COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers	)	D.T.E. 03-60

REPLY PANEL TESTIMONY OF VERIZON MASSACHUSETTS

(Mass Market Switching, Transport, and Loops)

Members of the Panel:

John Conroy
John White
William E. Taylor

February 25, 2004

PUBLIC VERSION

I. INTRODUCTION

Q. PLEASE IDENTIFY THE MEMBERS OF THIS PANEL.

A. The members of this panel are John Conroy, John White, and William E. Taylor. This testimony is submitted on behalf of Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon MA").

Q. ARE YOU THE SAME MR. CONROY WHO WAS A MEMBER OF THE PANEL THAT FILED INITIAL AND SUPPLEMENTAL TESTIMONY ON BEHALF OF VERIZON MA ADDRESSING MASS MARKET SWITCHING, TRANSPORT, AND LOOPS?

A. Yes.

Q. ARE YOU THE SAME MR. WHITE WHO WAS A MEMBER OF THE PANEL THAT FILED INITIAL AND SUPPLEMENTAL TESTIMONY ON BEHALF OF VERIZON MA ADDRESSING MASS MARKET SWITCHING, TRANSPORT, AND LOOPS?

A. Yes.

Q. ARE YOU THE SAME DR. TAYLOR WHO WAS A MEMBER OF THE INITIAL PANEL THAT FILED TESTIMONY ON BEHALF OF VERIZON MA ADDRESSING HOTCUTS ON NOVEMBER 14, 2003?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The purpose of this testimony is to rebut the testimony submitted by various other parties to this proceeding and to further support Verizon MA's triggers case regarding mass market switching, dedicated transport and high capacity loops.

II. THE SCOPE OF THIS PROCEEDING

Q. PLEASE EXPLAIN THE *TRO'S* MANDATORY "TRIGGERS" ANALYSIS.

A. As discussed in Verizon MA's Initial Panel Testimony, the *Triennial Review Order*[1] establishes mandatory triggers for determining impairment for all of the network elements – including mass market switching, dedicated transport and high capacity loops – that are at issue in the nine-month proceedings.

Briefly, for switching, under the "self-provisioning trigger," a state "*must* find 'no impairment' when three or more unaffiliated competing carriers are serving mass market customers in a particular market with the use of their own switches." *TRO* ¶ 501 (emphasis added). Under the "competitive wholesale trigger," states *must* find no impairment where there are two or more unaffiliated CLECs that offer wholesale switching service to other carriers in a particular market using their own switches. *TRO* ¶ 504. It is only after the Department has determined that neither trigger is met in a market that it may – if the ILEC continues to request mass market switching relief – conduct an analysis of the "potential" for CLECs to deploy their own switches in the relevant geographic market, given economic and operational conditions in that market. *TRO* ¶ 506. Moreover, it bears noting that the mass market switching triggers case is not a shorthand method of conducting the FCC's

[1] *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of*

potential deployment case as several CLECs suggests. In fact, the potential deployment analysis described by the FCC would *supplement* the switching triggers case by allowing states to find that impairment does not exist in additional markets, *even where the triggers were not initially met in those same markets. See TRO* ¶ 510 ("We also find that to the extent there is a switch in an area serving the local exchange mass market, this fact must be given particularly substantial weight. The existence of a competitor that is serving the local exchange mass market with its own switch provides evidence that the mass market can be served effectively. The state commission should consider whether the entire market could be served by this switch.[] Although a single self provisioned switch is not sufficient to invoke the mandatory triggers described above, *we conclude that the existence of even one such switch might in some cases justify a state finding of no impairment, if it determines that the market can support 'multiple, competitive supply.'"*) (Citations omitted, emphasis added).

For unbundled dark fiber, DS1, and DS3 dedicated transport facilities the FCC authorized state commissions to determine the specific routes that meet one or both of two objective triggers – which show that CLECs are already providing non-ILEC transport facilities, either to themselves (self-provisioning trigger) or to other carriers (wholesale trigger). If a state commission finds that either trigger is met for a route, the state commission "must make a finding of non-impairment," and "the incumbent LEC will no longer be required to unbundle that transport along that route[.]" *TRO* ¶¶ 400, 411; *see also TRO* ¶ 405.

1996, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 03-36 (rel. August 21, 2003) ("TRO").

Likewise for unbundled dark fiber, DS1, and DS3 hi-cap loop facilities serving the enterprise market, the FCC authorized the state commissions to determine the specific customer locations that meet one of two objective triggers — which show that CLECs are already providing non-ILEC hi-cap loop facilities, either to themselves (self-provisioning trigger) or to other carriers (wholesale trigger). If a state commission finds that either trigger is met for a specific loop capacity at a specific customer location, the state commission must make a finding of non-impairment, and the ILEC will no longer be required to unbundle that loop capacity to that customer location. *TRO* ¶ 328; *see also* 47 C.F.R. §51.319(a)(4)-(6).

Q. IS VERIZON MA OFFERING ANY EVIDENCE OF "POTENTIAL DEPLOYMENT" IN THIS CASE?

A. No. As Verizon MA has stated from the outset, it does not intend to present evidence of "potential deployment" in this case. Therefore, CLEC claims about economic and operational impairment factors that might affect a "potential deployment" analysis are not relevant to this case. Instead, we rely exclusively on our satisfaction of the self-provisioning trigger, which looks only to *actual* CLEC deployment of mass market switching, and on the self-provisioning and wholesale triggers for transport and loops. While the CLECs recognize this in their testimony, they continue to raise potential deployment arguments especially with respect to mass market switching. The FCC's objective triggers, however, are not subject to these irrelevant arguments, which cannot be permitted to color the Department's application of the triggers.

Q. THE CLECS RAISE VARIOUS ALLEGED ECONOMIC AND OPERATIONAL BARRIERS TO COMPETITIVE ENTRY INTO THE MASS MARKET, SUCH AS ISSUES REGARDING THE CUTTING OVER OF LOOPS TO A CLEC'S SWITCH, AVAILABILITY AND COST OF COLLOCATION SPACE, FUNCTIONALITY OF VERIZON'S OPERATIONS SUPPORT SYSTEMS ("OSS"), DEPLOYMENT OF IDLC, AND COSTS TO CLECS OF DEPLOYING THEIR OWN SWITCHES. ARE THESE CLAIMS RELEVANT TO THE TRIGGERS RELIED ON BY VERIZON MA IN THIS PROCEEDING?

A. No. As noted in its Initial Panel Testimony and Supplemental Testimony, Verizon MA seeks the elimination of unbundled access to mass market circuit switching in the Boston-Cambridge-Quincy, Providence-New Bedford-Fall River, Springfield, and Worcester MSAs based on its satisfaction of the *TRO*'s self-provisioning trigger. In its Initial Panel Testimony, based on Verizon's internal data, Verizon MA identified 10 unaffiliated CLECs serving mass market customers in the Boston-Cambridge-Quincy MSA; 5 serving mass market customers in the Providence-New Bedford-Fall River MSA; 4 serving mass market customers in the Springfield MSA; and 7 serving mass market customers in the Worcester MSA. In its Supplemental Panel Testimony, Verizon MA presented additional evidence taking into account information received from CLECs in response to the Department's information requests. That data confirmed that CLECs are using their own switches to provide voice grade service that satisfies the FCC's mass market switching non-impairment triggers in the markets identified in the Initial Panel Testimony.

