

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising)
From Federal Communications Commission)
Triennial UNE review: Location-Specific Review)
For DS1, DS3, and Dark Fiber Loops, and Route)
Specific Review for DS1, DS3, and Dark Fiber)
Transport)

Docket No. 030852-TP

Filed: January 15, 2004

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FCCA'S RESPONSE IN OPPOSITION TO
BELLSOUTH'S MOTION TO STRIKE
PORTIONS OF DIRECT TESTIMONY

The Florida Competitive Carriers Association (FCCA), through its undersigned counsel, submits its response in opposition to the Motion of BellSouth Telecommunications, Inc. (BellSouth) to strike portions of the prefiled direct testimony of FCCA's witness Gary Ball, filed on January 8, 2004. The Commission should summarily deny BellSouth's motion to strike Gary Ball's testimony.

BellSouth's motion complains that the pre-filed direct testimony of Gary Ball fails to cite to a single issue from the Second Order on Procedure. (PSC-03-1265-PCO-TP, issued November 7, 2003) BellSouth also dismisses Mr. Ball's testimony as not "useful," because it, according to BellSouth, does not relate to any issue established by the Commission, and, instead, discusses the Triennial Review Order and provides a description of ALEC networks. BellSouth's motion should be denied, for the following reasons.

First, although the Second Order on Procedure states that prefiled testimony and prehearing statements shall address the issues set forth in the Order, it does not require parties to cite in their testimony the specific issues that they address. Moreover, there is no rule that imposes such a requirement on parties filing testimony. Further, if there

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were such a requirement, others' testimony would suffer from the same infirmities complained of by BellSouth. (See, e.g., the Joint Direct Testimony of Orville D. Fulp and John White, filed December 22, 2003 on behalf of Verizon Florida, Inc., which does not cite to any issue identified by the Commission.) In the interest of providing increased convenience of reference for the Commission, however, the FCCA offers --and is attaching as Exhibit A to this Response-- the Revised Direct Testimony of Gary Ball, modified solely to add citations to the issues identified in that order. (In Exhibit A, the revisions are highlighted. Concurrently with this filing, the FCCA will also submit and serve clean versions of the revised testimony).

Second, BellSouth's motion does not, and cannot, contend that the discussion of the Triennial Review Order or the descriptions of CLECs' networks is irrelevant. Indeed, before applying the trigger, potential deployment and transition analyses that are outlined in the Second Order on Procedure, Mr. Ball's testimony addresses two key considerations before state commissions implementing the TRO: 1) the factual findings made by the FCC in determining the national findings of impairment and the trigger analyses (Direct Testimony of Gary Ball, pp. 4-9); and 2) the architecture of ALEC networks, which are not typically "routes" providing "transport" as defined by the TRO (Direct Testimony of Gary Ball, pp. 9-12). Mr. Ball also discusses the issue of continued impairment after triggers have been met (*id.*, pp. 29-30), which is delineated by the TRO, ¶¶ 336, 411. In these respects, BellSouth fails to mention how BellSouth's testimony on these points (see, e.g., Direct Testimony of Shelly W. Padgett, pp. 14 -20; direct Testimony of Wayne Gray, pp. 2-10), which ignores or misconstrues the definitions and route-specific,

capacity-specific requirements of the FCC’s trigger analyses, is itself somehow not “self-serving” and may be “useful” to the Commission’s deliberations.¹

Third, Mr. Ball’s testimony does, indeed, address the issues identified in the Second Order on Procedure. Specifically, Mr. Ball’s testimony corresponds to the issues as follows:

<u>Testimony Section</u>	<u>Issues</u>
Part I – FCC Impairment Overview, (pages 4-12)	1 -19
Part II – Self-Provisioning for DS3 and Dark Fiber (pages 12–21)	2, 5, 9, 10, 14, 15, 17
Part III – Wholesale Triggers for DS1, DS3, and Dark Fiber (pages 21-29)	1, 3, 7, 8, 12, 16, 17, 18
Part IV – Impairment where triggers have been met (pages 29-30)	1-19
Part V – Potential Deployment (pages 30-33)	4, 6, 13, 19
Part VI – Transitional Issues (pages 33-36)	20

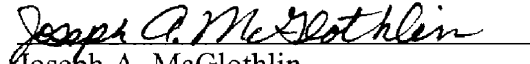
Further, pages 2, line 17 through page 4, line 9 should not be stricken as suggested by BellSouth, because that testimony addresses the purpose of Mr. Ball’s testimony and how his testimony is organized. There is nothing in the Second Order on Procedure that precludes a party from laying a foundation for the witness’s testimony, and in fact, asking such questions assists the reader in understanding the scope of the testimony. Indeed, each of BellSouth’s witnesses addresses the question of the purpose of his testimony.

¹ Ironically, the prefiled direct testimony of BellSouth witness Padgett does not identify a single issue until page 10 of the testimony, and the testimony only consists of 28 pages.

(See, e.g., Direct Testimony of Aniruddha Banerjee, page 3; Wayne Gray, page 2; and Shelly Padgett, pages 2-3)

Conclusion

As has been demonstrated, Mr. Ball's direct testimony addresses the issues set forth in the Second Order on Procedure. BellSouth's motion must therefore be denied.


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DOCKET NO. 030852-TP

EXHIBIT A TO

**FCCA'S RESPONSE IN OPPOSITION TO
BELLSOUTH'S MOTION TO STRIKE
PORTIONS OF DIRECT TESTIMONY**

REVISED DIRECT TESTIMONY

OF

GARY J. BALL

ON BEHALF OF

THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION

(REVISED TO SHOW CITATIONS TO IDENTIFIED ISSUES)

(REVISIONS HIGHLIGHTED)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising) Docket No. 030852-TP
from Federal Communications Commission's)
Triennial UNE Review: Location-Specific Review) Filed: JANUARY 15,
~~2010~~)
for DS1, DS3 and Dark Fiber Loops, and Route-)
Specific Review for DS1, DS3 and Dark Fiber Transport)

REVISED DIRECT TESTIMONY

OF

GARY J. BALL

ON BEHALF OF

THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION

1 **Q. PLEASE STATE YOUR FULL NAME, TITLE AND BUSINESS**
2 **ADDRESS.**

3 A. My name is Gary J. Ball. I am an independent consultant providing
4 analysis of regulatory issues and testimony for telecommunications
5 companies. My business address is 47 Peaceable Street, Ridgefield,
6 Connecticut 06877.

7

8 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND**
9 **AND PROFESSIONAL EXPERIENCE.**

10 A. I graduated from the University of Michigan in 1986 with a Bachelor of
11 Science degree in Electrical Engineering. I received a Masters in Business
12 Administration from the University of North Carolina – Chapel Hill in
13 1991, with a concentration in economic and financial coursework. I have
14 worked in the telecommunications industry for the past twelve years, and I
15 have extensive experience in developing and analyzing financial and
16 costing models associated with telecommunications networks and
17 services, as well as the design, implementation, and operation of such
18 networks and services.

19

20 From 1991 through 1993, I was employed by the Rochester Telephone
21 Corporation (now part of Citizens Communications) where I served in
22 various engineering, financial, and regulatory roles. From 1993 to 1994, I

1 was the manager of Regulatory Affairs for Teleport Communications
2 Group.

