EXHIBIT AJG-1T

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of	**)**	
	)	**DOCKET NO. UT-033044**
QWEST CORPORATION	**)**	
	)	
To Initiate a Mass-Market Switching	**)**	
And Dedicated Transport Case	**)**	
Pursuant to the Triennial Review	**)**	
Order	**)**	

DIRECT TESTIMONY

OF

ANTHONY J. GIOVANNUCCI

ON BEHALF OF

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
AT&T LOCAL SERVICES ON BEHALF OF TCG SEATTLE, AND TCG OREGON
(COLLECTIVELY "AT&T")

DEDICATED TRANSPORT

December 22, 2003

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I. INTRODUCTION OF WITNESS

Q. WHAT IS YOUR NAME AND BUSINESS ADDRESS?

A. My name is Anthony J. Giovannucci. My business address is 429 Ridge Road, Dayton, New Jersey.

Q. WHAT ARE YOUR PRESENT RESPONSIBILITIES AND BACKROUND?

A. I am a Division Manager with AT&T Local Network Planning and Program Management ("LNS"), the organization within AT&T Corp. that provides local service to AT&T Business customers. In my current position I am responsible for a number of key areas of Outside Plant activity, including the development of an Outside Plant plan of record for capital deployment, negotiation and completion of agreements controlling rights-of-way, franchises and joint facilities builds. Additionally, I am responsible for the development and application of Standard Network Architecture Guidelines. Prior to my present position, I did contract work at various regional Bell companies (BellSouth) and operations companies between 1987 and 1993; from 1993 to 1998, I worked at TCG, which was acquired by AT&T in 1998.

As a Division Manager in LNS Planning and Program Management I am part of a larger team that is responsible for the efficient planning, engineering, delivery and management of local network capacity, assets, and associated information services. In general, this team ensures that LNS optimizes the use of its limited

resources and controls expenses while meeting end-user customers' expectations and allowing for an appropriate return on the Company's investment.

II. PURPOSE OF TESTIMONY

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to assist the Commission in implementing a workable framework to evaluate ILEC claims of non-impairment that is faithful to the principles and requirements set forth in the *Triennial Review Order.*[1]

In its *TRO,* the Federal Communications Commission ("FCC") determined that incumbent local exchange carriers ("ILECs") must provide competitive local exchange carriers ("CLECs") with unbundled access to dedicated transport. The FCC made a national finding that CLECs are impaired without access to DS-1, DS-3 and dark fiber dedicated transport.[2] Nevertheless, the FCC has authorized state commissions to evaluate any specific claims that an ILEC might advance, on the basis of specific criteria to be assessed on a particular route, that competing carriers are not impaired without unbundled access to dedicated transport at a specific capacity level.

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1 In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (CC Docket No. 96-98); *Deployment of Wireline Services Offering Advanced Telecommunications Capability* (CC Docket No. 98-147), Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC No. 03-36 (rel. Aug. 21, 2003) (*"Triennial Review Order"* or *"TRO"*).

[2] *TRO,* ¶ 359.

Section III briefly describes dedicated transport and identifies the impairments CLECs face without the availability of dedicated transport as an unbundled network element ("UNE"). Section IV below summarizes the reasons why the FCC continues to require the ILECs to provide unbundled access to dedicated transport.[3] Section V sets forth the analysis that the Commission must undertake to determine if certain "triggers" have been met – *i.e.*, that certain conditions exist on a specific transport route that indicate a CLEC is not impaired without access to UNE transport on that route. If, and only if, the triggers are met, may the state lift the unbundling obligation for dedicated transport on a particular customer route. Section VI discusses reasons why, even when there is evidence that a trigger has been satisfied, it may be appropriate for the Commission to find that CLECs remain impaired with respect to particular transport routes. Section VII briefly explains the additional test for non-impairment based on potential facilities deployment. Finally, Section VIII identifies and addresses the transition issues that the Commission must resolve before setting a termination date for the availability of unbundled access to dedicated transport for any particular transport route.

[3] A transport "route" is defined as a connection between two specific incumbent LEC switches or wire centers. *TRO*, ¶ 401.

III. DEDICATED TRANSPORT

A. Use of Dedicated Transport

Q. WHAT IS DEDICATED TRANSPORT?

A. The interoffice transmission facilities that provide telecommunications between wire centers or switches are called dedicated transport. Such facilities are generally offered at DS1, DS3 and OCn capacity levels. The FCC also included dark fiber in the definition of dedicated transport. Until recently, the FCC, defined dedicated transport as "incumbent transmission facilities… that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers."[4] However, in the *TRO,* the FCC modified its definition of dedicated transport to include only "those transmission facilities connecting incumbent LEC switches and wire centers within a LATA."[5] Thus, CLECs will no longer be able to obtain the transmission facilities between ILEC wire centers or switches and CLEC wire centers or switches as UNEs. If a CLEC wants to obtain these facilities from the ILEC, it will have to pay much higher special access rates. This is unfortunate, because it will raise the CLECs' costs to provide service.

[4] *In the Matter of the 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, FCC 99-238 (rel. Nov. 5, 1999), App. C., § 51.319(d)(1).
[5] *TRO*, ¶ 365.

Q. WHY DO CLECS NEED UNBUNDLED ACCESS TO DEDICATED TRANSPORT?

A. CLECs use dedicated transport to interconnect to the ILECs' networks pursuant to Section 251(c)(2), and they also use dedicated transport facilities (where available) to backhaul traffic to their wire centers or switches. Although, as noted above, the FCC has changed the definition of dedicated transport so that CLECs no longer can obtain dedicated transport between ILEC wire centers or switches and CLEC wire centers or switches, CLECs are still impaired without access to transport between ILEC wire center or switches, because such facilities cannot be economically replicated, and there are also numerous operational issues that can prevent a carrier from building its own facilities timely or at all. Thus, CLECS continue to need access to such ILEC-provided transport, even if in some cases they must obtain it as a non-UNE facility at a higher rate. Furthermore, although AT&T is not at this time asking this Commission to modify the FCC's definition, it is important to recognize that the FCC has not eliminated the impairments CLECs suffer by simply changing the definition of dedicated transport.