Verizon MA has also demonstrated satisfaction of the objective triggers with regard to specific dedicated transport routes and specific customer locations for high capacity loops.

Thus, the CLECs' allegations of operational or economic impairment do not undercut and, in fact, are not relevant to this showing. The *TRO* unequivocally "require[s] state commissions to find 'no impairment' in a particular market when either [the self-provisioning trigger or the competitive wholesale facilities] trigger is satisfied." *TRO* ¶ 498.

Q. HAVE THE CLECS IDENTIFIED "EXCEPTIONAL SOURCES OF IMPAIRMENT" THAT WOULD JUSTIFY THE FILING OF A PETITION TO THE FCC FOR A "WAIVER" OF THE MANDATORY FINDING OF NO IMPAIRMENT?

A. No, they have not. The FCC permits a state to petition the FCC for waiver of the mandatory triggers where there is such an exceptional source of impairment that "service to mass market customers is foreclosed even to carriers that self-provision switches." *TRO* ¶ 503. None of the witnesses claimed that these operational and economic issues were exceptional sources of impairment, and no witness claims to put forward such evidence. In any event, the claims of operational and economic problems are the same type of arguments that the CLECs made before the FCC in the *TRO* proceeding, which the FCC considered in the *TRO* when it established the triggers in the first place. As the FCC clearly indicated, "we believe the existence of three self-provisioners of switching demonstrates adequately the technical and economic feasibility of an entrant serving the mass market with its own switch, and

indicates that existing barriers to entry are not insurmountable." *TRO* ¶ 501. The "exceptional sources of impairment" cannot include the same type of economic and operational considerations that the FCC already considered in establishing the triggers.

III. MASS MARKET SWITCHING

A. THE DISTINCTION BETWEEN MASS MARKET AND DS1 ENTERPRISE CUSTOMERS

Q. IS THERE CONSENSUS AMONG THE PARTIES AS TO THE CUT-OFF POINT BETWEEN MASS MARKET CUSTOMERS AND DS1 ENTERPRISE CUSTOMERS?

A. There appears to be. No party disputed Verizon MA's proposal that if a CLEC has made the economic decision to treat the customer as a mass market customer and to serve the customer location using voice-grade loops, then the DS0 lines at that customer location should be counted as such for purposes of the switching impairment analysis.

Q. DR. MAYO ON BEHALF OF AT&T (AT 19-28) AND DR. PELCOVITS ON BEHALF OF MCI (AT 56-58) DISCUSS THEIR VIEWS OF THE TRIGGERS. WHAT ARE TRIGGERS AND WHY DID THE FCC DECIDE TO USE A TRIGGERS APPROACH TO DETERMINE WHETHER ILECS SHOULD BE RELIEVED OF CERTAIN UNBUNDLING OBLIGATIONS?

A. The FCC describes triggers as "a principal mechanism for use by states in evaluating whether requesting carriers are in fact not impaired in a particular

market," and has emphasized that they are "keyed to objective criteria" and "provide bright-line rules."[2] The FCC has also highlighted that the use of objective triggers can expedite proceedings, noting that the triggers allow state commissions to "avoid the delays caused by protracted proceedings and can minimize administrative burden."[3]

Triggers are objective measures of CLEC competitive activity, which are to be used by state commissions for determining the degree of competition in a particular market and, therefore, whether ILECs should be relieved of certain unbundling obligations. In this proceeding, the trigger that determines whether Verizon MA must continue to offer switching for CLECs serving the mass market is whether there are at least three unaffiliated CLECs serving mass market customers in a particular market with the use of their own switches.

Because determining the degree of competitive activity in a particular market can be a complicated undertaking, subject to considerable debate and disagreement among economists and policymakers, the use of objective triggers is a way to preserve the resources that would otherwise be consumed in such debates, and provide for expedited decision making on the part of state commissions. It is relatively straightforward to determine whether an ILEC has or has not met a particular objective trigger.

Moreover, because there can be several different geographic markets in every ILEC territory—as we discuss below, the relevant geographic market is the

[2] *TRO* ¶ 498.

[3] *TRO* ¶ 498.

MSA—the use of objective triggers substantially reduces the amount of resources and time that state commissions must devote to the issue. Without the use of objective triggers, the state commission would need to conduct more resource-intensive proceedings that apply to the different geographic markets, thus prolonging the time required to reach a decision. Though it is possible that the triggers may be overly conservative and relieve ILECs of unbundling obligations only after the time when sound economic principles would call for relief, the desire to minimize regulatory debate and provide a straightforward and expedited approach to relieving ILECs of unbundling obligations is the reason for the use of objective triggers.

B. APPLICATION OF THE TRIGGER IN THE RELEVANT MARKET

The Concept of a Geographic Market

Q. DR. PELCOVITS (AT 37) SUGGESTS THAT THE RELEVANT GEOGRAPHIC MARKET IS, AT A MAXIMUM, THE WIRE CENTER. DO YOU AGREE WITH HIS POSITION

A. No. Sound economic principles and a number of FCC policy statements—contrary to Dr. Pelcovits' position—support the conclusion that the relevant geographic market is the MSA, not the individual wire center. This section provides the basis for that conclusion.

Q. HOW DO ECONOMISTS DEFINE A GEOGRAPHIC MARKET?

A. A geographic market area is one in which sellers provide products or services that customers treat as substitutes for one another and thus which compete against one another. As a leading text describes the concept:

> The geographic limit of a market is determined by answering the question of whether an increase in price in one location substantially affects the price in another. If so, then both locations are in the same market.[4]

For mass market local telephone service, carriers offering mass market local telephone service in the core of an urban area would compete in the same geographic market as carriers offering local service in a close suburb because reductions in local exchange prices in the suburb could lead to lower prices in the core area. This would happen because carriers advertise and promote mass market services on a metropolitan-wide basis, and customers in the core area would consequently expect to pay the same prices advertised for services in the suburb. Conversely, if a firm attempted to raise rates in the suburb, a competitor in the core area could quickly expand its business in the suburb using the same switch and the same mass marketing tools, placing downward pressure on the prices in the suburb.

Q. DOES THE ANALYSIS OF THE GEOGRAPHIC SCOPE OF THE RELEVANT MARKET IN THE CASE OF TELECOMMUNICATIONS DIFFER IN DETAIL FROM THE TYPICAL DELINEATION OF THE GEOGRAPHIC DIMENSIONS OF A PRODUCT?

[4] D.W. Carlton and J.M. Perloff, *Modern Industrial Organization* (Harper Collins 2d ed. 1994), at 807. Similarly, the *Horizontal Merger Guidelines* (Section 1.2.1) consider firms at different locations to be in the same market when a potential price increase by one firm (assuming other firms maintain their current prices) would be unprofitable, because customers would shift to the products of firms at other locations in the same geographic market.

A. To some extent. The typical case, (*e.g.*, a merger analysis), starts with the products of the firm(s) in question and then poses the question of whether customers would shift to the products of firms *at other locations* in the event of a price increase by the reference firm(s). That is, firms are viewed as having precise locations; consequently, considerations such as transportation costs come into play when determining whether customers would shift their purchases to the competing firms. In contrast, telecommunications carriers have switches that can reach major portions of the geographic market area and market their services throughout the geographic market. Indeed, CLECs frequently offer service (using resale or UNE-P) in geographic areas where they have no facilities, so the notion of identifying a firm with a location at which it provides service makes less sense for telecommunications carriers than (for example) cement manufacturers.