3
4 Beginning in 1994, I served initially as the Regional Director of
5 Regulatory Affairs for MFS Communications Company for the Northeast,
6 and subsequently was promoted to Assistant Vice President of Regulatory
7 Affairs. In 1996, WorldCom acquired MFS, after which I was promoted
8 to Vice President of Regulatory Policy Development. In that capacity, I
9 was responsible for coordinating and developing the Company's
10 regulatory positions on issues such as access charges, interconnection,
11 intercarrier compensation, unbundled network elements, and new service
12 technologies. I remained at WorldCom until beginning my own
13 consulting practice in 2002.

14
15 **Q. ON WHOSE BEHALF ARE YOU TESTIFYING IN THIS**
16 **PROCEEDING?**

17 A. I am testifying on behalf of the Florida Competitive Carriers Association
18 ("FCCA") The FCCA is a coalition of Florida competitors committed to
19 the advancement of policies that encourage local and long distance
20 competition in the state. The jobs, services and customer savings that
21 these companies provide are a product of the competitive policies of both
22 the federal Telecommunications Act of 1996 and Chapter 364, Florida
23 Statutes.

1

2 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

3 A. In its Triennial Review Order (“TRO”), the FCC conducted a
4 comprehensive analysis that resulted in the determination that CLECs are
5 impaired without access to high capacity loops and dedicated transport at
6 the national level. As a result, incumbent local exchange carriers
7 (“ILECs”) must continue to provide competitive carriers (“CLECs”) with
8 access to unbundled loops and dedicated transport at the DS1, DS3, and
9 dark fiber capacity levels on a widespread basis. Recognizing that there
10 may be individual customer locations or transport routes where
11 competitively provisioned loops and transport have been deployed to such
12 an extent that the national finding does not apply and CLECs may not be
13 impaired, the FCC developed a procedure known as the trigger analysis
14 (“triggers”). The triggers are designed to give ILECs an opportunity to
15 rebut the national finding at specific customer locations or on specific
16 transport routes where actual deployment demonstrates non-impairment at
17 that location or route.

18

19 The purpose of my testimony is to provide to the Commission a workable
20 framework for evaluating ILEC claims of non-impairment that is faithful
21 to the principles and requirements set forth in the TRO. As I will
22 demonstrate, the ILECs face a significant burden in satisfying the rigorous
23 granular analysis of the triggers, and the Commission should cast a

1 suspicious view upon any ILEC claims that the triggers have been
2 satisfied on a large scale.

3

4 **Q. HOW IS YOUR TESTIMONY ORGANIZED?**

5 A. My testimony is divided into six parts. In part one, I will discuss the
6 FCC's impairment analysis and how it relates to the unbundled loop and
7 transport services necessary for a facilities-based CLEC to compete
8 effectively with the ILECs. In part two, I will explain the self-
9 provisioning triggers that the FCC devised for high capacity loops ~~issues~~
10 ~~2 and 3~~ and dedicated transport ~~issues 9, 10, 14 and 15~~ at the DS3 and
11 dark fiber capacity levels, and will provide the proper framework for
12 interpreting an ILEC's claim that the triggers have been met. In part three,
13 I will explain the wholesale triggers for high capacity loops ~~issues 1 and~~
14 ~~3~~ and transport ~~issues 7, 8, 11, 12, 13, 17 and 18~~, and will discuss the
15 additional requirements needed to define a carrier as a wholesale provider.
16 In part four, I will discuss situations where competitive providers still may
17 be impaired for a customer location or route even if the trigger has been
18 met. In part five, I will discuss the concept of potential deployment
19 claims, including the fact that DS1-level loops and transport are not
20 eligible for potential deployment claims ~~issues 4, 13 and 19~~. Lastly, in
21 part six, I will describe the transitional issues this Commission should
22 consider in order to protect CLECs and their customers from unanticipated

1 disruption to their services and rates if the Commission delists any loops
2 or transport routes issuance.

3

4

I. THE FCC'S IMPAIRMENT ANALYSIS

5

ISSUANCE

6

**Q. PLEASE DESCRIBE THE FCC'S POLICY OBJECTIVES THAT
7 PROVIDE THE FRAMEWORK FOR THE TRIENNIAL REVIEW
8 IMPLEMENTATION.**

9

A. When applying the rigorous standards for the granular analysis, it is
10 imperative that the Commission keep the TRO's three policy objectives at
11 the forefront. First, the TRO continues the Commission's implementation
12 and enforcement of the federal Act's market-opening requirements. This
13 objective is critical because it recognizes the importance of providing a
14 regulatory environment that is conducive to competition. Second, the
15 TRO applies unbundling as Congress intended, with a recognition of the
16 market barriers faced by new entrants as well as the societal benefit of
17 unbundling. This again is critical because it recognizes the balance that is
18 required to ensure that consumers are able to realize the benefits of
19 competition through better telecommunications options at lower costs.
20 This objective further recognizes the consumer's investment in the ILEC's
21 monopoly network and the objective of delivering better services and
22 lower costs to consumers through competition. Finally, the TRO
23 establishes a regulatory foundation that seeks to ensure that investment in

1 telecommunications infrastructure will generate substantial, long-term
2 benefits for all consumers.

3

4 **Q. PLEASE DESCRIBE THE FCC’S APPROACH TO**
5 **DETERMINING IMPAIRMENT FOR UNBUNDLED NETWORK**
6 **ELEMENTS.**

7 A. The FCC based its impairment findings upon a determination that “[a]
8 requesting carrier is impaired when lack of access to an incumbent LEC
9 network element poses a barrier or barriers to entry, including operational
10 and economic barriers, that are likely to make entry into a market
11 uneconomic.” TRO ¶ 7. The FCC also found that “[a]ctual marketplace
12 evidence is the most persuasive and useful evidence to determine whether
13 impairment exists.” The FCC elaborated that it is particularly “interested
14 in the relevant market using non incumbent LEC facilities.” *Id.*

15

16 **Q. WHAT DID THE FCC CONCLUDE WITH REGARD TO HIGH**
17 **CAPACITY LOOPS AND DEDICATED TRANSPORT?**

18 A. The FCC concluded that competing carriers are impaired on a national
19 level without access to unbundled high capacity loops (DS1, DS3, and
20 dark fiber) and transport (DS1, DS3, and dark fiber). *See TRO* ¶ 202
21 (stating that “requesting carriers are impaired on a location-by-location
22 basis without access to incumbent LEC loops nationwide.”); *see also TRO*
23 ¶ 359 (stating that it finds “on a national level that requesting carriers are

1 impaired without access to unbundled dark fiber transport facilities ...
2 [DS3 transport and DS1 transport]).” As a result, the FCC rules require
3 that competing carriers have access to unbundled loops and transport
4 everywhere unless a specific route has been found to lack impairment.

5

6 **Q. DID THE FCC’S IMPAIRMENT ANALYSIS DISTINGUISH**
7 **BETWEEN DIFFERENT TYPES OF UNBUNDLED LOOPS AND**
8 **TRANSPORT?**

9 A Yes. The FCC defined two distinct loop types: Mass Market Loops,
10 representing voice-grade DS0-level loops, and Enterprise Market Loops,
11 representing higher capacity loops, which typically are used by business
12 customers. The FCC defined Enterprise Market Loops as loops at a
13 capacity level of DS1 or above; the FCC analyzed these loops separately
14 at the following capacity levels: OC(n), dark fiber, DS3, and DS1. For
15 the purposes of my testimony, Enterprise Market Loops are equivalent to
16 high capacity loops.