Q. WHY DO CLECS NEED TO BACKHAUL TRAFFIC TO THEIR WIRE CENTERS OR SWITCHES?

A. The short answer is because the CLECs network architecture is different than the ILECs.

Every customer of an ILEC has a loop that is connected to the ILEC's switch. Generally, these loops terminate in a wire center (also known as a central office) on the customer-facing side of the main distribution frame ("MDF"). On the other side of the MDF (the equipment side) are the appearances for the various pieces of equipment found in that central office, including the ILEC's switch ports. Relatively short pairs of wires known as jumper wires are extended between the two sides of the MDF to make a connection between the loops and the switch. The important point here is, that with the ILEC's network architecture the customer loops all terminate in the same central office where the ILEC's switch that serves those customers is located. *See* Direct Testimony of Robert V. Falcone at 13 – 15 for a more complete explanation.

Because all of the customer loops terminate in the ILEC's central office, before a CLEC can gain access to these loops it must first establish a collocation arrangement in the ILEC's wire center. Once these collocation arrangements are established the CLEC must install the equipment in its collocated space to allow it to convert the analog loop to a digital signal to make it capable of being extended without a degradation in customer service. The CLEC must also install or lease the high capacity transport facilities that will be needed to extend the loops from the ILEC's central office to the distant location where the CLEC has its switch installed. This extension of the loops to the distantly located CLEC switch is generally referred to as backhaul. For the high capacity facility portion of this

arrangement the CLEC commonly uses ILEC dedicated transport to backhaul the loops to its switch.[6]

B. AT&T's Network

Q. CAN YOU DESCRIBE HOW AT&T PLANS AND BUILDS ITS LOCAL NETWORKS?

A. Yes. First, AT&T's decision to enter a new market may include a decision to install a local switch, which initially in virtually all cases would serve large business customers. AT&T must also determine the most economical and reliable method for establishing connections from its switch to customer end-users, *i.e.*, whether and how to deploy outside plant or to collocate in the ILEC's wire center to gain access to its customers' loops.

AT&T connects its customers to its own network using two distinct methods. Under the first method, referred to as "Type I" provisioning, AT&T provides the connection between the end-user customer and AT&T's network entirely on AT&T owned and operated facilities. In these situations, AT&T either owns or is economically able to justify building facilities to the end-user's premise. The second – and by far more common – provisioning method, is referred to as "Type II" provisioning, in which AT&T leases from another carrier some portion of the equipment or facilities used in providing connectivity to the end-user's premises.

[6] As noted above, in the past ILECs were required to provide dedicated transport from their wire center or switch to the CLEC's wire center or switch. Now, the CLECs will have to provide such "entrance facilities" themselves, or purchase them from the ILEC as special access.

When it uses Type II provisioning, AT&T has determined that it does not have, or cannot feasibly build, facilities all the way from its network to an end-user's premises.

To the extent that there is a standard AT&T/LNS local network architecture, its foundation is a "ring" design based on self-healing, SONET switching equipment. The ring architecture allows the "signal path" to switch from the "east" direction to the "west" direction around the ring based on manual and automatic setup of the multiplexing facilities. This design, which relies on physical diversity in all routes and location entrances,[7] provides the most reliable network and protects against events such as cable cuts or severe weather that can paralyze a more traditional network.

AT&T's network is made up of two distinct ring types: Backbone and Customer Rings. Transport is provided by the Backbone ring.

Q. WHAT ARE BACKBONE RINGS?

A. In general, the Backbone provides high bandwidth trunking and transport between AT&T's own facilities and its switch. The Backbone ring is laid out to support the deployment of SONET rings and/or asynchronous equipment and is based on physically diverse, redundant point-to-point connections between AT&T nodes.

[7] Physical diversity is defined as distinctly different routing of the fiber cable such that there are two distinct routes in the right-of-way and between the served locations that maintain a defined physical distance between each route, and two entrances to a location, with each entrance maintaining a defined physical distance from the opposite entrance.

The nodes, or peripheral processors, do part of the processing required to perform the ring's function. The nodes also serve as access points on the ring where digital information enters, exits or is further processed. The location of the backbone is tied both to the anticipated potential for demand and the availability of existing facilities from which to leverage expansion. For example, in many of the original TCG markets, TCG had access to the fiber network of one of its cable owners from which to begin its network design.

Q. WHAT ARE CUSTOMER RINGS?

A. Customer Rings also support the deployment of SONET rings. Traffic on these facilities is generally reserved for the lateral connectivity of specific customers and/or locations that require connectivity to the Local Service Node, where services can be routed to Backbone and associated rings as necessary.

Q. WHAT PORTION OF THE NETWORK DOES AT&T BUILD FIRST?

A. In entering a new market, AT&T first builds backbone and high-capacity facilities, and uses lower capacity (*e.g.*, DS-1 or DS-3) facilities from other carriers, almost always the incumbent. Therefore, as with the ILECs' networks, the logical development of the network is to build the largest "pipes" first, *i.e.*, establishing the backbone and then to create where economically and operationally feasible, connectivity to customer locations.

Q. HOW DOES AT&T DECIDE WHERE TO COLLOCATE IN ILEC WIRE CENTERS?

A. When AT&T initially constructed its network collocations, two factors were taken into account when determining where to place its collocations (1) the proximity to AT&T's network; and (2) the concentration of customers. Other factors, including the both initial and recurring collocation costs and the availability of collocation space, also influenced collocation decisions.

After AT&T entered into its original interconnection agreements and collocation space first became more widely available, the Company actively sought to place collocation cages in as many ILEC wire centers as possible, with the intention of building facilities to put these collocations 'on net' as traffic volumes warranted such construction.[8] However, over time it has become apparent that due to the high backhaul costs associated with these collocations, along with the inevitable operations hurdles (including acquisition of rights-of-way for the self-provisioning of facilities and the cost of a hot cut), the investment in collocations in anticipation of some day having sufficient customer demand was not economically feasible.

[8] There were many factors that influenced AT&T to acquire and build out a number of collocations through out the ILEC footprint. In addition to the obvious motivation of having access to the largest pool of customers available, from 1996 through 2000, collocation space was in high demand, often with dozens of both facilities-based CLECs and DLECs seeking space. Since the collocation space is offered on a 'first come, first in' basis, it appeared that a provider who was not among the 'first in' was likely to be required to use the less desirable virtual collocation or potentially be shut out of a wire center. Additionally, many of the more efficient collocation alternatives now available (*e.g.*, ability to use smaller, shared space without a separate cage), were not available prior to the FCC promulgation of collocation rules.