Q. IN ASSESSING WHETHER THE ABSENCE OF UNBUNDLED LOCAL SWITCHING WOULD IMPAIR ENTRY INTO MASS MARKET LOCAL EXCHANGE SERVICES, HOW WOULD AN ECONOMIST DETERMINE THE GEOGRAPHIC SCOPE OF THE MARKET?

A. The obvious touchstone is the FCC's market-definition rule, which specifies that:

> A state commission shall define the markets in which it will evaluate impairment by determining the relevant geographic area to include in each market. In defining markets, a state commission shall take into consideration the locations of mass market customers actually being served (if any) by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets profitably and efficiently using currently available technologies. A state

commission shall not define the relevant geographic area as the entire state.[5]

In addition to the specific requirements of the rule, paragraphs 495-96 of the *TRO* refer to other factors that a state commission may consider in defining the geographic market. For example, in paragraph 495, the FCC stated: "states should not define the market so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market."

All in all, however, the most significant factor is where CLECs have chosen to enter and compete for mass market customers through their own switches and the areas that they do serve and could serve using those switches. The FCC places heavy emphasis on actual marketplace evidence throughout the *TRO*. At paragraph 93, for example, the FCC states, "As we anticipated in the *Triennial Review NPRM*, we agree with commentators that argue that actual marketplace evidence is the most persuasive and useful kind of evidence submitted. In particular, we are most interested in granular evidence that new entrants are providing retail services in the relevant market using non-incumbent LEC facilities…." The market-entry evidence presented by Messrs. Conroy and White in their Initial and Supplemental Testimony shows where CLECs are providing mass market switching services and implicitly reflects the CLECs' own

[5] 47 C.F.R. § 51.319(d)(2)(i).

economic and business evaluation of all the other potentially relevant factors listed in paragraphs 495-96.[6]

Q. IS THE ANALYSIS UNDER THE FCC'S RULE IN REASONABLY CLOSE ALIGNMENT WITH THE TRADITIONAL ECONOMIC APPROACH TO GEOGRAPHIC MARKET DETERMINATION?

A. Yes. The competing firm can be thought to be located at the location of its switch and to offer the local exchange service product at that location. In order to reach customers throughout the market, the firm incurs "transportation costs" in the form of outlays for unbundled loops, transport of traffic between its switch and ILEC end-offices, certain non-recurring charges, and the like.

Specifically, from the perspective of the CLEC, two related considerations come into play, which together determine the geographic area in which the CLEC chooses to compete for mass-market services. First, the CLEC incurs fixed costs (costs insensitive to the number of customers) when it chooses to locate its switch and market its services following the contours of the media markets. That is, when a CLEC enters using mass-market advertising, it has implicitly chosen to reach all potential customers in the geographic area served by the media. Thus, to serve mass-market customers, CLECs implicitly offer service to a geographic area consisting of the intersection of the areas (i) served by a switch and (ii) corresponding to media market geographic reach. Second, the CLEC must decide how to serve customers in particular ILEC wire centers to which it has already offered service: whether to incur fixed costs of collocation or to serve the

[6] Initial Panel Testimony at 5-26 and Attachments 1-4; Supplemental Panel Testimony at 1-5 and

customers through EELs or resold ILEC services. Putting these two types of costs together, the CLEC entrant determines that it is likely to be profitable to serve this area—*i.e.*, the intersection of the reach of a switch and the reach of mass media—given the most efficient way to connect customers in different ILEC wire centers to its switch.

Economic analysis, of course, also takes into account actual market activity to date, because that indicates how competitors themselves have balanced the various considerations that go into entering a market. In Massachusetts, CLECs have deployed their own switches to serve the Boston, Providence, Springfield and Worcester MSAs. These switches have wide geographic reach (as wide as an entire MSA) and represent a sunk investment. In using that investment, CLECs have served mass market and other customers across much of the MSA. Given the MSA-wide coverage of major media outlets and the CLECs' incentives to use fixed investment to full capacity, this geographic scope of entry is exactly what one would expect, and CLECs can be expected to continue expanding the scope and extent of their facilities-based services throughout the MSA.

Q. WHAT GEOGRAPHIC AREA WILL THIS ANALYSIS PRODUCE AS A MARKET DEFINITION?

A. This analysis of how CLECs enter local exchange markets, together with the economic definition of a relevant geographic market discussed above, shows that the MSA is the best readily-available geographic area that corresponds to the

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Attachment 1.

concept of the geographic market. In individual circumstances, media geographic contours may not align perfectly with MSA boundaries, and switches can certainly serve larger areas than individual MSAs. Circumstances of individual CLECs may favor entry into different geographic areas: *e.g.*, cable companies may initially serve telephone customers in their cable footprint, or some CLECs may offer service in contiguous areas in a neighboring MSA. Nonetheless, because the MSA approximates how mass-market services are sold (through mass-market advertising) and how services are provided (with a switch that serves a large geographic area), the MSA is the best available answer to the question: In what geographic areas are CLEC and ILEC services likely to compete?

Q. WHAT ARE METROPOLITAN STATISTICAL AREAS?

A. In concept, a MSA is a county or group of counties having a large clustered population, including adjacent areas having a high degree of community of interest with the core population center. Specifically, the Office of Management and Budget (OMB) defines MSAs as a county or group of counties with (1) a city of population 50,000 or more or (2) an urbanized area (as defined by the Census Bureau) of population of at least 50,000 consisting of one or more counties. According to the OMB:

> The general concept of a Metropolitan Statistical Area or a Micropolitan Statistical Area is that of an area containing a recognized population nucleus and adjacent communities that have a high degree of integration with that nucleus. Metropolitan Statistical Area.—A Core Based Statistical Area associated with at least one urbanized area that has a population of at least 50,000.
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> The Metropolitan Statistical Area comprises the central county or counties containing the core, plus adjacent outlying counties having

a high degree of social and economic integration with the central county as measured through commuting.[7]

MSAs are carefully developed to reflect demographic and commercial reality based on the application of OMB standards to census data (including commuting patterns). MSAs have a "high degree of integration" with a recognized population nucleus and recognize "economic linkages between urban cores and outlying, integrated areas."[8]

Q. WHY DO THESE AREAS DETERMINE REASONABLE BOUNDARIES FOR THE GEOGRAPHIC SCOPE OF LOCAL EXCHANGE MARKETS?

A. In general, we would expect carriers to try to serve at least the MSA because the high degree of social and economic integration present in such areas implies that firms would generally market services throughout this geographic area.[9] Mass-market entry is associated with media advertising aimed at a geographic area at least as large as the MSA; thus, we would expect the carrier to try to serve the entire MSA because, if a carrier advertised throughout the MSA, but did not serve the entire area, that would raise its costs and potentially harm its reputation. Service offerings, including offerings of discounted bundled services, are frequently rolled out by individual MSA since that is the geographic area covered

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[7] Currently defined metropolitan and micropolitan statistical areas are based on application of the 2000 standards (which appeared in the Federal Register on December 27, 2000) to Census 2000 data and were announced by OMB effective June 6, 2003.

[8] 65 Fed. Reg. 82228 (2000).