17

18 The FCC segregated dedicated transport by capacity levels before
19 performing its impairment analysis, stating that this would “be the most
20 informative manner to review the economic barriers to entry that affect
21 how a competing carrier is impaired without access to unbundled
22 transport.” *TRO* ¶ 380. The FCC performed separate impairment analyses

1 for OC(n) Transport, Dark Fiber Transport, DS3 Transport, and DS1
2 Transport.

3 (b)(3)(C)

4 **Q. WHAT WAS THE FCC’S BASIS FOR FINDING THAT**
5 **COMPETING CARRIERS WERE IMPAIRED WITHOUT ACCESS**
6 **TO HIGH CAPACITY LOOPS AT THE DARK FIBER, DS3, AND**
7 **DS1 CAPACITY LEVELS?**

8 A. The FCC’s impairment analysis places substantial emphasis on two
9 factors: whether carriers can economically self-provision high capacity
10 loops and if competitive alternatives exist. The FCC based its finding that
11 competing carriers are impaired without Enterprise Market Loops at the
12 dark fiber, DS3, and DS1 capacity levels in large part on the fact that the
13 costs to construct loops and transport are fixed and sunk. The FCC stated
14 that “[b]ecause the distribution portion of the loop serves a specific
15 location, and installing and rewiring that loop is very expensive, most of
16 the costs of constructing loops are sunk costs.” *TRO* ¶ 205. The FCC
17 concluded that it would be extremely difficult to recover these
18 construction costs and be a viable competitor in the marketplace.

19
20 The FCC found that there are substantial economic and operational
21 barriers to deploying loops. For example, the FCC found that “the cost to
22 self-deploy local loops at any capacity is great . . . and that a competitive
23 LEC that plans to self-deploy its facilities must target customer locations

1 where there is sufficient demand from a potential customer base, usually a
2 multi-tenant premises location, to generate a revenue stream that could
3 recover sunk construction costs of the underlying loop transmission
4 facility . . .” *TRO* ¶ 303. The FCC emphasized, however, that other
5 obstacles to deploying high capacity loops exist even if the carrier can
6 overcome the cost issues. For example, carriers encounter barriers in
7 obtaining reasonable and timely access to the customer’s premises and in
8 “convincing customers to accept the delays and uncertainty associated
9 with deployment of alternative loop facilities.” *TRO* ¶ 303 (citations
10 omitted).

11 ~~(Issue 7-22)~~

12 **Q. WHAT WAS THE FCC'S BASIS FOR FINDING THAT**
13 **COMPETING CARRIERS ARE IMPAIRED WITHOUT ACCESS**
14 **TO UNBUNDLED DEDICATED TRANSPORT AT THE DARK**
15 **FIBER, DS3, AND DS1 CAPACITY LEVELS?**

16 A. The FCC stated that its impairment findings with respect to DS1, DS3, and
17 dark fiber transport facilities “recognize that competing carriers face
18 substantial sunk costs and other barriers to self-deploy facilities and that
19 competitive facilities are not available in a majority of locations,
20 especially non-urban areas.” *TRO* ¶ 360 (citations omitted). The FCC
21 concluded that it would be extremely difficult to recover these costs and to
22 be a viable competitor in the marketplace. Indeed, the FCC concluded that
23 “[d]eploying transport facilities is an expensive and time-consuming

1 process for competitors, requiring substantial fixed and sunk costs " *Id.* ¶
2 371 (citations omitted). The FCC elaborated that the costs of self-
3 deployment include collocation costs, fiber costs, costs to physically
4 deploy the fiber, and costs to light the fiber. *Id.* CLECs also encounter
5 delays in constructing dedicated transport due to having to obtain rights-
6 of-way and other permits. *Id.*

7 Issue 1-12

8 **Q. DID THE FCC FIND THAT THERE WAS ANY EVIDENCE OF**
9 **NON-IMPAIRMENT FOR ENTERPRISE MARKET LOOPS AND**
10 **DEDICATED TRANSPORT AT THE DARK FIBER, DS3, AND DS1**
11 **LEVELS?**

12 A. In making a national finding of impairment for loops and transport, the
13 FCC found that evidence of non-impairment was isolated and minimal.
14 For example, the FCC found little evidence of self-deployment for DS1
15 loops, *TRO* ¶ 298, and found "scant evidence of wholesale alternatives"
16 for DS1 loops. *TRO* ¶ 325.

17
18 For transport, the FCC found that "alternative facilities are not available to
19 competing carriers in a majority of areas." *TRO* ¶ 387. Indeed, even
20 relying on ILEC data, which was not subject to cross-examination in the
21 FCC proceeding, at most 13% of BOC wire centers have even a single
22 competing carrier collocated using non-ILEC transport facilities *TRO* at
23 note 1198. The triggers require the presence of two or three such

1 competitors (also satisfying additional criteria) on each route. Therefore,
2 based on this analysis, one would expect that there will be only a small
3 number of transport routes at issue in this proceeding.

4

5 **Q. ARE THE FCC'S FINDINGS ON IMPAIRMENT CONSISTENT**
6 **WITH THE TYPICAL FACILITIES-BASED CLEC'S NETWORK?**

7 A. Yes. FCCA's members use a variety of entry strategies to provide
8 services to their customers. The FCCA members that provide facilities-
9 based local services rely on UNE loops to serve the majority of their
10 customers. FCCA members also use loop and transport UNEs in a
11 combination commonly referred to as an "enhanced extended link" or
12 "EEL." EELs are a predominant reason facilities-based CLECs need
13 access to unbundled dedicated transport, as they allow CLECs to access
14 customers in central offices where they are not collocated, greatly
15 expanding the scope of customers they can serve.

16

17 Although there is some variance among CLEC networks, competitors'
18 network architectures ordinarily are composed of multiple fiber rings in a
19 city or market, which have been completed at different stages due to
20 construction funding limitations, growth in capacity requirements, or, in
21 some cases, acquisitions. These CLECs serve customers using their fiber
22 rings when possible, although in a majority of instances, they will need
23 access to unbundled loops and loop/transport combinations (EELs) to

1 provide service to customers. This is the case because the fiber rings
2 typically only connect aggregation points, such as collocation
3 arrangements to a carrier's switching or hub site. A few major customer
4 sites sometimes will be included on the ring, but most CLEC networks
5 only reach a handful of such sites in any state.

6
7 These networks have been developed in this manner as a direct
8 consequence of the fixed and sunk costs that the FCC found create
9 impairment for CLECs. As the FCC found, there are few customer
10 locations where there is sufficient demand from a potential customer base
11 to justify the deployment of a DS3 loop to the location, with building
12 access and construction delays compounding the entry barriers that
13 CLECs face in deploying loop facilities. In addition, the fixed and sunk
14 costs associated with deployment of transport facilities leads carriers to
15 deploy facilities only where a sufficient aggregation of traffic between the
16 two end points justifies the deployment.

17

18 **Q. HOW DOES THIS NETWORK ARCHITECTURE IMPACT THE**
19 **TRIGGERS ANALYSIS?**

20 A. Fundamentally, one must recognize that CLEC networks do not replicate
21 the ILEC network either in scale or in network architecture. The primary
22 function of a CLEC fiber ring is to move traffic from an aggregation point
23 to the CLEC's switching or hub site. This architecture allows the CLEC

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On behalf of the Florida Competitive Carriers Association

1 to purchase unbundled local loops dedicated to specific customers,
2 aggregate the traffic onto a large capacity facility, and carry the traffic to
3 its switch for call processing purposes. In other words, CLEC networks
4 typically are built to utilize unbundled network elements – principally
5 loops and transport – not to substitute for them entirely.

