quotes are insufficient to demonstrate that a wholesale service is widely available.

could properly assume that the carrier was providing wholesale DS3 and DS3 service *everywhere* at the cited Pennsylvania locations. Such a nonsensical presumption cannot provide evidentiary support for Verizon's contentions.

Finally, Verizon did not establish that its identified wholesalers are operationally ready to serve. A wholesaler that merely aspires to provide service to a particular location, but has not completed the construction and connections needed to provide immediate service over those facilities also does not count for trigger purposes since such a wholesaler provides no practical alternative to use of the ILEC's UNEs.[381] Verizon failed to provide any evidence to demonstrate that the CLECs identified are "operationally ready."

In sum, Verizon has utterly failed to provide evidence to establish that the FCC's triggers for any capacity of high-capacity loops are met at any particular customer location in Pennsylvania.[382]

---

[381] As AT&T's witnesses testified: "For this reason, a wholesaler also must have reasonable operations support systems ("OSS") that are ready to provide the pre-ordering, ordering, provisioning, maintenance and repair, and billing support that are vital to the provision of a wholesale service." AT&T Stmt. 1.0 at 138-39.

[382] In the event the Commission finds that either the transport or high-capacity loop triggers have been met – which it should not – the Commission must develop an appropriate transition plan. *TRO* ¶ 339 (transition for high capacity loops) and ¶ 417 (transition for transport). Specifically, AT&T recommends that the Commission develop a multi-tiered transition process such as the one applicable to mass-market switching. AT&T's witnesses Kirchberger and Nurse described this process for hi-cap loops and transport as follows:

> First, there should be a transition period of nine months in which CLECs may order "new" UNEs on routes where the Commission finds a trigger is met. Second, CLECs should have a transition period equal to that applied to line sharing and mass market switching, with reasonable partial milestones for intermediate periods. Third, and in all events, a CLEC should not be required to migrate any customer to non-UNE facilities until the end of an existing service contract term. Fourth, until migrated, all loop and transport UNEs should remain available at the state-defined TELRIC rate. Finally, the Commission should also adopt an exception process that accounts for the multitude of potential operational problems that may occur when CLECs attempt to construct facilities.

AT&T Stmt. 1.0 at 153-54.

CONCLUSION

For the reasons set forth above, Verizon's petition for a finding that CLECs are not impaired in the absence of unbundled local switching, unbundled dedicated transport, and unbundled high capacity loops should be denied and dismissed.

Respectfully submitted,

AT&T Communications of Pennsylvania, LLC

By its Attorneys,

Robert C. Barber
Ivars V. Mellups
Michael McRae
3033 Chain Bridge Road
Oakton, VA 22185
(703) 691-6061

Of Counsel:
Mark A. Keffer

Dated: February 17, 2004

Certificate of Service
Docket No. I-00030099

The undersigned hereby certifies that true and correct copies of the Main Brief of AT&T Communications of Pennsylvania, LLC. were caused to be served on the persons named below by electronic and overnight mail in accordance with the requirements of 52 Pa. Code §§1.52 and 1.54:

Patricia Armstrong, Esq.
Thomas, Thomas, Armstrong & Niesen
PO Box 9500
Harrisburg, PA 17108

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

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

Julia A. Conover, Esq.*
Suzan Paiva, Esq.
Verizon Pennsylvania, Inc.
1717 Arch Street 32 NW
Philadelphia, PA 19103

Steven A. Augustino, Esq.
Kelley Drye & Warren LLP
1200 19th Street N.W.
Suite 500
Washington, DC 20036

Renardo L. Hicks, Esq.
Anderson Gulotta & Hicks, PC
1110 N. Mountain Road
Harrisburg, PA 17112

Ross A. Buntrock, Esq.
Kelley Drye & Warren LLP
1200 19th Street N.W.
Suite 500
Washington, DC 20036

Michelle Painter, Esq.
MCI
1133 19th Street, NW
Washington, DC 20036

Zsuzsanna E. Benedek, Esq.
Sprint
240 North Third St., Suite 201
Harrisburg, PA 17101

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

Kandace Melillo, Esq.
Office of Trial Staff
Pennsylvania PUC
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Richard U. Stubbs, Esq.
Cavalier Telephone Mid-Atlantic, LLC
965 Thomas Drive
Warminster, PA 18974