[9] While these incentives clearly apply to new entrants, there may be circumstances where a CLEC's existing facilities or customer base may dictate serving, at least initially, a geographic area different from an MSA. Examples might include cable companies that choose to provide telephone service to their video footprint or CLECs that expand across an MSA boundary into an area contiguous with their existing facilities. However, of all the existing, pre-defined geographic areas, the MSA comes closest to encompassing the area in which local exchange competition takes place.

by newspapers and local radio, television and cable media.[10] Thus, all potential customers in the MSA are exposed to the same mass-market advertising messages.

By the same token, entry into local exchange markets from outside the MSA (*e.g.*, in response to a price increase) may be more difficult because potential new entrants have no existing customer base and little brand awareness, except that engendered by the provision of other related services (*e.g.*, AT&T or MCI's long distance services) or by national marketing plans (*e.g.*, MCI's The Neighborhood). Furthermore, potential customers served by ILEC central offices too small or too sparsely populated to justify the CLEC's cost of collocation or backhaul transport to the switch are still exposed to the same marketing messages and can be served through resale of the ILEC's retail local exchange service.

In this sense, mass-market consumers in any two central offices in the same MSA generally face similar competitive conditions and have access to similar competitive alternatives. In addition, as the FCC observed in its *Pricing Flexibility Order*, at ¶ 72, the MSA reflects the primary geographic scope of competitive entry from the CLEC's perspective, because the entry decision is generally undertaken first at the level of the MSA.[11] Consistent with the

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

[11] *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition of U S West Communications, Inc. for Forbearance from Regulation as a dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, CCB/CPD File No. 98-63 and

geographic market definitions favored by recent FCC decisions (discussed below) and the geographic market analysis generally used in the antitrust and economic context, such customers are thus part of the same geographic market.

Previous FCC Determinations of Geographic Markets

Q. HAS THE FCC RECENTLY PROVIDED GUIDANCE ON HOW TO DEFINE THE RELEVANT GEOGRAPHIC MARKET IN ACCORDANCE WITH THE *TRO*?

A. Yes. Recently in its *Brief for Respondents* before the United States Court of Appeals for the District of Columbia Circuit, the FCC explained the guidance it gave to the states as it pertains to market definition.[12] On page 40 the FCC stated:

> Under this standard, the self-provisioning trigger would be met, at a minimum, not only at locations in which three competitive providers are *actually serving* mass market customers with non-ILEC switching, but also at locations where three competitive providers are "*holding out*" the availability of such service to mass market customers.
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> Footnote: "This focus on the locations in which customers face similar competitive choices is consistent with Commission precedent analyzing geographic markets in the merger context. *See e.g., Application of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985 (¶54) (1997); *Application of EchoStar Communications Corp*. 17 FCC Rcd 20559 (¶¶119-120)(2002).

As described above, mass market entry is often associated with media advertising aimed at a geographic area at least as large as the MSA. That is,

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CC Docket No. 98-157. Fifth Report and Order and Further Notice of Proposed Rulemaking, Released August 27, 1999 ("*Pricing Flexibility Order*").

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

CLEC advertising is conducted at least at the MSA level, which means that CLECs are "holding" themselves out to offer service at the MSA.

Q. HAS THE FCC PREVIOUSLY DETERMINED THAT MSAS ARE THE CORRECT GEOGRAPHIC SCOPE OF LOCAL EXCHANGE MARKETS?

A. Yes, in at least three contexts. In its just-released order that allows customers to port their wireline telephone numbers to wireless carriers, the FCC implemented this requirement on a MSA basis.[13] This order is especially germane to this proceeding, because, as four of the five FCC Commissioners explicitly observed in their separate statements, one of the major implications of the order is to substantially increase the intermodal competition between wireline services (including ILEC offerings) and wireless services.

Second, in its assessment of how the merger of formerly independent ILECs would affect local exchange competition in the merged territories, the FCC identified specific metropolitan areas as the markets subject to a competitive assessment.[14] The FCC identified the metropolitan scope of advertising markets as a relevant factor in defining the market.[15]

Third, in its order granting ILECs price flexibility for certain interstate services, the FCC concluded:

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

[14] *See, e.g., Bell Atlantic-NYNEX Order* ¶ 43.

[15] *Id.*,at ¶ 55.

> We will grant pricing flexibility relief for both Phase I and Phase II on an MSA basis. We agree with those commenters that maintain that MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition.[16]

When properly interpreted, the FCC's market definition rule in the *TRO* is entirely consistent with its prior emphasis on the "scope of competitive entry" used to define geographic markets in its price flexibility order.

In addition to defining geographic markets for local competition, the FCC has used MSAs in numerous other proceedings, such as in its Biennial Review of spectrum aggregation limits for wireless carriers,[17] in defining the geographic markets for programming distributors[18] and in conducting lotteries and granting the right to acquire cellular telephone licenses.[19] It also used the MSA as the geographic basis for its switching exemption in the *UNE Remand Order* for CLECs serving enterprise (4-plus line) customers.[20]

Q. DO ANY OF THESE PREVIOUS FCC USES OF MSAS AS GEOGRAPHIC MARKETS PERTAIN PARTICULARLY TO THE MASS-MARKET LOCAL EXCHANGE SERVICES AT ISSUE IN THIS CASE ?

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[16] *Pricing Flexibility Order* ¶ 72.

[17] *In re 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, 15 FCC Rcd. 22072 (October 17, 2000), ¶ 16.

[18] *In re Implementation of Section 304 of the Telecommunications Act of 1996*, 13 FCC Rcd. 14775 (June 11, 1998), ¶ 108.

[19] The Federal Trade Commission has also noted that MSAs can serve as "close proxies" for detailed geographic analysis and has frequently used MSAs to define geographic markets in the number of cases involving retail sales to consumers. *See In the Matter of CVS Corporation*, File No. 971-0060, Analysis to Proposed Consent Order to Aid Public Comment (June 1997).

[20] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3699, *("UNE Remand Order")*, ¶¶ 276-298. Specifically, ILECs are exempted from having to provide unbundled switching to CLECs serving customers with four or more lines in density zone one of the top 50 MSAs.

A. Yes. The *TRO* states [at ¶ 497] that the product market for analyzing mass-market switching is mass market local exchange service. In its use of MSAs as the geographic market for mass market services in the Bell Atlantic-NYNEX merger Order, the FCC explicitly stated that

> We conclude first that the relevant market is the provision of local exchange and exchange access services to residential and small business customers, particularly in LATA 132. There is significant evidence that bundled local and long distance services may become a relevant product market as well as firms begin to enter complementary markets. Because there is also significant evidence that the New York metropolitan area, including northern New Jersey, may likely become a relevant geographic market as competition develops, we will treat the New York metropolitan area as a relevant geographic market as well. [footnote omitted] The record further suggests that other geographic markets may also be relevant, including Boston, Massachusetts and Providence, Rhode Island.[21]

Thus, both the geographic and product markets are the same in the FCC's Bell Atlantic-NYNEX merger analysis and the *TRO*. The FCC further explained its reasoning in the merger case,

> We conclude that LATA 132, which essentially covers the same territory as NYNEX's New York Metropolitan Regional Calling Area, currently constitutes a relevant geographic market for the three product markets. [footnote omitted] At present, any carrier that offers service in the New York Metropolitan Regional Calling Area offers that service to all customers in that area. Thus, with respect to mass market customers, each customer in the area can select service from the same alternative providers. [footnote omitted] Applicants appear to concede that LATA 132 is a relevant geographic market. [footnote omitted] Additionally, the New York television advertising market, as well as most of the New York radio advertising market, encompasses all of LATA 132. [footnote 131: The Nielsen New York TV Designated Market Area (DMA) includes the following radio Metro markets: New York; Nassau-

[21] *Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, *Memorandum Opinion and Order, 12 FCC Rcd 199985 (1997) ("Bell Atlantic-NYNEX Order")* at ¶ 43.