6
7 As a result, the existence of fiber facilities does not by itself mean that the
8 CLEC provides transport between ILEC wire centers. First, as I explain in
9 Part Two of my testimony (22-23), although a typical CLEC network will
10 have multiple “on-net” aggregation points, it would be a misinterpretation
11 of the FCC’s triggers to conclude that each pair of these aggregation
12 points have CLEC owned transport facilities between them. Assume, for
13 example, that a CLEC has an “on-net” presence at aggregation points A
14 and B. The typical CLEC network will be configured to carry traffic from
15 point A to the switch, and similarly, from point B to the switch. It does
16 not carry traffic from point A to point B. (Most often, these two
17 connections will travel on separate fiber strands within the ring.) The
18 configuration is not unlike the design of some elevators in very tall
19 buildings. One elevator may provide access to the 40th floor, while a
20 separate elevator operating in a separate shaft accesses the 12th floor.
21 Even though a person in the lobby can reach either floor, it is not the case
22 that a person on the 40th floor can stop his elevator on the 12th floor
23

1 Second, in many situations, a CLEC will serve two ILEC central offices
2 that are not on the same fiber ring. Although it is theoretically possible to
3 connect central offices on different fiber rings, transport routes linking the
4 two central offices are not ordinarily provisioned in this manner.
5 Applying an elevator analogy, this is like going from the 40th floor in one
6 building to the 12th floor in another. Once in a while, one could get there
7 by going down to the lobby, exiting the building, walking to the other
8 building and using the elevator to reach the 12th floor in the second
9 building. It is possible and maybe even tolerable if no other solution is
10 available, but one would not want to do this every day.

11

12 **II. SELF-PROVISIONING TRIGGERS FOR HIGH CAPACITY**
13 **LOOPS AND TRANSPORT**

14

~~030852-TP 14, 15, 17~~

15 **Q. WHAT ARE THE PURPOSES OF THE FCC'S SELF-**
16 **PROVISIONING TRIGGER FOR UNBUNDLED LOOPS AND**
17 **TRANSPORT?**

18 **A** The Self-Provisioning Triggers are intended to identify those customer
19 locations and transport routes where sufficient deployment of
20 competitively owned facilities is present to demonstrate that *other*
21 *competitors* are not impaired without access to unbundled loops or
22 transport. The Self-Provisioning Trigger assumes a world where the
23 competitors that own the existing facilities do not make them available to

1 other competitive providers. In order for the Self-Provisioning Trigger to
2 be satisfied, the CLEC without any facilities has to be able to deploy
3 duplicative facilities without experiencing impairment.

4
5 The Self-Provisioning Trigger relies on indirect evidence based on a
6 proven past deployment in order to demonstrate non-impairment for other
7 carriers. The FCC's theory is that actual deployment by similarly situated
8 CLECs provides evidence that a CLEC without its own facilities does not
9 face impairment. Indeed, the FCC specifically cautioned that the Self-
10 Provisioning Trigger must exclude "unusual circumstances unique to [a]
11 single provider that may not reflect the ability of other competitors to
12 similarly deploy." *TRO* ¶ 329 at n.974. Thus, the purpose of the Self-
13 Provisioning Trigger is to identify situations through actual deployment
14 situations where the barriers created by fixed and sunk costs have been
15 overcome with respect to all providers that may offer service to a
16 particular location or on the given route.

17

18 **Q WHAT CAPACITY LEVELS ARE SUBJECT TO THE SELF-**
19 **PROVISIONING TRIGGERS?**

20 A. The Self-Provisioning Triggers only apply to DS3 and Dark Fiber Loops
21 and Transport. *TRO* ¶¶ 334, 409. DS1 Loops and Transport are not
22 included under these triggers. In other words, regardless of how much

1 self-provisioned deployment may exist at a customer location or on a
2 route, a DS1 UNE will continue to be available to a requesting CLEC.

3

4 **Q. WHAT MUST AN ILEC DEMONSTRATE TO ITS STATE**
5 **COMMISSION TO SATISFY THE SELF-PROVISIONING**
6 **TRIGGERS AT THE RELEVANT CAPACITY LEVEL?**

7 A. For loops, the ILEC must demonstrate that there are *two or more*
8 competing providers that have deployed their own facilities at the specific
9 capacity level (DS3 or dark fiber), and are serving customers using those
10 facilities. For transport, the ILEC must demonstrate there are *three or*
11 *more* competing providers that have deployed their own facilities at the
12 specific capacity level (DS3 or dark fiber), and are offering service using
13 those facilities.

14

15 **Q. WHAT MUST AN ILEC DEMONSTRATE TO PROVE THAT THE**
16 **SELF PROVISIONING TRIGGERS ARE SATISFIED FOR HIGH**
17 **CAPACITY LOOPS AT A SPECIFIC CUSTOMER LOCATION?**

18 A. As a preliminary matter, the ILEC must demonstrate that the two
19 competitive providers:

- 20 • Are not affiliated with each other or the ILEC
- 21 • Use their own facilities and not facilities owned or controlled by
22 the other competitive provider or the ILEC; and
- 23 • Are serving customers using their own facilities at that location
24 over the relevant capacity level.

1

2 **Q. WHAT MUST AN ILEC DEMONSTRATE TO PROVE THAT THE**
3 **SELF-PROVISIONING TRIGGERS ARE SATISFIED FOR**
4 **DEDICATED TRANSPORT BETWEEN TWO ILEC WIRE**
5 **CENTERS?**

6 A The ILEC must demonstrate for each of the three competitive providers,
7 that:

- 8 • They not affiliated with each other or the ILEC
- 9 • Each qualifying self-provisioned facility along a route must be
10 operationally ready to provide transport into or out of an
11 incumbent LEC central office
- 12 • Each qualifying self-provisioned facility terminates in a
13 collocation arrangement.

14

15 **Q. FOR THE SELF-PROVISIONING TRIGGERS TO BE SATISFIED,**
16 **MUST A CLEC SELF-PROVISION THE SPECIFIC CAPACITY**
17 **LEVEL IN QUESTION?**

18 A. Yes. The *Triennial Review Order* contemplates that the Self-Provisioning
19 Triggers apply when a CLEC self-provisions the particular capacity level
20 in question. For example, a CLEC that self-provisions at the OCn
21 capacity level will not be capable of providing service at lower capacity
22 levels in a given wire center if it has not deployed the appropriate
23 electronics to demultiplex the traffic at that wire center.

24

1 **Q. WHAT ARE THE KEY CRITERIA THAT A STATE**
2 **COMMISSION MUST APPLY IN ORDER TO ENSURE THE**
3 **ILECS ARE USING THE APPROPRIATE INTERPRETATION OF**
4 **THE SELF-PROVISIONING TRIGGERS?**

5 A. The first key issue is to ensure that the ILEC is defining loops and
6 transport routes in a manner consistent with the FCC, and is applying
7 those definitions appropriately. For loops, the FCC’s definition is “the
8 connection between the relevant service central office and the network
9 interface device (“NID”) or equivalent point of demarcation at a specific
10 customer premises.” In addition, the loop must permit the CLEC to access
11 all units within a customer location, such as all tenants in a multi-tenant
12 building or all buildings in a campus environment.