C. CLEC Impairments

Q. WHAT IMPAIRMENTS DO CLECS FACE IN DEPLOYING THEIR OWN TRANSPORT?

A. The first issue is the lack of sufficient traffic to warrant building facilities. When AT&T considers whether to build its own interoffice dedicated transport facilities to an ILEC wire center, most wire centers can be eliminated right off of the bat. When the percent of the market share that AT&T can reasonable expect to achieve is taken into account the majority of the wire centers in the ILEC network simply do not have a sufficient customer concentration to economically justify such construction.[9] Indeed, in 70 percent of the ILECs' wire centers, AT&T would not have sufficient traffic to fill a single DS-3 facility to reasonable levels of utilization, and no such construction can be justified without the expectation that the self-provided facilities will be used to support numerous DS-3's worth of traffic. Thus, the self-provisioning of facilities in the vast majority of wire centers is infeasible for the CLECs.

Q. CAN YOU IDENTIFY SOME ADDITIONAL IMPAIRMENTS?

A. Yes. The poor condition of the industry, construction difficulties, prior volume and term commitments, the cost and time needed to obtain collocation arrangements and lack of capital.

[9] Even in highly competitive UNE-P markets such as New York, the ILEC (Verizon) has maintained a >75% share of the market for all local access lines with all of the other CLECs operating in the state competing for a piece of the remaining 25% of the market.

Q. WHY DO YOU IDENTIFY THE POOR CONDITIONS IN THE TELECOMMUNICATIONS INDUSTRY AS AN IMPAIRMENT?

A. Even in the relatively small subset of cases when it may make business sense to build our own facilities, the economy and general poor conditions for telecommunications companies also has had an unexpected impact on projects that AT&T currently has under construction.

For example, AT&T engages in joint builds[10] with other CLECs in order to share the high fixed costs of construction. In the last several years, however, many firms with whom AT&T was building outside plant facilities have filed for bankruptcy.

Q. WHAT KIND OF CONSTRUCTION DIFFICULTIES DOES AT&T FACE?

A. New network construction is very time consuming. Often such construction requires cooperation from the local authorities and other carriers and can take months, or even years, to complete. But customers typically seek service in time frames measured in days or weeks. As a result, when faced with significant construction delays, AT&T must rely on the other suppliers able to meet those time constraints. The choice is generally a choice of one – the ILEC. This is

[10] Under the terms of a "joint build" agreement, two or more carriers agree to share the cost and usage of new facilities. In these circumstances, one of the firms is identified as the 'lead' partner, and undertakes the actual construction of the facility. The remaining carriers do not take possession of their part of the facility until construction concludes and acceptance testing is completed. Depending on the terms of the parties' agreement, non-lead parties may make significant payments toward construction costs prior to the assets being transferred.

especially true because the construction process often is fraught with hurdles that slow, and at times can even stop, deployment.

In particular, deploying new dedicated transport facilities involves a sequence of critical steps, and failure or delay in any one of those steps could halt a build. First, a CLEC must negotiate a right-of-way agreement with the local municipality where the CLEC seeks to provide service. Municipalities often demand exorbitant fees and other onerous conditions. Although a typical franchise agreement may take between four and six months to negotiate, AT&T has franchise negotiations (and accompanying litigation) that remain unresolved after several years.[11] Further, even after a franchise agreement is reached, a municipality's ratification process can add as much as 60-90 days before construction can begin. These types of problems are not isolated incidents; AT&T has experienced such delays and additional costs across the country.

The imposition of other extraneous and burdensome regulations are also often included in connection with government entities' granting of a franchise. Despite clear FCC and court decisions delineating precisely what falls within the rubric of rights-of-way management and what does not, many local authorities continue to require compliance with regulations that are unrelated to the management of rights-of-way, but instead seek to control other carrier operations. Perhaps the

[11] The terms 'franchise' and right-of-way are often used interchangeably to describe the permission needed to actually construct telephone facilities. However, the permission a LEC seeks from the municipality is the ability to access rights-of-way within the municipality to build. The 'franchise' or actual right to provide telecommunications service is granted by the state PUC.

greatest burden on CLECs are unreasonable delays in the granting of access to rights-of-way.

Q. CAN A CLEC AVOID THESES DELAYS?

A. Possibly. To avoid these delays, CLECs have three choices: they can accept these burdensome and discriminatory conditions; use the existing facilities of the incumbent; or forego competing to provide service to customers. None of these alternatives put a CLEC in a practical position to compete.[12]

Not only must the CLEC seeking to build negotiate with local municipalities, but it is likely the CLEC will also need to negotiate additional agreements with other parties, including the ILEC. Such agreements may address the use of existing rights-of-way capacity or developing new right-of-way capacity on the CLEC's desired route. Finally, even the conclusion of negotiations does not necessarily signal the end to the delays to the start of construction. Many municipalities have specific provisions requiring carriers to build facilities jointly (*e.g.*, coordination of street digging), and some municipalities have placed restrictions or moratoria

[12]The final option open to AT&T or another CLEC is to simply anticipate them and build facilities well in advance of customer needs, much the same way the ILECs originally built their networks. Unfortunately, the realities of the market, including the CLECs' current inability to obtain capital, demonstrate that this "build it and they will come" option is simply the road to insolvency.

on new construction. All of these requirements add complexity, cost, delay and uncertainty to any attempt to obtain a permit and initiate construction.[13]

Even if AT&T obtains all of the necessary authorizations (rights-of-way, building access), that is only the beginning of the process. Once all these steps have been successfully completed – and assuming the customer is still willing to wait for service – the CLEC is then in a position to begin constructing the necessary facilities. As with any type of construction project, unforeseen problems including labor and equipment shortages can delay completion.

Q. HOW LONG DOES IT GENERALLY TAKE TO BUILD FACILITIES?

A. Even under ideal conditions, it takes a minimum of twelve months for a facility to become "revenue ready" – *i.e.*, ready to provide service to a customer or customers subtending a particular central office. Such ideal conditions include: (1) prior existence of any necessary rights-of-way, or circumstances; (2) availability of collocation space; (3) all construction proceeding without unforeseen delays; and (4) ready access to the customer's premises within the building. In our experience, the chances of all of these conditions being satisfied

[13] It is important to note that even in circumstances in which these provisions are presently applied equally to all carriers, the ILEC is likely to have obtained its franchise and accompanying benefits prior to the imposition of the current requirements. This often leads to situations where municipalities seek significant payments or benefits from the CLECs that were not originally imposed on the ILEC (*e.g.*, to have part of the CLEC's network assigned to the municipality). Further, it is not uncommon for municipal ordinances to allow existing providers, *i.e.*, the ILEC, to be "grandfathered." Additionally, as the first occupier of conduit, ILECs have another advantage. ILECs routinely retire copper facilities 'in place' and only pull out the retired copper when they have a need for additional new facilities. This practice effectively allows the ILECs to reserve space in the existing conduit, while at the same time making it unavailable to other providers who need it immediately.

at a location are almost nil. Indeed, in many cases, the difficulties described above can add months, and even years to the process. At times AT&T may be forced to abandon plans to build within a market because the obstacles are simply too great.