> Suffolk; Stamford-Norwalk, CT; Morristown, NJ; Monmouth-Ocean, NJ; Poughkeepsie, NY; and Newburgh-Middletown, NY (Mid-Hudson Valley). Broadcasting & Cable Yearbook, C-198 (R.R. Bowker 1997). The Yearbook also contains a list of radio stations in the New York area. *Id.* at B307-308. *See also* BIA Publications, Inc., Radio and Television Master Access Database (1997)]
>
> …We also conclude, however, that as new entry occurs and customers in a broader area come to have the same choice among competitors, there may well be a wider geographic market. We therefore will also treat the New York metropolitan area, including northern New Jersey (the "New York metropolitan area") as a relevant market. There are economies of scope for advertising in this market. [footnote omitted] The television advertising market, as well as most of the radio advertising market, of New York City extends into northern New Jersey. [footnote: *See*, *supra*, note 131]. Many residents from New Jersey work or travel to New York on a regular basis, making it increasingly likely that the New York advertising market reaches these potential consumers. Bell Atlantic itself advertises in New York media in order to target New Jersey residents. [footnote omitted] The record also contains other evidence indicating that many companies, including Bell Atlantic, believe the New York Metropolitan market may extend beyond LATA 132. [footnote omitted] To the extent, however, that the market would permit price discrimination between services offered in New York City and those in northern New Jersey, northern New Jersey may continue to be a separate geographic market. [footnote omitted][22]

Thus, in determining the geographic market for mass market local exchange competition, the FCC explicitly took into account economies of scope in mass-market advertising.

Finally, that this approach to defining the geographic market applies to the trigger analysis for mass-market switching was made explicit in the FCC's explanation of its geographic market requirements in the *TRO* to the D.C. Circuit Court:

[22] *Id.*, at ¶¶ 55-56.

> This focus on the locations in which customers face similar competitive choices is consistent with Commission precedent analyzing geographic markets in the merger context. *See e.g., Application of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985 (¶54) (1997); *Application of EchoStar Communications Corp*. 17 FCC Rcd 20559 (¶¶119-120)(2002).[23]

Response to MCI's Wire Center Proposal

Q. MCI PROPOSES INDIVIDUAL WIRE CENTERS AS THE APPROPRIATE GEOGRAPHIC MARKET IN THIS CASE.[24] DO YOU AGREE WITH THIS ASSESSMENT?

A. No. Neither economic theory nor the actual marketplace evidence in Massachusetts is consistent with the use of ILEC wire centers as geographic markets. As a matter of theory, the wire center is far too small to exhaust the economies of scope and scale in local switching, particularly for a CLEC that cannot expect to serve the majority of customers in each ILEC wire center. Similarly, an individual wire center is too small to justify the fixed and sunk costs of mass-market advertising, as well as the costs of establishing sales, marketing and customer-care organizations. As a matter of fact, the actual marketplace evidence in Massachusetts shows that entry and provision of mass-market services by switch-based CLECs is concentrated in the Boston, Providence, Springfield, and Worcester MSAs, but is not limited to individual wire centers within those MSAs.

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[23] *Brief for Respondents*, On Petition for Review of an Order of the Federal Communications Commission, *United States Telecom Ass'n v. FCC*, No. 00-1012 (D.C. Cir.)(filed December 31, 2003) ("*Brief for Respondents*") at 40.

[24] Pelcovits Testimony at 35-40.

Q. DO OTHER CLECS AGREE THAT WIRE CENTERS ARE AN APPROPRIATE GEOGRAPHIC MARKET?

A. No. Mr. Gillan's tentative geographic market definition in this proceeding is far larger than a wire center.[25] Furthermore, in California, AT&T's economic expert recognized that the application of the FCC's rule would likely produce geographic areas wider than single wire centers:

> [I]t is unlikely that the "efficient CLEC" would enter a state intending to serve only a single wire center. Rather, the model CLEC would likely map out a footprint that is large enough to permit it to realize necessary economies of scale and to market to a broad range of potential customers. *In most cases, this will approximate an MSA, LATA, or similarly broad area*, while in some very dense areas it may be only a portion of such an area, depending on the local demographics.[26]

Likewise, in Pennsylvania, AT&T's economic expert, Dr. Mayo, observed that "Due to economies of scale associated with local exchange switches, the relevant geographic market is likely to be broader than single wire centers."[27] No other party to this proceeding suggests that single switches cannot serve areas as large as or larger than a MSA, nor does any party deny that mass market advertising and promotion typically covers an entire MSA.

Q. HAVE ANY OTHER STATE COMMISSIONS ADDRESSED THE USE OF WIRE CENTERS AS THE GEOGRAPHIC MARKET FOR THIS PURPOSE?

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[25] Gillan Testimony at 16-21.

[26] Opening Testimony of Professor Nicholas S. Economides on Behalf of AT&T Communications of California, Inc. (U 5002 C), Nine Month Phase, (Rulemaking 95-04-043, Investigation 95-04-044), filed December 12, 2003, at.40 [emphasis added].

[27] Dr. John Mayo, Before the Pennsylvania Public Service Commission, AT&T Statement 2.0, Docket No. I-00030099, January 13, 2003, at 19.

A. Yes. In a recent decision, the Ohio Commission rejected the use of the wire center as the geographic market for the purpose of the impairment analysis, finding that the wire center was too small to exhaust economies of scale and scope. The Ohio Commission found that "there is no evidence in the record that any switch-based competitive carrier has entered a market and provided services in only a single wire center in the state of Ohio."[28]

Q. ARE THERE ANY OVERARCHING FLAWS IN DR. PELCOVITS' CONCLUSION THAT THE GEOGRAPHIC MARKET SHOULD BE THE ILEC WIRE CENTER?

A. Yes. Aside from the fact that he pays little heed to the FCC's actual market-definition rule, Dr. Pelcovits' approach suffers at the outset from some key flaws and erroneous assumptions. To begin with, he describes the Department of Justice *Horizontal Merger Guidelines'* method of specifying a geographic market and stresses the (correct) fact that the *Horizontal Merger Guidelines*' process begins with the smallest possible geographic market and then tests the possibility of expanding it. From that premise, however, he leaps to the conclusion that the analysis necessarily must *result* in a narrow market definition as well. Next, Dr. Pelcovits introduces the term "unit of analysis" [at 37] and uses it somewhat interchangeably with the concept of a geographic market. His view seems to be that because data are obtainable at the wire center level, each wire center should be viewed as a separate "unit of analysis" and thus as a separate geographic

[28] In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching in the [SBC Ohio and Cincinnati Bell Telephone Company] Mass Market, The Public Utilities Commission of Ohio, *Opinion and Order*, Case Nos. 03-2040-TP-COI, 04-34-TP-COI and 04-35-TP-COI, January 14, 2004 ("Ohio Order") at 30.

market. That leap of logic is also not well founded. Just because data may be conveniently available for individual wire centers does not automatically mean that (i) CLECs are able to take advantage of scale and scope economies within individual wire centers and/or (ii) findings of impairment would be different for groups of contiguous wire centers within a wider area, such as an MSA.