13
14 The FCC defined a transport route as “a connection between wire center or
15 switch ‘A’ and wire center or switch ‘Z’.” The FCC elaborated that “even
16 if, on the incumbent LEC’s network, a transport circuit from ‘A’ to ‘Z’
17 passes through an intermediate wire center ‘X,’ the competing providers
18 must *offer service* connecting wire centers ‘A’ and ‘Z,’ but do not have to
19 mirror the network path of the incumbent LEC through wire center ‘X’.”
20 Thus, the FCC requires that transport service must be offered between the
21 two wire centers in question.

22

1 Q. CAN YOU PROVIDE AN EXAMPLE OF HOW THE DEFINITION
2 OF A LOOP COULD BE MISINTERPRETED BY AN ILEC FOR
3 THE PURPOSES OF THE SELF-PROVISIONING TRIGGER?

4 A. Yes. In a multi-tenant building, two CLECs may have provisioned fiber-
5 optic facilities to serve one customer each, while the rest of the building is
6 being served solely by the ILEC. Even though there are two competing
7 loop facilities into the building, an ILEC request that the Trigger is
8 satisfied for the entire building, or even the two customers served by the
9 CLECs, would be incorrect, as no customer location within the building is
10 being served by the facilities of two or more competing providers. The
11 key distinction in this example is that the customer location, which is the
12 endpoint of the loop per the FCC, is a subset of a building location in a
13 multi-tenant environment.

14

15 Q. CAN YOU PROVIDE AN EXAMPLE OF HOW THE DEFINITION
16 OF A TRANSPORT ROUTE COULD BE MISINTERPRETED BY
17 AN ILEC FOR THE PURPOSES OF THE SELF-PROVISIONING
18 TRIGGER?

19 A. Yes. An ILEC may have performed a primitive counting exercise, in
20 which it simply identifies all of the collocation arrangements for a given
21 CLEC, confirms that fiber optic facilities are present in the collocation
22 arrangement, then declares that transport routes exist between each
23 collocation arrangement. This approach would be deficient, in that it

1 presents no evidence that the CLEC in question is providing transport
2 service between the two ILEC wire centers, which is the FCC
3 requirement. The “evidence” does not identify the capacity levels at
4 which the service is provided (in order to apply the trigger to each level of
5 capacity), nor does it demonstrate that the CLEC is operationally ready to
6 provide transport “into or out of” the two end points of the route. As I
7 explained earlier in my testimony, CLECs generally use collocation
8 arrangements to aggregate unbundled loops, so there is a high probability
9 that the equipment and fiber optics installed in a collocation arrangement
10 are not being used to provide transport between two ILEC wire centers.
11 For example, a CLEC may have deployed equipment to concentrate voice-
12 grade loops, such as a digital loop carrier system, or equipment to provide
13 DSL service, such as a DSLAM, in a given central office. In these
14 instances, the CLEC would have equipment installed in its collocation but
15 would *not* be able to provide transport at either a DS3 or a Dark Fiber
16 level between wire centers. To support a trigger claim, the ILEC must
17 produce additional evidence that shows that the CLEC self-provisions
18 transport service at the specific capacity level (DS3 or dark fiber) between
19 the two wire centers and that each collocation arrangement in question is
20 being used as an endpoint for a transport route at the specific capacity
21 level between two wire centers.
22

1 Q. WHAT EVIDENCE MUST AN ILEC SUBMIT TO MEET THE
2 FCC'S REQUIREMENT OF OPERATIONAL READINESS FOR
3 THE SELF-PROVISIONING TRIGGER?

4 A. While the existence of CLEC facilities obviously is a prerequisite to the
5 provision of service, that alone does not reflect whether the equipment can
6 be used to provide the service to satisfy the trigger, whether the CLEC can
7 provide service at the requisite capacity level, or whether CLEC has
8 performed the necessary engineering, provisioning, and administrative
9 tasks to ensure that service can be provided. The only reliable way of
10 demonstrating that a CLEC is operationally ready under the Self-
11 Provisioning Trigger is to produce evidence that the CLEC is actually
12 providing service at the customer location or on the given transport route.
13 If the CLEC facilities are in use providing the requisite capacity of service
14 and if the CLEC is able to provision additional circuits using existing
15 equipment and facilities, then it is operationally ready to provide the
16 service. This is consistent with the FCC's requirement that evidence be
17 provided that CLECs are *servicing* customers using self-provisioned loop
18 facilities, and that CLECs *offer service* between two wire centers on a
19 given transport route. *See, e.g.,* 47 C.F.R. §§ 51.319(a)(5)(1)(A),
20 51.319(e)(2)(i)(A).

21

1 **Q. FOR PURPOSES OF APPLYING THE TRIGGERS, WHICH**
2 **FACILITIES COUNT AS "OWNED FACILITIES"?**

3 A. In order for facilities to qualify for purposes of the triggers, the carrier
4 must have deployed its "own facilities" on the entire loop. There are two
5 ways that a carrier can have ownership over the facilities: the carrier can
6 have legal title to the facilities or, the carrier can have a "long-term" (*i.e.*,
7 10 years or more) dark fiber IRU, if the fiber is lit by the qualifying carrier
8 by attaching its own optronics to the facilities. If the carrier does not use
9 its own facilities, then the carrier cannot count for purposes of the self-
10 provisioning trigger.

11

12 **Q. WHICH FACILITIES DO NOT COUNT AS "OWNED**
13 **FACILITIES"?**

14 A. Facilities obtained from other sources such as through special access
15 arrangements, UNEs, capacity leases (unless they are long term IRUs),
16 and all third-party provided facilities fail to qualify as "owned facilities."
17 The FCC specifically emphasized that a CLEC “using the special access
18 facilities of the incumbent LEC or the transmission facilities of the other
19 competitive provider ... would *not* satisfy the definition of a self-
20 provisioning competitor for purposes of the trigger.” *TRO* ¶ 333.

21

22 In addition, the triggers are designed to prevent double counting of
23 facilities. Therefore, for purposes of the self-provisioning test, a carrier

1 may not be using "facilities owned or controlled by one of the other two
2 providers" *TRO* ¶ 333. For example, if Carrier A has deployed
3 facilities to a building or on a transport route and Carrier B purchases
4 service from Carrier A, only one self-provisioner is present on the route.
5 Carrier B does not own the facilities it uses to provide service to its
6 customers.

7

8 **Q. IF A CARRIER SATISFIES THE SELF-PROVISIONING**
9 **TRIGGER, WILL IT AUTOMATICALLY QUALIFY AS AN**
10 **ELIGIBLE PROVIDER UNDER THE COMPETITIVE**
11 **WHOLESALE FACILITIES TRIGGER OR VICE VERSA?**

12 A. No. The FCC emphasized that the triggers are separate and distinct. The
13 purpose of the self-provisioning trigger is to determine through actual
14 experience whether similarly situated CLECs can deploy their own
15 facilities in order to serve its own customers. In contrast, the wholesale
16 facilities trigger examines whether the provider makes its facilities
17 available to other carriers on a widely available basis. Self-provisioners
18 that do not provide service to other carriers do not qualify under the
19 Wholesale Trigger. *See TRO* ¶ 414 (wholesale test does not count
20 facilities owned by a competitor unwilling to offer capacity on a whole
21 basis). Similarly, although some wholesale carriers also may self-provide
22 facilities to serve their own customers, others may not provide any end
23 user service and thus cannot be self-provisioners under the triggers. *See*

1 TRO ¶ 406 & n.1256 (self-provisioner must be operationally ready to
2 provide transport; carrier must “remain in operation” on the route). For
3 example, an entity that operates only as a “carrier’s carrier” does not
4 qualify as a self-provisioner under the FCC’s triggers.