In addition, as noted earlier, construction typically involves deploying a "SONET ring" architecture (or some other means of network redundancy). A "SONET ring" is a form of "self-healing" network architecture that provides unique reliability for customers, because it employs diverse routing to ensure continued service even when particular segments of the ring are accidentally cut or experience other technical difficulties. Generally, this diverse routing is accomplished by constructing two physically separate fiber paths in a closed chain or "ring." The key fact to note is that the route diversity often results in doubling the difficulties a CLEC must overcome before the project even begins. To implement a redundant network design, CLECs often need multiple rights-of-way, and may have to negotiate access to each of them with one or more entities, including municipalities, incumbent LECs or other parties.

Q. WHAT IMPAIRMENTS DOES A CLEC FACE WHEN IT SEEKS TO COLLOCATE?

A. CLECs must also establish appropriate collocation in order for self-constructed interoffice transmission facilities to be of much value. Because virtually all customer loops terminate in ILEC offices, in order to connect these loops to the

CLEC's network, some form of collocation is ultimately required. Obtaining collocation is also accompanied by its own set of impairments, including lengthy ILEC application processes, unclear space disposition or wire center space exhaustion, and significant space preparation and use charges. Other factors that impact the costs of using collocation in a network design include remote placement of collocation space (*i.e.*, within a wire center but far from the frame) that may require added copper connectivity, unreasonable power delivery and riser charges, ILEC imposition of government-mandated building code upgrades that should be covered by the ILEC (*e.g.*, asbestos removal and compliance with Americans with Disabilities Act), ILEC premium charges for 'preferred' contractors and consultants, and charges for unneeded or unnecessary services or quantities of service.

Further, there is no reasonable alternative to collocation within an ILEC wire center. Although the ILECs have attempted to make much of the availability of collocation "hotels," these are generally designed for and used by carriers offering *specialized* services, including ISPs, Application Service Providers, Integrated Communications Providers, data storage companies, voice processing companies and enterprise companies. Therefore, while these hotels can provide needed access for these providers to connect with each other, the primary collocation needs for CLECs, such as AT&T, that offer a full array of local services, including local voice service, is the need for access to the ILECs' network

facilities. This need can only effectively be served by collocation within an ILEC wire center.

Q. WHY IS LACK OF CAPITAL AN IMPAIRMENT?

A. It is important not to forget that new construction requires significant up-front capital investment and, as a result, the CLEC must obtain a source of funds for the project. The decision to invest capital in new construction is based on fairly simple business case principles. AT&T balances the amount of money needed for the construction, the availability of capital, the average payback time on the capital, the maximum contributions such construction will have on the success of a variety of products and services of the Company, and the potential risks and returns of other projects competing for the same limited construction dollars. As part of the business case, AT&T considers its existing facilities, including wire center collocations, and how new construction will maximize the usage of those facilities. AT&T then must balance these factors against both the customer's willingness to wait for facilities, and the willingness of a customer to enter into a term contract sufficient to meet AT&T's cost recovery guidelines.

But a sufficient pool of capital is often difficult to obtain, particularly at rates that would conform to prudent business practices. Moreover, any capital that is available will generally be allocated first to ventures that have the potential to generate new revenues before being made available for cost reduction/service improvement opportunities. As a result, construction projects to replace existing

leased facilities will generally be deferred in preference to other projects that gain new customers or increase spending by existing customers. Even then the construction project must have higher potential returns (lower payback periods) and/or lower risk (uncertainty) of cost savings should access prices drop compared to other projects competing for today's exceedingly scarce capital. In my experience, the planned local construction program has always exceeded the available capital. However, due to unanticipated needs to address customer demands and/or in order to better assure the Company's ability to meet short-term earnings requirements of the financial markets, by year's end, the funding available for projects is typically cut again.[14]

The current economic decline, particularly in the telecommunications industry, has also radically changed both the availability and cost of capital. In the past, both the capital markets and vendors served as ready sources of capital, but the downturn in the economy, coupled with the now almost routine failures of CLECs, have made investors wary.

Q. ARE THERE ALTERNATIVES TO THE ILECS?

A. Unfortunately, there are few alternatives to using the ILECs' facilities. This is due to a number of factors. First, the coverage area, or footprint, of alternative

[14] Even in circumstances where the economic threshold for self-supply is met, there are factors that preclude construction. For example, in some instances, the incumbent is providing service under term or volume discount arrangements that include substantial termination penalties that make switching to a CLEC prohibitively expensive. In other instances, AT&T is unable to use its own facilities because of limited collocation space or collocation equipment capacity.

suppliers tends to be quite limited. In most areas, the ILEC is the only provider with facilities. Further, AT&T has found that in markets where a viable alternative is available, its facilities often overlap with AT&T's own facilities.[15] Thus, there is a false impression that the geographic coverage of the CLECs' networks is greater than it actually is.

Another practical limitation to the use of alternate supply is that AT&T requires all of its suppliers to comply with Telcordia standards (or other generally recognized industry standards) and meet Direct Measures of Quality ("DMOQs") that include financial consequences for failure to perform (which the ILECs generally resist for their special access services). However, some potential alternative suppliers either cannot or are unwilling to commit to set performance measures. Thus, they are not considered suitable.

Alternative suppliers also must be able to meet OBF standards for pre-ordering, ordering, provisioning, maintenance and repair and billing. Although AT&T has a strong preference for the use of mechanized operational support systems, suppliers must at least have procedures that meet industry minimum standards. It would be impractical for a national competitor to deal with a variety of alternative suppliers unless there were some reasonably standardized means for exchanging critical information and monitoring interrelated business operations. While the

[15] In fact, as mentioned previously, AT&T has actively sought to partner with other telecommunications carriers in order to combine resources to justify continued growth of the network.

ILEC can comply with these requirements, not all alternative suppliers can do so, or at least not on a mechanized basis.