In fact, as demonstrated in Verizon MA's Initial and Supplemental Panel Testimony, (i) CLECs' actual entry decisions demonstrate that they are able to enjoy economies of scale in deploying switches that serve multiple wire centers and (ii) that once they have entered within a particular MSA, CLECs generally serve customers broadly within the MSA, demonstrating that findings of impairment are not likely to differ across the wire centers within an MSA.

Second, Dr. Pelcovits [at 35] asserts that the analysis "should be focused on the actual customer locations that CLECs serve using their own switches," as opposed to the area served by the switch. But restricting analysis to where CLECs currently choose to provide switching has no place in the FCC's Rules or in an economic definition of the geographic market. The actual locations of mass-market customers served by switch-based CLECs is the *starting point* for the analysis under the FCC's market-definition rule, and those locations together comprise the minimum[29] market where CLECs have found switch-based entry to be feasible. The FCC's rule does not stop there, however, and neither can the analysis. Just as the DOJ/FTC *Horizontal Merger Guidelines* recognize that

[29] Current locations comprise the *minimum* area in which switch-based entry is feasible because the fact that some CLECs currently expand into additional wire centers using UNE-P does not constitute evidence that UNE-L or facilities-based entry into those wire centers is impaired.

geographic markets can be larger than the area currently being served,[30] so too did the FCC adopt additional criteria that can be used to define a geographic market larger than the locations of current customers. For example, suppose mass market customers in ILEC wire center A can be efficiently served from the CLEC's currently installed switch, but the CLEC currently serves no mass market customers in A using its switch that currently serves customers in wire center B. Prices and terms and conditions of mass market services that a hypothetical monopolist could profitably offer in wire center A would surely be affected by the CLEC's prices and service offerings in wire center B in the MSA. Hence, by the market definition process in the *Horizontal Merger Guidelines* and in the FCC's rule, wire centers A and B must be in the same geographic market.[31]

Third, Dr. Pelcovits [at 43] limits the relevant geographic market to wire centers currently served by CLECs because CLECs would incur sunk costs of collocation to establish service in a new wire center. But Dr. Pelcovits provides no evidence to suggest that collocation costs (and other fixed costs of serving customers using UNE-L) are "significant" for a CLEC that has already incurred the costs of establishing mass-market services in neighboring wire centers and has already (i) purchased and installed a switch that (if sized efficiently) has excess capacity at current demand, (ii) established a mass-market marketing organization and customer service centers that can serve the wire center, and (iii) purchased

[30] Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, April 2, 1992, § 1.21.

[31] Note that this analysis is <u>not</u> one of potential or future competitive effects. Rather, the fact of competitive alternatives in wire center B affects the <u>current</u> profit-maximizing price of the hypothetical monopolist in wire center A.

and implemented mass market advertising that reaches all potential customers in that wire center.

Fourth, Dr. Pelcovits opines [at 33] that: "[i]t would be wrong as a matter of economic principles, and contrary to the purpose of the trigger analysis, to lump together multiple geographic areas, each of which has fewer than three competitive suppliers, and treat those as a single geographic market in which the trigger is met." Dr. Pelcovits has put the cart before the horse. One cannot know whether one is "lump[ing] together multiple geographic areas" until one defines the areas – and defining the areas is the threshold task before the Department. The number of competitive suppliers or uncommitted entrants in a geographic area has nothing to do with the economic definition of a geographic market that Dr. Pelcovits, himself, has cited.[32]

Fifth, Dr. Pelcovits [at 39-40] points to variations in costs and revenues across wire centers and [at 42] claims that "[a] market definition that ignored these factors [*e.g.*, variations across wire centers] would fly in the face of the entire foundation of antitrust and regulatory economics." Again, variations in revenues and costs across wire centers affect the boundaries of the geographic market only to the extent that they prevent the actions of firms in one wire center from affecting the pricing decisions of firms in other wire centers. Whether

[32] *See, e.g.*, Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines*, April 2, 1992, Section 1.1.1: "Absent price discrimination, the Agency will delineate the product market to be a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price. That is, assuming that buyers likely would respond to an increase in price for a tentatively identified product group only by shifting to other products, what would happen? If the alternatives were, in the aggregate, sufficiently attractive at their existing terms of sale, an attempt to raise prices would result in a reduction of sales large enough that the price

variations in ILEC retail or UNE prices across density zones or rate groups are enough to limit geographic markets to those areas is an empirical matter. And the actual marketplace evidence cited in Verizon MA's Initial and Supplemental Panel Testimony shows that this is not the case. Thus, while competitive conditions may vary across the wire centers in the Boston, Providence, Springfield and Worcester MSAs, they do not vary enough that the variation has an important effect on the proportion of customers in the MSA that have switch-based CLEC alternatives or on the reach of individual competitors within those MSAs.

Q. DR. PELCOVITS ALSO CLAIMS [AT 36] THAT THE MOST ACCURATE GEOGRAPHIC MARKET DEFINITION WOULD TREAT EACH CUSTOMER LOCATION AS A SEPARATE MARKET. IS HE CORRECT?

A. No. Such a definition is inconsistent with both the FCC's market definition rule for mass market switching and the economic literature Dr. Pelcovits cites. The *TRO*'s requirement that the market not be defined so narrowly as to preclude CLECs from taking advantage of scale and scope economies mandates a geographic market much larger than individual customer locations.[33] And as a

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increase would not prove profitable, and the tentatively identified product group would prove to be too narrow."

[33] In particular, the *TRO* paragraph (309) that Mr. Pelcovits cites to define "considerations of practicality" instead speaks to the accommodation of the scale and scope economies that the *TRO* mass market switching geographic market definition rule requires: "in the mass market where revenues are small, customers are typically served in large groups, using uniform technologies and mass marketing and provisioning techniques to minimize the cost of serving each customer." Indeed, the trigger analysis in the *TRO* would make no sense if the FCC contemplated geographic markets consisting of single customer locations, since even where facilities-based competition was ubiquitous, mass market customers would never be served on a facilities basis by three or more CLECs at a single location.

matter of economic theory, customers at different locations would be in the same market because the prices competing firms would offer to customers at a particular location would be influenced by what was being offered in nearby locations. Finally, the FCC chose to define the market in terms of single customer locations in the case of loops, but conspicuously did not do so when it came to mass market switching.

Q. GIVEN THAT VERIZON MA HAS DONE NO STUDY OF CLEC ECONOMIES OF SCALE AND SCOPE, HOW DOES ONE KNOW IF THE GEOGRAPHIC MARKET VERIZON MA RECOMMENDS IS CONSISTENT WITH THE *TRO*?