5
6 **III. WHOLESALE TRIGGERS FOR HIGH CAPACITY LOOPS AND**
7 **TRANSPORT**

8 Lines 1, 5, 7, 8, 11, 12, 14, 17, 18

9 **Q. WHAT IS THE PURPOSE OF THE FCC’S WHOLESALE**
10 **TRIGGERS FOR HIGH CAPACITY LOOPS AND DEDICATED**
11 **TRANSPORT?**

12 **A.** The Wholesale Triggers provide the ILECs an opportunity to demonstrate
13 that there is no impairment for a specific customer location or route by
14 identifying locations for which there are a sufficient number of alternative
15 providers offering wholesale loop and transport services using their own
16 facilities. The underlying premise of the Wholesale Triggers is that when
17 a working wholesale market with multiple alternative sources of supply
18 exists for loops or transport, then CLECs would not be reliant on receiving
19 the element from the ILEC as a UNE.

20
21 **Q. WOULD A WORKING WHOLESALE MARKET BE BENEFICIAL**
22 **TO CLECS?**

1 A. Yes, if the alternative facilities were available as more than a theoretical
2 possibility. For a viable competitive wholesale market to exist, not only
3 must competitive facilities be deployed, but also the requesting carrier
4 must be able to use these facilities to replace ILEC UNEs in ordinary
5 applications. It is for this reason that the FCC emphasized in the context
6 of loops that alternative providers must “offer an equivalent wholesale
7 loop product at a comparable level of capacity, quality and reliability.”
8 *TRO* ¶ 337. Equally important, the alternative facilities must work
9 seamlessly with other components of a CLEC network, including ILEC-
10 supplied UNEs. Because loops and transport must be examined
11 separately, there will be many instances where a CLEC will purchase a
12 UNE loop and competitive transport, or will purchase a competitively
13 supplied loop in conjunction with UNE transport. Moreover, CLECs may
14 even face situations where DS1 loops and transport are ordered as UNEs,
15 but DS3 loops or transport to the same location or along the same route are
16 ordered through competitive suppliers. These permutations make it
17 imperative that all barriers to a competitive wholesale market be
18 eliminated before any finding can be made that the Wholesale Trigger’s
19 requirements are satisfied. At a minimum, a working wholesale market
20 requires reasonable and nondiscriminatory cross connects from the ILEC,
21 UNE and special access ordering procedures that accommodate a multi-
22 vendor environment, and billing processes for combinations of UNE and
23 non-UNE arrangements.

1

2 **Q. WHAT CAPACITY LEVELS ARE SUBJECT TO THE**
3 **WHOLESALE TRIGGERS FOR HIGH CAPACITY LOOPS AND**
4 **TRANSPORT?**

5 A. Wholesale loops and transport at both the DS1 and DS3 level are subject
6 to the Wholesale Triggers. Dark Fiber loops are not subject to the Trigger,
7 Dark Fiber transport is subject to the Trigger.

8

9 **Q. WHAT MUST AN ILEC DEMONSTRATE TO ITS STATE**
10 **COMMISSION TO SATISFY THE WHOLESALE PROVISIONING**
11 **TRIGGERS FOR HIGH CAPACITY LOOPS AND DEDICATED**
12 **TRANSPORT?**

13 A. The wholesale facilities trigger examines whether there are competing
14 providers offering a bona fide product on the specific route. To satisfy the
15 wholesale facilities trigger, the Commission must find that there are *two or*
16 *more* competing providers that have deployed their own high capacity
17 loop or dedicated transport facilities, that are operationally ready to use
18 those transport facilities and are willing to provide transport over those
19 facilities on a widely available wholesale basis to other carriers.

20

21 In addition to evidence provided under the self-provisioning trigger, the
22 ILECs also must demonstrate that the alternative provider is actually
23 offering wholesale service for the specific route or location at the requisite

1 capacity level, has equipped its network to facilitate numerous wholesale
2 customers, and has developed the appropriate systems and procedures to
3 manage a wholesale business.

4

5 **Q. WHAT MUST AN ILEC DEMONSTRATE TO SATISFY THE**
6 **WHOLESALE PROVISIONING TRIGGERS FOR HIGH**
7 **CAPACITY LOOPS?**

8 A. Specifically, under the FCC's rules, this trigger requires evidence that:

- 9 • Two or more competing providers not affiliated with each other or
10 the ILEC are present at the customer location;
- 11 • Each provider has deployed its own facilities and is operationally
12 ready to use those facilities to provide wholesale loops at that
13 location;
- 14 • Each provider is willing to provide wholesale loops on a widely
15 available basis at that location; and
- 16 • Each provider has access to the entire multiunit customer premises.
17 *See 47 C.F.R. § 51.319(a)(5)(i)(B).*

18

19 **Q. WHAT MUST AN ILEC DEMONSTRATE TO SATISFY THE**
20 **WHOLESALE PROVISIONING TRIGGERS FOR DEDICATED**
21 **TRANSPORT?**

22 A. Specifically, the trigger requires evidence that:

- 23 • Two or more competing providers not affiliated with each other or
24 with the ILEC are present on the route;
- 25 • Each provider has deployed its own transport facilities "and is
26 operationally ready to use those facilities to provide dedicated ...
27 transport along the particular route;"

- 1 • Each provider "is willing immediately to provide, on a widely
2 available basis," dedicated transport to other carriers on that route;
- 3 • Each provider's facilities terminate in a collocation arrangement at
4 each end of the transport route; and
- 5 • Requesting telecommunications carriers are able to obtain
6 reasonable and nondiscriminatory access to the competing
7 provider's facilities through a cross-connect to the competing
8 provider's collocation arrangement." 47 C.F.R. § 51.319(e)(1)(ii).

9

10 **Q. IN ADDITION TO THE ISSUES RAISED IN THE SELF-**
11 **DEPLOYMENT ANALYSIS, ARE THERE AREAS THE ILECS**
12 **NEED TO ADDRESS IN ORDER TO SATISFY THE WHOLESALE**
13 **TRIGGERS?**

14 A. Yes. A significant issue is to properly identify the relevant wholesale
15 providers of loops and transport, and to ensure that the ILECs are not
16 overly broad in their identification of wholesale providers. Many carriers
17 may provide some wholesale services, but may not be in a position to offer
18 the specific loop or transport services necessary to satisfy the trigger. For
19 example, a carrier may offer wholesale long distance voice services, and
20 also may have established collocation arrangements for the self-provision
21 of a data service for a specific retail customer. The fact that the carrier is a
22 wholesale provider of an unrelated service is not relevant to the trigger
23 analysis if the carrier is not offering wholesale services specific to its
24 collocation arrangements. The FCC also triggers require evidence of
25 wholesale availability be presented for each level of capacity.