IV. THE FCC FOUND THAT COMPETITIVE CARRIERS ARE IMPAIRED NATIONWIDE WITHOUT UNBUNDLED ACCESS TO HIGH CAPACITY DEDICATED TRANSPORT

Q. WHAT WERE THE FCC'S FINDINGS WITH RESPECT TO DEDICATED TRANSPORT?

A. After extended proceedings and after considering 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, up to specifically defined limits.[16] The FCC found, on a nationwide basis, that CLECs are impaired without access to unbundled DS-1, DS-3 and dark fiber interoffice transport.[17] This means ILECs must provide unbundled access to DS-1, DS-3 and dark fiber transport absent a route-specific showing of non-impairment.[18] It should be noted that the FCC capped access to DS-3 transport at 12 DS-3 circuits per route per carrier, reasoning that demand for greater capacities would justify the high sunk costs of a CLEC establishing its own interoffice transport on such routes.[19]

The FCC determined that there is an important and continuing need for the incumbent LECs to continue to provide competitors with unbundled access to

[16] *Id.*, ¶¶ 359 & 381-93.
[17] *Id.*, ¶¶ 381, 386 & 390.
[18] The FCC began its analysis by limiting the definition of dedicated transport "to only those transmission facilities connecting incumbent LEC switches or wire centers." ¶¶ 359, 366.
[19] *TRO*, ¶388.

dedicated transport. The FCC found that "[d]eploying transport facilities is an expensive and time-consuming process for competitors, requiring substantial fixed and sunk costs."[20] The costs of self-deploying transport facilities include collocation costs, the costs of fiber, the cost of physically deploying the fiber, and the cost of the optronics necessary to light the fiber.[21] In addition, the FCC acknowledged that a "substantial part of the costs of deploying transport is in the sunk cost of burying, or otherwise deploying the fiber," including costs of "obtaining rights-of-way, digging up streets or attaching cabling to poles."[22] Given these costs, the FCC concluded that, to avoid impairment, competitive carriers continue to need access to unbundled dark fiber transport, DS3 transport (up to a maximum of twelve unbundled DS3 transport circuits along a single route) and DS1 transport.[23]

The FCC adopted two triggers to be used to identify where CLECs are not impaired without access to ILEC transport: a self-provisioning trigger and a wholesale facilities trigger.[24] The self-provisioning trigger, however, does not apply to DS-1 transport because the FCC specifically found that CLECs cannot economically self-provision transport at such a low capacity level.[25] Critically,

[20] *Id.*, ¶¶ 371, 373, 382.
[21] *Id*.
[22] *Id.*, ¶ 382.
[23] *Id.*, ¶¶ 359, 388.
[24] *Id.*, ¶¶ 399 – 400, 405 - 411 & 412 - 416.
[25] *Id.*, ¶ 409.

the Commission must perform the transport trigger analysis on a route-specific basis, with "routes" connecting specific pairs of ILEC wire centers.[26]

V. DS1, DS3 AND DARK FIBER TRANSPORT TRIGGERS

A. Self-Provisioning Transport Trigger

Q. DESCRIBE THE SELF-PROVISIONING TRIGGER.

A. First, it is important to understand that the Commission's trigger analysis is more than a mere counting exercise. The FCC found that CLECs are impaired without access to ILEC dark fiber, DS-1 and DS-3 transport (up to 12 DS-3s per route per carrier).[27] To change that finding for any specific transport route, the ILEC must adduce evidence that shows CLECs are not impaired on that route at the identified capacity levels. This requires the ILEC to provide clear evidence that CLECs have overcome the myriad of operational and economic barriers they face in deploying such facilities so that real competition is available on that route.

The FCC expressly delegated state commissions the authority to find competitors are not impaired without access to UNE dedicated transport "when there is sufficient evidence that facilities deployment is possible on a particular route."[28] The best evidence of that, according to the FCC, is actual competitive deployment of transport facilities on the route in question. In order to meet this "self-provisioning trigger" for a specific route, the ILEC must demonstrate that three or

[26] *Id.*, ¶ 401.
[27] *See* 47 C.F.R. §51.319(e)(2)(iii).
[28] *TRO*, ¶405.

more unaffiliated and competing carriers have each deployed transport facilities on that route.[29] 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.[30]

Q. WHY DID THE FCC REQUIRE THREE COMPETING CARRIERS?

A. The FCC's reasons for requiring three competitive facilities in this instance are instructive. First, the FCC wanted "to be assured that the route can support 'multiple, competitive transport networks.'" Second, the FCC recognized that some network owners may not want to provide wholesale services, so this trigger is differentiated from the wholesale services trigger. Third, the FCC explained that, because of the sunk costs associated with installing transport, the transport facilities would remain on a route even if the competitive provider exits the market itself.[31] Underlying this reasoning is the principle that must guide the Commission in its trigger analysis: real availability of competitive alternatives is of paramount importance to making a non-impairment finding.

Q. DID THE FCC IDENTIFY ANY CRITERIA FOR THE STATES TO USE IN APPLYING THE SELF-PROVISIONING TRIGGER?

A. Yes. Performing the substantive trigger analysis requires the Commission to apply a number of key criteria: the providers must be unaffiliated, the providers

[29] *Id.*, ¶ 405.
[30] *Id.*, ¶ 406.
[31] *Id.*, ¶ 407.

must own their own facilities, the triggers must be analyzed for each capacity level, the trigger must be reviewed on a route-specific basis, and the trigger candidates must be operationally ready.

Q. DID THE FCC DEFINE WHAT AN UNAFFILIATED PROVIDERS IS?

A. Yes. To "prevent gaming," the FCC required alternative self-providers of transport to be unaffiliated.[32] The transports must be self-provisioned by three or more *unaffiliated* competitive LECs. The FCC emphasized that the three CLECs identified to satisfy this trigger must be "unaffiliated with the incumbent LEC and each other."[33] For purposes of these proceedings, the FCC noted that it is using the term "affiliate" as it is defined by the Communications Act in 47 U.S.C. § 153(l). The Communications Act defines as an "affiliate," *inter alia*, any entity that owns "an equity interest (or the equivalent thereof) of more than 10 percent" in another entity.[34] Therefore, the trigger only applies where there are three or more CLECs providing service, neither of which are more than 10% owned by the ILEC or the other CLEC. In applying this standard, the FCC observed that "when a company has acquired dark fiber from another carrier on a long-term IRU basis *and activated that fiber with its own optronics*, that facility should be counted as a separate, unaffiliated facility."[35]

[32] *See, e.g.*, ¶¶ 400, 405, 408, 414, & 408 n. 1263.
[33] *Id.*, ¶ 408.
[34] 47 U.S.C. § 153(l), *quoted in TRO*, ¶ 1263 & n.980.
[35] *TRO*, ¶ 408 (emphasis added).