A. One does not need a specific study to conclude that wire centers are too small for a CLEC to take advantage of the economies of scale and scope in serving its customers. Moreover, if the market definition phase of the trigger proceeding were to require an explicit study of CLEC economies of scale and scope in serving geographic areas larger than a wire center, the FCC's goal of a bright-line, objective trigger would be lost. Rather, basic economics identifies the sources of fixed costs incurred when a CLEC enters an MSA, and, as discussed above, previous FCC findings support the view that these costs (advertising, marketing, costs of the switch) can be efficiently shared across customers throughout a geographic area approximated by an MSA. Finally, and most persuasive, we do not observe facilities-based CLECs in Massachusetts (or anywhere else) entering and providing mass-market local exchange services in single wire centers. The evidence in Massachusetts shows that once CLECs provide switch-based services

to mass-market customers in an MSA, they tend to provide service across large portions of the MSA.

Q. DR. PELCOVITS CLAIMS (AT 39-40) THAT IT IS PRACTICAL TO CONDUCT AN IMPAIRMENT ANALYSIS AT THE WIRE-CENTER LEVEL. HAS THE FCC CONSIDERED THE PRACTICAL DIFFICULTIES OF ADMINISTERING RULES WHICH DIFFER ACROSS ILEC WIRE CENTERS?

A. Yes. From an implementation viewpoint, in its *Pricing Flexibility Order*, the FCC rejected the use of wire center areas for the geographic scope of a market, partly on the grounds of administrative cost (¶ 74).

CLECs Need Not Currently Serve the Entire Geographic Market

Q. DR. MAYO (AT 25-26) WOULD VIEW WITH SUSPICION CLECS THAT DON'T SERVE "A SIGNIFICANT SHARE" OF THE GEOGRAPHIC MARKET. IS THIS AN APPROPRIATE CONCERN FOR THE DEPARTMENT?

A. No. From an economic perspective, the fact that a CLEC in a particular MSA has not yet reached every wire center does not imply that "the natural presumption is that there are economic barriers to further expansion." (Mayo Testimony at 31). Profit opportunities vary by geographic areas within MSAs and CLECs, like any business, invest incrementally based on those profit opportunities. Deploying a telecommunications network and incrementally adding to the CLEC's existing network cannot be done overnight; it is a capital-intensive process. The fact that in any given MSA there are pockets of unserved areas does not mean that it is

necessarily unprofitable for a CLEC to serve those wire centers. In particular, the easy availability of UNE-P corrupts any inference regarding "economic barriers to further expansion" that could legitimately be drawn from the absence of switched-based mass market CLEC services in parts of an MSA; so long as CLECs can continue to rely on the UNE-P at below market prices, there is no incentive to expand even where there are no economic barriers.

Moreover, nothing in economics or the *TRO* requires that entrants serve a market ubiquitously in order to demonstrate that entry into that market is feasible and sustainable. In economics, once a firm has incurred the fixed costs of entry (in this case, the purchase and installation of a switch and marketing costs), it then pursues customers in that market roughly in the order of their profitability. Were the ILEC hypothetically to increase prices in a wire center where CLECs do not currently serve mass-market customers, it would raise the profitability of serving customers in that wire center. Retail prices above the competitive market level would thus not be sustainable in these circumstances because the major fixed costs of entry into the market would have already been incurred. Thus, applying the *Horizontal Merger Guidelines* approach to geographic market definition, we note that these wire centers (where CLECs do not currently serve customers) are nonetheless part of the MSA geographic market. A hypothetical monopolist of such a wire center could not hold price above the competitive market level without attracting competition from competitors already owning facilities and offering service in the market.

In addition, the FCC has already addressed this question and concluded that its choice of a level of competition in its trigger analysis (three, not four or two) accounts for the possibility that CLECs may not actually be providing service to mass-market customers using their own switches in all wire centers in the relevant geographic market. Its correction to ¶ 499 of the *TRO* makes it clear that geographic ubiquity is not required for CLECs to count as self-providers of switching services for the application of the retail trigger analysis. *See Errata*, CC Docket Nos. 01-338, 96-98, 98-147 (September 17, 2003) ¶ 21. The correction *eliminates* the requirement that the competitive switch providers counted in the trigger analysis "should be capable of economically serving the entire market, as that market is defined by the state commissions. This prevents counting switch providers that provide services that are desirable only to a particular segment of the market." Thus, the *TRO* explicitly requires the Department to *include* in its list of qualifying CLECs, those that do not currently serve customers ubiquitously throughout the geographic market. As the FCC explained to the D.C. Circuit Court of Appeals:

> The Commission provided significant guidance on market definition, directing that states "*must* take into consideration the locations of customers actually being served by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets economically and efficiently using currently available technologies." [ftnt: cite] Under this standard, the self-provisioning trigger would be met, at a minimum, not only at locations in which three competitive providers are *actually serving* mass market customers with non-ILEC switching, **but also at locations where three competitive providers are "*holding out*" the availability of such service to mass market customers**. [ftnt: This focus on the locations in which customers face similar competitive choices is

consistent with Commission precedent analyzing geographic markets in the merger context. See [cites].[34] [emphasis added].

Finally, economic theory does not require that "all or virtually all" customers have competitive alternatives in order that a market be effectively competitive. Economists recognize that competition occurs at the margin, and the presence of large proportions of infra-marginal customers does not mean that the market outcome will be anything other than competitive. For example, one can buy canned tomatoes infrequently at the grocery store and have no idea what the current market price for such tomatoes is or whether they can be purchased for a lower price at some other store. Many consumers are in the same situation. Nonetheless, the local grocery store cannot profitably increase the price of a can of tomatoes by a penny—or it would already have done so. The possibility of a small proportion of customers taking their business elsewhere is sufficient to discipline the canned tomato market, and the same principle applies to local telecommunications service.

The History of UNE-P Plays No Role In The Definition Of The Geographic Market

Q. VARIOUS CLECS, PRIMARILY AT&T AND MCI, HAVE SUBMITTED TESTIMONY DISCUSSING THE POTENTIAL IMPACT OF THIS CASE ON THE UNE PLATFORM. IS SUCH TESTIMONY RELEVANT TO GEOGRAPHIC MARKET DETERMINATION OR TO ANY OTHER ISSUES IN THIS CASE?

[34] FCC, Brief for Respondents, *United States Telecom Association, et. al., v. Federal Communications Commission and United States of America*, Case No. 00-1012 (and consolidated cases), United States Court of Appeals for the District of Columbia Circuit (December 31, 2003).

A. No. These concerns have nothing to do with the definition of the appropriate geographic market or the applications of the FCC's trigger analysis.

Q. WHAT IS MR. GILLAN'S BASIC APPROACH TO GEOGRAPHIC MARKET DEFINITION?

A. Mr. Gillan's "basic approach" [at 15] is to look "at areas served by a particular network element and determine whether an alternative could reasonably produce the same result." More specifically, Mr. Gillan looks at areas currently served by the UNE-P and asks whether the "same result" would occur if CLECs did not have access to unbundled local switching.

Q. IS THE PATTERN OF UNE-P DEPLOYMENT RELEVANT TO THE DEPARTMENT'S DETERMINATION OF THE GEOGRAPHIC MARKET?

A. No. The *TRO* [47 U.S.C. § 51.319(d)(2)(i)] specifies the process for the Department to define the geographic market in which to apply its trigger rules, and the process should not be modified to account for Mr. Gillan's (or anyone else's) policy or economic concerns. The reason is simple. All of those issues were considered by the FCC and discussed at length in the *TRO*. At the end of the day, they were embodied in the FCC's standard of three switch-based CLECs serving mass-market customers in the relevant geographic market. To reconsider these issues and, on their account, skew either the definition of the geographic market or the requirements that qualifying trigger CLECs must meet would violate the explicit terms of the *TRO* and would effectively double-count the weight that the FCC determined these factors should have.