26

1 **Q. HOW IS A ROUTE DEFINED FOR PURPOSES OF APPLYING**
2 **THE WHOLESALE FACILITIES TRIGGER TO HIGH**
3 **CAPACITY LOOPS?**

4 A. First, as with the self-provisioning trigger, the “customer location” side of
5 each wholesale loop must terminate at a location that affords alternative
6 providers access to the entire customer premises, including in multi-tenant
7 buildings, access to the same common space, house and riser and other
8 intra-building wire as the ILEC. If a loop does not provide alternative
9 providers with access to the entire customer premises, then the carrier
10 providing the loop should not be counted for purposes of either the
11 wholesale or the self-provisioning trigger. This requirement is particularly
12 important in the context of the wholesale trigger because the CLEC most
13 often would be seeking to buy a wholesale loop in order to serve tenants in
14 the building that are not already served on a retail basis by the wholesale
15 provider. If the wholesale provider is not able to offer service to reach
16 customers other than its own, that carrier is not truly offering an
17 alternative wholesale service.

18
19 Second, in the wholesale context, the “central office” side of the loop is
20 equally important. As I explained previously, CLEC networks are
21 designed to combine loops at certain aggregation points so that they may
22 be multiplexed and carried on transport facilities back to the CLEC switch.
23 In order to enable wholesale loops to be aggregated in this manner, the

1 wholesale loop must provide a connection into the ILEC serving central
2 office, so that competitors are able to connect a wholesale loop with
3 another carrier's transport with either their own collocated facilities, or
4 with ILEC UNE transport.

5

6 **Q. HOW DOES THE REQUIREMENT OF OPERATIONAL**
7 **READINESS APPLY TO THE WHOLESALE TRIGGERS?**

8 A. In addition to the requirements of the self-provisioning triggers, the ILECs
9 must demonstrate that the wholesale provider is operationally ready and
10 willing to provide transport to other carriers at each capacity level. At a
11 minimum, the ILEC must show that each wholesale carrier:

- 12 • Has sufficient systems, methods and procedures for pre-ordering,
13 ordering, provisioning, maintenance and repair, and billing;
- 14 • Possesses the ability immediately to provision wholesale high
15 capacity loops to each specific customer location identified or
16 dedicated transport along the identified route;
- 17 • For loops, has access to an entire multi-unit customer premises;
- 18 • Is capable of providing transport at a comparable level of capacity,
19 quality, and reliability as that provided by the ILEC;
- 20 • For transport, is collocated in each central office at the end point of
21 each transport route;
- 22 • Has the ability to provide wholesale high capacity loops and
23 transport in reasonably foreseeable quantities, including having
24 reasonable quantities of additional, currently installed capacity,
25 and
- 26 • Reasonably can be expected to provide wholesale loop and
27 transport capacity on a going-forward basis.

28

1 **Q. WHAT DOES "WIDELY AVAILABLE" MEAN FOR THE**
2 **WHOLESALE FACILITIES TRIGGER?**

3 **A** To be widely available, service must be made available on a common
4 carrier basis, for example, through a tariff or standard contract. The fact
5 that a carrier may have provided service to only one or a few other carriers
6 on a route is not sufficient, unless the carrier also is willing to provide
7 comparable service to other carriers. *See TRO ¶ 414* (trigger does not
8 count competing carriers that are not willing to offer capacity on their
9 network on a wholesale basis). Moreover, an offer to negotiate an
10 individualized private carriage contract does not constitute service being
11 widely available. In addition, each carrier identified as a wholesale
12 provider must be able "immediately to provide" wholesale service. 47
13 C.F.R. § 51.319(e). If the carrier is required to construct facilities in order
14 for the service to be made available, then the service is not widely
15 available. Similarly, a service is not widely available if the carrier is
16 unable to interconnect with its wholesale customers because sufficient
17 facilities have not been terminated in the relevant central office or if
18 insufficient collocation space is present to accommodate new CLECs in
19 the central office.

20

1 **Q. WHAT DOES IT MEAN TO HAVE REASONABLE ACCESS TO**
2 **THE WHOLESALE PROVIDER?**

3 A. Requesting carriers must be able to access cross-connects at
4 nondiscriminatory rates, terms, and conditions in accordance with FCC
5 and state commission rules. In addition, ILECs must provide requesting
6 carriers with adequate cross-connect terminations at cost-based rates, and
7 must enable sufficient capacity expansion. If carriers are not able to cross
8 connect at the ILEC central office, then they cannot obtain access to the
9 wholesale providers' facilities.

10

11 As I stated above, for a competitive wholesale market to be in place, there
12 must be proper systems and processes for ordering and provisioning. In
13 addition, carriers must be able to obtain the service at nondiscriminatory
14 rates and on nondiscriminatory intervals. Requesting carriers also must
15 be able to order circuits to terminate in all qualified wholesale providers'
16 collocation space. The Commission should inquire whether the ILEC's
17 OSS is capable of handling LSRs that are provisioned to a wholesale
18 provider's facilities.

19

20 **Q. WHAT ARE THE REMAINING STEPS?**

21 A. Once the Commission has determined the appropriate application of the
22 triggers, then it must gather the evidence for each route. As I stated
23 above, the ILEC is responsible for challenging the national finding of

1 impairment and must provide demonstrative evidence that the trigger is
2 satisfied for each route for which it challenges the FCC's national finding.
3 The ILEC then has the burden of proving that the competing carriers that
4 it has identified indeed satisfy the trigger for the particular loop at issue.
5 The ILEC's evidence must be differentiated among each capacity type and
6 for each customer route.

7
8 Once the ILEC has put forth the routes that it intends to challenge and the
9 supporting evidence, the Commission must evaluate whether the carriers
10 that the ILEC has identified as satisfying the trigger for each route meet
11 the qualifying criteria. The Commission then must classify the route as
12 impaired or not impaired based on all of evidence that the parties have
13 submitted.

14

15 **IV. CONTINUED IMPAIRMENT AFTER TRIGGERS HAVE BEEN**
16 **MET**

17

through 1.2)

18 **Q. IF A STATE FINDS THAT A TRIGGER IS SATISFIED BUT**
19 **NEVERTHELESS FINDS EVIDENCE THAT IMPAIRMENT**
20 **REMAINS, IS IT REQUIRED TO “DE-LIST” A PARTICULAR**
21 **LOOP OR TRANSPORT ROUTE?**

22 **A.** No. If a state finds that a trigger is facially satisfied but believes that
23 impairment still exists, then the state may petition the FCC for a waiver of

1 application of the trigger until the barrier to deployment identified by the
2 state no longer exists. For example, in the *Triennial Review Order*, the
3 FCC explained that a state might find impairment if “a municipality has
4 imposed a long-term moratorium on obtaining the necessary rights-of-way
5 such that a competing carrier can not deploy new facilities.” *TRO* ¶ 411.
6 As another example, ILECs have claimed collocation exhaust in many
7 central offices throughout the state. If a CLEC cannot collocate in one or
8 both of the central offices on the transport route, then CLECs remain
9 impaired on that route, regardless of whether the trigger is facially
10 satisfied.

11

12 **Q. SHOULD THE COMMISSION ESTABLISH AN EXCEPTION**
13 **PROCESS FOR LOCATIONS AND ROUTES WHERE THE**
14 **TRIGGERS HAVE BEEN MET?**

15 A. Yes. If a carrier demonstrates that it is attempting in good faith to
16 construct facilities for a location or route for which UNEs are no longer
17 available and that it is incurring a specific problem that makes
18 construction within the applicable timeframe unachievable (*e.g.*, issues
19 with rights-of-way or building access), then it should be permitted to seek
20 a waiver from the Commission consistent with the problem it faces. The
21 CLEC should be permitted to continue to purchase the identified facility
22 as a UNE until the Commission acts on its request.