Q. DESCRIBE THE OWNERSHIP REQUIREMENT.

A. The unaffiliated carriers must own the transport facilities. The key question is whether three carriers "have each made sunk investment in transport facilities on a route," thus permitting the state to conclude "that sunk costs, economies of scale, and other barriers to deploying transport facilities do not present an insurmountable barrier [to self-provisioning transport] on a particular route . . ."[36] A carrier leasing dark fiber subject to long-term IRUs qualifies, provided, however, that the fiber is lit with the IRU-holder's own optronics.[37]

Q. DESCRIBE THE CAPACITY REQUIREMENT.

A. The trigger analysis must be performed for each particular capacity of transport (*i.e.,* DS-3, dark fiber). The FCC organized its transport 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."[38] And as the FCC also explained, the requirement of separate application of the trigger analysis for each capacity level of transport means that if impairment "at a particular capacity" of transport on one specific route is no longer found, transport at other capacities might still be available.[39]

[36] *Id.*, ¶ 405.
[37] *Id.*, ¶ 408.
[38] *Id.*, ¶ 376; *see TRO* Section VI(C)(4)(c) (setting forth "Capacity-Based Impairment Analysis" for dedicated transport).
[39] *Id.*, ¶ 407.

The relevant threshold inquiry for the self-provisioning transport trigger for any single route, therefore, is whether three carriers have self-provisioned dedicated transport at a particular capacity level. The upper bound (12 DS3s) reflects the FCC's decision to relieve the ILECs of any obligation to provide dedicated transport at a capacity level above 12 DS3 circuits.[40]

Therefore, an ILEC that wishes to establish a finding of no impairment based on the self-provisioning triggers for a particular transport capacity level, *e.g.*, below 12 DS3s, must show that three carriers have self-deployed transport facilities at the relevant capacity level. Thus, a carrier that has deployed transport at a capacity level of, *e.g.,* 18 DS3 circuits, or that has deployed optical level (OC) transport facilities, would not count for these purposes. If three carriers had self-deployed transport circuits at a level of 12 DS3s (or less), then the self-provisioning trigger would be met and, if the other criteria are met, the ILEC would no longer need to provide UNEs at a DS3 level on the route.

For dark fiber, no capacity levels apply. The relevant inquiry is simply whether the three carriers (that meet the remaining requirements) have deployed dark fiber along the relevant route.

[40] *Id.*, ¶¶ 388 - 389

Q. WHAT DOES THE ROUTE-SPECIFIC REVIEW ENTAIL?

A. The FCC requires that the transport trigger analysis be performed on a route-specific basis.[41] It defines a transport route as a complete "connection between [ILEC] wire center or switch 'A' and [ILEC] wire center or switch 'Z.'"[42] 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 offer service connecting wire centers 'A' and 'Z,'* but do not have to mirror the network path" through X.[43] The question, then, is whether the CLEC identified as a trigger candidate has dedicated transport between the two wire centers at issue, not whether the CLEC's transport circuit follows the same path as the ILEC's circuit. In other words, does the CLEC have transmission facilities that connect the two specific ILEC wire centers and/or switches within a LATA?

At the same time, however, the FCC limits qualifying providers (whether self-provisioning or wholesale) to those who provide transport for the *entire* route between A and Z. The FCC specifically rejected ILEC claims that competitors could be forced to use a "daisy chain" of individual links, managed by multiple

[41] *Id.*, ¶ 401.
[42] *Id.*
[43] *Id.*, ¶ 401 (emphasis added). While the FCC placed no defined limitation on the number of hops (*i.e.* passes through an office and/or intermediate electronics) a transport circuit might make between end points and still be considered a route between 'A' and 'Z', it bears noting that transport circuits offered by a CLEC that make many hops may not offer the same quality of service as ILEC transport with fewer (or no) hops. The introduction of every intermediate office or additional electronic device between points 'A' and 'Z' adds more potential points of failure and potential degradation of service. *Id.*, ¶ 373.

providers, between intervening wire centers.[44] Thus, any evaluation of impairment with respect to transport has to focus, first and foremost, on whether three other providers are each providing transport services that provide a complete connection between the two wire centers at issue. The FCC's emphasis on *connecting* wire centers in the new definition of dedicated transport,[45] and its emphasis on *offering services connecting* wire centers in its example of a transport route,[46] are also instructive as to what does not constitute a route. It should be self-evident, for example, that a SONET ring that passes by wire center "A", but is not connected to wire center "A", cannot count as a trigger for transport routes including wire center "A." Likewise, a SONET ring that collects traffic from both wire centers "A" and "Z" and carries that traffic to a CLEC point of presence not located in either wire center "A" or "Z" does not qualify as a trigger if it does not provide transport services connecting "A" to "Z."[47] This principle is also tied to the notion of operational readiness. Finally, if a CLEC route between "A" and "Z" has to pass through the CLEC's switch or traffic has

[44] *Id.*, ¶ 402. The FCC found this definition necessary to "avoid the costs and operational problems associated with cobbling together multiple vendor links to complete a route between two incumbent LEC central offices." *Id*., ¶401.
[45] *Id.*, ¶ 365.
[46] *Id.*, ¶ 401
[47] This is true because such rings would not fit the definition of "dedicated transport" set out by the FCC. That definition makes clear that the two end points of a qualifying route must each lie in an ILEC central office or ILEC switch; in the SONET ring example in the text above, by contrast, transport is provided only to and from the CLEC POP. *See, e.g.*, ¶¶ 365-66, 401. It is also true because SONET rings are limited in the number of nodes that can be placed on a particular physical ring and the maximum distance that can exist between any two nodes. Since the Commission is not and should not be in the business of designing CLEC networks, the Commission ought not force the CLECs to create a trigger where none currently exists.

to pass through the CLEC's switch, the route does not qualify for purposes of the trigger.[48]

Q. WHAT DOES "OPERATIONALLY READY" MEAN?

A. 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."[49] At a minimum, that the facility must begin *and* "terminate in a collocation arrangement" in an ILEC wire center *and* "in a similar arrangement at each end of the transport route that is not located at an incumbent LECs premises," and the collocation and "similar arrangement" must be fully provisioned (*i.e.*, with both space and power) before the facility is considered complete.[50] CLEC facilities that terminate only in so-called "collocation hotels" do not qualify.[51] A SONET ring would not constitute a trigger as between wire centers "A" and "Z" even if it collects traffic from both if it does not terminate traffic in "A" and/or "Z" because it is not operationally ready to provide transport services between those wire centers.