Philip Macres, Esq.
Swidler Berlin Shereff & Friedmann
3000 K Street, NW
Washington, DC 20007

Debra M. Kriete, Esq.
Rhoads & Sinon LLP
1 South Market Square, 12th Fl.
Harrisburg, PA 17101

Thomas Koutsky, Esq.
Z-Tel
1200 19th Street, NW
Suite 500
Washington, DC 20036

Robin Cohn, Esq.
Russell Blau, Esq.
Swidler Berlin Shereff Friedman
3000 K St., NW
Washington, DC 20007

Robert C. Barber

Dated: February 17, 2004

* overnight mail

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

IN REPLY PLEASE
REFER TO OUR FILE

February 26, 2004

ORIGINAL

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

Re: Investigation Into The Obligations of Incumbent Local Exchange Carriers To Unbundle Network Elements

Docket No. I-00030099

DOCKETED
MAR 17 2004

Dear Secretary McNulty:

Please be informed that the Office of Trial Staff (OTS) will not be filing a Reply Brief in the above-captioned matter.

Copies of this letter are being served upon Administrative Law Judges Michael C. Schnierle and Susan D. Colwell, and all active parties of record.

Very truly yours,

Kandace F. Melillo

Kandace F. Melillo
Prosecutor
Office of Trial Staff

DOCUMENT
FOLDER

Cc: Honorable Michael C. Schnierle
Honorable Susan D. Colwell
Parties of Record

SECRETARY'S BUREAU
2004 FEB 26 AM 9:16
RECEIVED

32

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Re: Investigation Into The Obligation	:	
Of Incumbent Local Exchange Carriers	:	Docket No.
To Unbundle Network Elements	:	I-00030099

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Letter,** dated February 26, 2004, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below:

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

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

Ross A. Buntrock, Esquire
Genevieve Morelli, Esquire
Heather T. Hendrickson, Esquire
Kelley Drye & Warren LLP
1200 19th Street, NW Suite 500
Washington, D.C. 20036

Zsuzsanna E. Benedek, Esquire
Sprint Communications Co. LP
240 North Third Street - Suite 201
Harrisburg, PA 17101

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

Philip J. Macres, Esquire
Swidler Berlin Shereff Friedman LLP
3000 K Street NW
Suite 300
Washington, DC 20007-5116

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

Robert C. Barber, Esquire
Mark A. Keffer, Esquire
AT&T Communications of PA
3033 Chain Bridge Road
Room 3-D
Oakton, VA 22185

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

Enrico C. Soriano, Esquire
Steven A. Augustino, Esquire
Darius B. Withers, Esquire
Kelley Drye & Warren LLP
1200 19th Street NW
Washington, DC 22182

Charles V. Gerkin, Jr., Esquire
Regulatory Counsel
Allegiance Telecom Inc.
9201 North Central Expressway
Dallas, TX 75231

Robin F. Cohn, Esquire
Swidler Berlin Shereff Friedman LLP
3000 K Street NW
Suite 300
Washington, DC 20007-5116

Thomas Koutsky, Esquire
Z-Tel Communications Inc.
1200 19th Street NW
Suite 500
Washington, DC 20036

Renardo L. Hicks, Esquire
Anderson, Gulotta & Hicks, P.C.
1110 North Mountain Road
Harrisburg, PA 17112

Richard U. Stubbs, Esquire
Conrad Counsel
Cavalier Telephone Mid Atlantic LLC
965 Thomas Drive
Warminster, PA 18974

Rogelio E. Pena, Esquire
1375 Walnut Street
Suite 220
Boulder, CO 80302

William E. Ward
CTC Communications Corporation
115 Second Avenue
Waltham, MA 02451

Jeffrey J. Heins
Adelphia Business Solutions of PA Inc.
d/b/a TelCove
712 North Main Street
Coudersport, PA 16915

Jeanne Price
Marvin Hendrix
CEI Networks
P.O. Box 458
130 East Main Street
Ephrata, PA 17522

Metro Teleconnect Companies, Inc.
2150 Herr Street
Harrisburg, PA 17103-1625

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

Honorable Susan D. Colwell
Administrative Law Judge
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Kandace F. Melillo

Kandace F. Melillo
Prosecutor
Office of Trial Staff
Pa. Public Utility Commission

Dated: February 26, 2004
Docket No. I-00030099