23

1

2 **Q. CAN AN ILEC MAKE A GENERAL CLAIM FOR POTENTIAL**
3 **DEPLOYMENT, SUCH AS A CLAIM THAT NO IMPAIRMENT**
4 **EXISTS FOR ALL BUILDINGS SERVED OUT OF A WIRE**
5 **CENTER?**

6 A. No. The FCC's language is clear that potential deployment claims must
7 be location or route specific. In paragraph 335, for example, the FCC
8 states:

9 *[W]hen conducting its customer location specific*
10 *analysis, a state must consider and may also find*
11 *non impairment at a particular customer location*
12 *... if the state commission finds that no material*
13 *economic or operational barriers at a customer*
14 *location preclude a competitive LEC from*
15 *economically deploying loop transmission facilities*
16 *to that particular customer location at the relevant*
17 *loop capacity level.*

18 *TRO ¶ 335 (emphasis added).*

19

20 **Q. WHAT TYPE OF DEMONSTRATION WOULD THE ILECS NEED**
21 **TO MAKE IN ORDER TO SUCCESSFULLY PROVE NO**
22 **IMPAIRMENT EXISTS AT A LOCATION OR ROUTE EVEN**
23 **THOUGH THE TRIGGERS HAVE NOT BEEN MET?**

24 A. The potential deployment test posits a situation that is extremely unlikely
25 to occur. By definition, in order for the potential deployment analysis to
26 be relevant, the self-provisioning trigger must *not* be satisfied. This means
27 that there will be fewer than two carriers that have deployed loop facilities

1 to a customer location or fewer than three carriers that have deployed
2 transport facilities on a particular route. Importantly, since the FCC
3 considered actual deployment to be the best evidence of impairment or
4 non-impairment, *TRO* ¶¶ 335, 410, the failure to satisfy the trigger is
5 strong evidence that CLECs are impaired.

6
7 If the self-provisioning trigger has not been satisfied, then absent other
8 evidence to rebut the FCC's finding, the FCC's nationwide finding of
9 impairment in the *TRO* would apply. Thus, the ILEC's task under a
10 potential deployment analysis is to show that, despite the characteristics of
11 loop or transport routes that were analyzed by the FCC, some other
12 characteristic *on that route* overrides the barriers that created impairment
13 in the first instance. In other words, the ILEC must demonstrate that
14 something unique to this particular customer location or this transport
15 route rebuts the national finding of impairment. The FCC offers no
16 factual examples of what circumstances would satisfy this requirement,
17 but this theoretical set of facts is extremely unlikely to exist if the FCC
18 triggers are applied consistent with the impairment analysis.

19

20

VI. TRANSITIONAL ISSUES

21

~~CONFIDENTIAL~~

22

Q. IF A STATE COMMISSION FINDS THAT A TRIGGER IS

23

SATISFIED, WHAT HAPPENS NEXT?

1 A. If the Commission finds that requesting carriers are not impaired without
2 access to unbundled transport and/or loops on any particular route or at
3 any customer location, then the Commission must establish an
4 "appropriate period for competitive LECs to transition from any
5 unbundled [loops or transport] that the state finds should no longer be
6 unbundled." *TRO ¶¶ 339, 417.*

7
8 **Q. WHAT ISSUES ARE INVOLVED IN ESTABLISHING AN**
9 **APPROPRIATE TRANSITION PERIOD?**

10 A. A transition period is required for two reasons. First, CLECs made
11 specific business decisions to serve or not serve customers in reliance on
12 the availability of UNE loops or UNE transport to the customer location or
13 on the relevant transport route. CLECs must be able to continue to offer
14 service to these customers after a finding of non-impairment. This
15 consideration is essential because services to enterprise customers are
16 contract-based and generally do not allow the provider to terminate or
17 modify the contract based upon sudden cost increases. Without a
18 transition period, CLECs and their customers would face significant
19 disruptions to their services if access to unbundled loops were
20 disconnected or migrated to other services. A transition is needed,
21 therefore, to prevent rate shock to customers receiving service using UNE
22 arrangements.

23

1 Second, a CLEC cannot modify its network overnight. A litany of
2 business arrangements will have to be negotiated, modified and
3 implemented if a state commission determines that one of the triggers has
4 been satisfied. For example, if a state commission determines that two or
5 more wholesale providers make their facilities widely available to other
6 CLECs, CLECs needing loops or transport (as the case may be) will need
7 time to consider the alternative sources of supply that are available to them
8 and to implement the solution that best fits each CLEC's needs. One
9 cannot assume that a CLEC will desire to transition to an ILEC-provided
10 non-UNE service. Indeed, if the wholesale trigger is satisfied, it is
11 because other alternatives are equally viable and presumably equally
12 attractive to the CLEC. A transition period must build in sufficient time to
13 enable the CLEC to make use of the alternatives that underlie the finding
14 of non-impairment.

15
16 **Q. ARE THERE ADDITIONAL TRANSITION ISSUES THE**
17 **COMMISSION SHOULD CONSIDER?**

18 A. Yes. The Commission should ensure that ILECs maintain an adequate
19 process for ordering combinations of loops and transport, in situations
20 where one or both network elements of the combination have been
21 delisted. In the *TRO*, over ILEC objections, the FCC specifically stated
22 that competing carriers are permitted to continue to have access to
23 combinations of loops and transport regardless of whether one of the items

1 has been delisted. *See TRO* ¶ 584. Similarly, the Commission should
2 ensure that ILECs have adequate billing processes and procedures in place
3 for CLECs to purchase delisted network elements, whether individually or
4 in combination.

5

6 **Q. HOW SHOULD TRANSITION ISSUES BE ADDRESSED?**

7 A. Establishing an appropriate transition period is a complex task. Ideally,
8 these issues should be addressed in a phase of this proceeding that
9 immediately follows the finding of non-impairment. If the Commission
10 follows such a procedure, ILECs should be prohibited from billing special
11 access rates to CLECs while the Commission receives evidence on the
12 elements necessary to protect customers from rate shock and to enable
13 CLECs to build replacement facilities and/or to migrate to the network
14 facilities of non-ILEC providers. In the event an interim transition is
15 desired, I recommend the minimum components described below.

16

17 **Q. WHAT IS YOUR RECOMMENDATION REGARDING THE**
18 **MINIMUM COMPONENTS OF A TRANSITION PROCESS?**

19 A. I recommend that the Commission develop a multi-tiered transition
20 process such as the one applicable to mass-market switching. First, there
21 should be a transition period during which CLECs may order new UNEs
22 for locations and routes where the commission found a trigger is met.

23 This period should be a minimum of nine months in order to enable a

1 CLEC to continue to offer competitive service to new customers while it
2 explores alternatives available to it. Second, CLECs should have a
3 transition period for existing customers similar to that applied to line
4 sharing and mass-market switching. The three year transition process
5 established for customers served by line sharing arrangements may
6 provide a useful model, with one-third of the customers to be transitioned
7 within 13 months, and another one-third transitioned within 20 months.
8 All loop and transport UNEs made available during these transition
9 periods should continue to be made available at TELRIC rates until
10 migrated.

11

12 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

13 **A.** Yes, it does.

14

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Response in Opposition to BellSouth's Motion to Strike Portions of Direct Testimony has been provided by (*) hand delivery, (**)email and U.S. Mail this 15th day of January, 2004, to the following:

(**)Adam Teitzman, Staff Counsel
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