[48] This is true, once again, because the portion of the route between the ILEC wire center and CLEC switch is not defined as dedicated transport by the FCC.
[49] *Id.*, ¶ 406.
[50] *Id.*, ¶ 406, n. 1256. & App B. – Final Rule, § 51.319(e)(2)(i)(A)(2) & (e)(3)(i)(A)(2).
[51] However, if the *ILEC* places equipment at a CLEC's premises ("reverse collocates"), "the transmission path from this point back to the incumbent LEC wire center shall be unbundled as transport between incumbent LEC switches or wire centers to the extent specified in this Part."

B. Competitive Wholesale Facilities Trigger

Q. DESCRIBE THE COMPETITIVE WHOLESALE FACILITIES TRIGGER.

A. The FCC also gave the states the role of identifying the transport routes, if any, on which requesting carriers are not impaired without access to UNE transport at a specific capacity because there are sufficient wholesale alternatives available to CLECs. Under the wholesale trigger, a finding of non-impairment is made "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."[52]

Q. DID THE FCC IDENTIFY ANY CRITERIA FOR APPLYING THE COMPETITIVE WHOLESALE FACILITIES TRIGGER?

A. Yes. Determining whether the wholesale facilities trigger is met requires the Commission to apply many of the same criteria as exist for the self-provisioning trigger. In particular, providers must be unaffiliated, the provider must own its own facilities, the provider must be operationally ready, the wholesale services must be widely available, and the provider must be providing service on the applicable route.

[52] *Id.*, ¶ 412.

Q. IS THE REQUIREMENT THAT THE PROVIDER MUST BE UNAFFILIATED THE SAME FOR BOTH TRIGGERS?

A. Yes. The wholesalers must be unaffiliated with the ILEC and each other. As with the self-provisioning trigger for transport, the FCC applies the definition of "affiliate" from 47 U.S.C. § 153(1).[53]

Q. DESCRIBE THE OWNERSHIP REQUIREMENT.

A. The unaffiliated wholesalers must own the facilities they use.[54] However, for purposes of DS1 and DS3 transport, carriers offering 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 electronic equipment."[55] Carriers with rights to ILEC unbundled dark fiber do not, however, count as providers of wholesale dark fiber for purposes of the wholesale trigger for dark fiber transport.[56]

Q. EXPLAIN WHAT "OPERATIONALLY READY" MEANS FOR PURPOSES OF THE WHOLESALE FACILITIES TRIGGER?

A. The carrier must be operationally ready and willing to sell the particular capacity of transport along the route in question. If the transport facility is not working and immediately available, it does not count for purposes of a trigger analysis.

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[53] *Id.*, ¶ 414, n. 1276.
[54] *Id.*, ¶ 414.
[55] *Id.*, ¶ 414, n.1277.
[56] *Id*.

The FCC emphasized the need for "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."[57]

A wholesaler's dedicated transport is not operationally ready or widely available if the wholesaler either lacks the operations support systems needed to support CLEC use, or lacks the collocation arrangements necessary to ensure that CLECs can readily cross-connect their facilities in the applicable ILEC wire centers that define the transport route.[58] In other words, for a wholesale carrier to qualify for trigger purposes, other CLECs must be able to access the alternative facilities by cross-connecting their collocations to the wholesaler's collocation (or to a fiber termination panel) "in a reasonable and non-discriminatory manner."[59] In particular, 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."[60] A carrier that fails to 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."[61] Finally, the FCC rules require that, in addition to the requirement that the competing

[57] *Id.*, (emphasis added).
[58] *See* e.g. ¶¶ 373, 414.
[59] *See* ¶ 414 n.1279.
[60] *Id*.
[61] *Id*.

provider's facilities terminate in a collocation at each end of the transport route, the competing provider's facilities must terminate "in a similar arrangement at each end of the transport that is not located at an incumbent LEC's premises.[62]

Q. WHAT DOES "WIDELY AVAILABLE" MEAN FOR PURPOSES OF THE WHOLESALE FACILITIES TRIGGER?

A. The FCC stated that the providers must make the specific-capacity wholesale services "widely available."[63] 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."[64] In those circumstances, other competitors cannot, as a practical matter, gain access on a wholesale basis to that alleged wholesaler's transport capacity. Such a wholesaler plainly should not and would not count for purposes of the trigger. Rather, for a wholesale service to be "widely available," its facilities should be immediately available through contract, tariff, or other standard common carrier arrangement. Mere offers to negotiate or to provide individual rate quotes are insufficient to demonstrate that a wholesale service is widely available.

[62] *TRO*, App. B. – Final Rules, § 51.319(e)(1)(ii)(c), (e)(2)(i)(B)(3) & (e)(3)(i)(B)(4).
[63] *Id.*, ¶ 414.
[64] *Id.*, ¶ 407.

Thus, for example, a carrier that sells transport to only one or a few other companies and at a specific capacity and does not make its services widely available at the same capacity to other CLECs would not qualify as a wholesaler. In other words, the mere fact that a carrier sells dedicated transport at wholesale would not satisfy the trigger. Such a carrier would be "unable immediately to provision service along the route," and the existence of such a carrier, though relevant to the self-provisioning trigger, would not qualify for the wholesale trigger.[65]

Q. IS THE ROUTE-SPECIFIC REVIEW THE SAME FOR BOTH TRIGGERS?

A. Yes. The analysis for the wholesale trigger must also be performed on a route-specific basis.

V. CLECS MAY BE IMPAIRED EVEN IF A TRIGGER IS SATISFIED

Q. IF THE TRIGGERS ARE MET, DOES THAT END THE STATE'S ANALYSIS?

A. No. The *TRO* recognizes that there may be situations where the FCC triggers may be satisfied but a particular CLEC may still be impaired without access to ILEC transport due to factors unique to a carrier's ability to serve a transport route or to changed factual circumstances. For example, a barrier to entry (such as a moratorium on obtaining new rights-of-way) imposed on a particular route

[65] *Id.*

by a local government would prevent a CLEC from entering that particular market.[66] The Commission should establish a process to enable CLECs to demonstrate that a significant impediment to facilities deployment or use remains even if a trigger were found to be satisfied. In addition, in cases where the impediment affects a more substantial number of CLECs, the Commission should utilize the waiver process specified in paragraph 411 of the *TRO*.

VI. ADDITIONAL FACTORS RELEVANT TO DETERMINING WHETHER POTENTIAL DEPLOYMENT PROVIDES A BASIS FOR FINDING NON-IMPAIRMENT

Q. IF THE TRIGGERS ARE NOT MET, DOES THAT END THE STATE'S ANALYSIS?

A. No. The triggers are used to establish non-impairment for a specific route, based on competitors' actual deployment of relevant facilities. The FCC found that actual competitive deployment is the best indicator that requesting carriers are not impaired and, therefore, emphasize[d] that this quantitative trigger is the primary vehicle through which non-impairment findings will be made."[67] The FCC's primary test for impairment thus recognizes that the absence of actual deployment of CLEC facilities is likely to be dispositive of continuing impairment in most, if not all, circumstances.

Although the FCC found that actual deployment is the best indicator of impairment, the *TRO* requires a state commission to also consider, upon

[66] *Id.*, ¶ 411.
[67] *Id.*, ¶ 410. *See* also ¶ 405.

presentation of evidence by an ILEC, potential deployment for a particular route "that it finds is suitable for 'multiple, competitive supply,' but along which [the actual deployment] trigger is not facially satisfied."[68] The factors that the Commission must evaluate for transport include the following characteristics:

1. local engineering costs of buildings and utilizing transmission facilities;
2. the cost of underground or aerial laying of fiber;
3. the cost of equipment needed for transmission;
4. installation and other necessary costs involved in setting up service;
5. local topography such as hills and rivers;
6. availability of reasonable access to rights-of-way;
7. the availability or feasibility of alternative transmission technologies with similar quality and reliability;
8. customer density or addressable market; and
9. existing facilities-based competition.[69]

Q. MUST THE STATE EVALUATE EACH OF THE FACTORS?

A. Yes. Each of these characteristics must be evaluated in the potential deployment analysis. For that reason, an ILEC that claims that CLECs are not impaired without access to UNEs in serving a specific route must introduce evidence with respect to each factor that demonstrates that the factor alone, or in combination with others, does not operate as a barrier to CLECs' ability to deploy the facilities in question.

[68] *Id.*, ¶ 410.
[69] *Id.*, ¶ 410.

It is difficult to see how an ILEC will be able to make such a detailed and site-specific showing. The FCC has already restricted the availability of DS3 transport UNEs by placing a strict limit on the capacity levels (12 DS3s) that any individual CLEC may obtain on a given route. The record before the FCC contained overwhelming evidence, summarized in the *TRO*, that CLECs remain impaired without the limited access granted by the *TRO* to UNEs at these lower-capacity levels. Potential revenues simply do not cover the high fixed and sunk costs of facilities deployment.[70]

Therefore, to set forth a successful case as to potential deployment, the ILEC would have to show for each particular transport route that the revenues available to a CLEC at that route would be sufficient to overcome the fixed and sunk costs of constructing a facility at that location, taking into account all the route-specific variables (such as those outlined in the FCC's list of factors) that affect those costs and revenues. In addition, the ILEC's evidence would also need to show that no other economic and operational barriers exist for the particular route in question. The inherent limitations of fixed, low-capacity facilities to generate adequate revenues to cover the high costs of deployment make it highly unlikely that any ILEC could make the requisite showing. And the universal nature of entry barriers, such as gaining necessary rights-of-way, deploying the facilities, and convincing customers to accept the delays inherent in service provided over

[70] *Id.*, ¶¶ 371, 376, 383 & 391.

new facilities,[71] make it even more doubtful that ILECs could provide evidence for *specific* routes that would overcome the FCC's findings of impairment and demonstrate that competition would be best served by denying CLECs access to unbundled facilities on routes where CLECs have not found it economical or desirable to deploy their own facilities.

VII. THE COMMISSION MUST ESTABLISH A REASONABLE TRANSITION PROCESS

Q. IF THE COMMISSION MAKES A FINDING OF NON-IMPAIRMENT ON A PARTICULAR ROUTE, DOES THE STATE HAVE ANY FURTHER OBLIGATIONS?

A. Yes. The principal focus of this declaration has been on the evaluation of any incumbent LEC's claim that CLECs are not impaired with respect to a particular transport route. Nevertheless, the *TRO* assigns one further role to the state commission that merits mention. The FCC expects the Commission to provide an appropriate period for CLECs to transition from any unbundled transport that the state finds should no longer be unbundled.[72] The FCC left it to the states to determine the parameters of an "appropriate" transition.

[71] *Id.*, ¶ 371, n. 1138.
[72] *Id.*, ¶ 417.

Q. WHAT PARAMETERS SHOULD THE STATES ESTABLISH FOR ANY TRANSITION PERIOD?

A. The principles that should guide the setting of an appropriate transition period are straightforward. At a minimum, for example, the Commission should set a transition period that provides CLECs a reasonable period of time to (1) self-provision the transport in question and (2) continue to offer service using UNEs pursuant to existing contracts. The latter is essential because services to enterprise customers are contract-based and not terminable without substantial costs and potential liability. Since this is the first time that CLECs face the loss of dedicated transport, they may face multiple situations in an area where they must migrate customers off such arrangements. Adjusting to such multiple changes will require some time, as well as substantial capital.[73]

Therefore, I recommend that the Commission develop a multi-tiered transition process such as the one applicable to mass market switching. First, there should be a transition period of nine months in which CLECs may order "new" dedicated transport on routes where the Commission finds a trigger is met.[74] Second, CLECs should have a transition period equal to that applied to line sharing and mass market switching, with reasonable partial milestones for intermediate

[73] *See Id.*, ¶ 371, n. 1138.
[74] The FCC noted that "the statutory maximum transition period of nine months will ensure an orderly transition to the new rules" and "is reasonably consistent with the transition period sought by the parties." ¶ 703.

periods.[75] 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. Until migrated, dedicated transport should remain available at the state-defined TELRIC rate.

In addition, the Commission should adopt an exception process that accounts for the multitude of potential operational problems that may occur when CLECs attempt to construct facilities. If a carrier demonstrates that it is attempting in good faith to construct facilities on a route for which UNE facilities have been eliminated and that it is incurring a specific problem that makes construction within the applicable timeframe unachievable (*e.g.*, issues with rights-of-way), it should be permitted to seek an exception from the Commission consistent with the problem it faces. The CLEC should be permitted to continue to purchase the identified facility as a UNE until the Commission acts on its request.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

[75] Thus, for example, except for grandfathered contracts, all transport UNEs should be migrated from the specified routes by October 2006, with one-third of UNE facilities transitioned within 13 months of a finding of no impairment, one-third within 20 months and the remainder within 27 months. Compare ¶ 532 (timeline for mass-market switching).