The purpose of defining a geographic market under the FCC's rules is not to test whether UNE-L would produce the same competitive results as UNE-P in the same area. The purpose is to define the area of effective competition for mass market local exchange services, for purposes of then applying the FCC's triggers. Mr. Gillan, however, seeks to turn the inquiry into a results-oriented exercise, regardless of what the FCC's rules, and the purpose of those rules, might be. Moreover, at this point in time, after seven years of unbundling requirements that the courts have held were never lawful in the first place, and after seven years of TELRIC-based pricing that the FCC has now indicated may have resulted in prices below economic cost, there is simply no basis for assuming that areas served by the UNE-P represent any kind of benchmark. To the contrary, the main effect of the UNE-P has been to discourage facilities investment and to aid the spread of what the D.C. Circuit Court characterized as "completely synthetic competition."[35]

Q. **HAS THE OHIO COMMISSION REJECTED MR. GILLAN'S APPROACH TO DEFINING THE GEOGRAPHIC MARKET?**

A. Yes. In that proceeding, Mr. Gillan testified on behalf of AT&T and CoreComm, and the Ohio Commission rejected his approach to defining the geographic market. The Commission stated:

> Next, we address AT&T/CoreComm's statement that is appropriate that the Commission define applicable "geographic areas" that allow it to recognize the unique competitive signature of UNE-P and test it against other entry strategies and that if only UNE-P can sustain the competition levels throughout the defined area, then the competitors would be

[35] *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002).

impaired. We disagree with AT&T/CoreComm's attempt to redefine the impairment standards and the analysis that the Commission needs to perform in the next phase. The FCC, in the *Triennial Review Order*, already provided the interpretation of the "impair" standard. The FCC has established the trigger test and the economic and operational analysis to be used by state commissions in proceedings, such as the one before us, to reach a conclusion regarding the competitor's impairment. **AT&T/CoreComm's approach is an invitation to use a completely different test to assess whether competitive carriers are impaired without access to the unbundled local switching, and such and approach is inappropriate and therefore, rejected by the Commission.** [footnotes excluded, emphasis added].[36]

Q. DR. MAYO (AT 7-14) URGES THE DEPARTMENT TO CONSIDER IN THIS PROCEEDING INDUSTRY HISTORY AND THE TELECOMMUNICATIONS ACT OF 1996. DO YOU AGREE?

A. No, such a historical review is not necessary. The purpose of the trigger phase of the Department's impairment investigation for local circuit switching is simply to quantify deployment, not to measure market share, market power or the potential for additional entry or to assess the role of the local switching UNE in local exchange competition. As expressed in the *TRO* that established this proceeding: "Our triggers are based on our conclusion that actual deployment is the best indicator of whether there is impairment, and accordingly evidence of actual deployment is given substantial weight in our impairment analysis."[37] The required measure of actual deployment in any market is thus the list and count of the competitors that currently supply services to mass-market customers using their own switches. The link between deployment and the public policy goals of the FCC and the Department has already been subsumed in the FCC's

[36] *Ohio Order* at 33.

[37] *TRO* ¶ 461.

determination of the triggers and is not for a state commission to second-guess those conclusions.

Q. IS THE RELATIVE DEGREE OF COMMERCIAL DEPLOYMENT OF UNE-L VERSUS UNE-P A RELEVANT FACTOR IN THIS PROCEEDING?

A. No. The likely success of CLECs using UNE-L is not a relevant consideration in applying the FCC's triggers and market-definition rule. Those rules are silent regarding the success the CLEC will achieve once it has entered the market, saying nothing about future volumes or market shares that a CLEC must achieve in order to be treated as unimpaired. From an economic perspective, that aspect of the standard is correct. Commercial outcomes must be the result of the competitive *process* that the Telecommunications Act was intended to facilitate.[38] That competitive process would be utterly distorted and frustrated if infant-industry policies (such as mandatory unbundling at regulated prices) remained in place until the CLECs reached some predetermined target demanded by CLECs as part of the regulatory process.

Indeed, a characteristic of unregulated, competitive markets similar to telecommunications—containing a high proportion of fixed costs and experiencing rapid technical change—is that competitive outcomes (*e.g.*, what types of firms will enter (or leave) markets, what products will they offer, and what shares of the market they will realize) are impossible to predict. A corollary

[38] "To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new

is that regulatory attempts to predetermine such outcomes are at best futile and at worst positively harmful. As the former Chairman of the New York Public Service Commission (and founding father of the field of regulatory economics), Alfred Kahn, said twenty years ago:

> The lesson, in short, was that there was no rational halfway house between thorough regulation and free competition…regulation confronted with competition will have a systematic tendency either to suppress it … or to orchestrate it and control the results it produces. Why? Because competition is unpredictable and messy, and the regulator prizes predictability and tidiness. Businesses move in and out of competitive markets. They are constantly changing their product and service offerings, schedules, and prices. The regulator, in contrast prefers continuity of service and stability and uniformity of prices and services offerings… [and] can't trust the market and free entry to satisfy economically legitimate demands.[39]

Attempts to judge impairment by market volumes or market shares of firms that have, in fact, entered the market represents bad policy and bad economics.

Q. HOW WOULD A UNE-P COMPETITIVE BENCHMARK VIOLATE THE DIRECTIVES FROM THE D.C. CIRCUIT?

A. More than once, the Court has admonished the FCC not to base impairment on the amount of "competition" that more liberal unbundling could produce. For example,

> If competition performed with ubiquitously provided ILEC facilities counts, the more unbundling there is, the more competition. The Commission, here in unison with the ILEC petitioners, evidently

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telecommunications technologies." Preamble, Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.)

[39] Alfred E. Kahn, "The Uneasy Marriage of Regulation and Competition," *Telematics* (September 1984) at 8-9.

> assumes that the Commission-imposed prices are highly attractive to CLECs; on that assumption, universal rules encompassing as many elements as possible would indeed generate a rapid spread of "competition."[40] But the Commission never makes the argument in quite so stark a form, unwilling to embrace the idea that such completely synthetic competition would fulfill Congress's purposes.[41]

In short, the relative success of UNE-P based entry compared with any form of facilities-based entry has no bearing on the trigger-based determination of impairment, either in economics or in the FCC's instructions to this Commission.

Q. BUT DOESN'T UNE-L ENTAIL ADDITIONAL SUNK COSTS AND DON'T SWITCH-BASED CLECS FACE DISADVANTAGES IN THEIR ABILITY TO COMPETE FOR MASS MARKET CUSTOMERS?

A. The nature and extent of any cost disadvantage that a switch-based CLEC faces and the effect of that disadvantage on its ability to enter the mass market and compete is the subject of a *potential deployment* analysis, not a *trigger* analysis. Taking such factors into account, the FCC determined that if three switch-based CLECs could enter and serve mass market customers, then actual marketplace evidence would have proven that CLECs were not impaired by the absence of unbundled local switching. Taking these factors into account again in applying the triggers or defining the geographic market would distort the weights the FCC already assigned these factors in its trigger decision.

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[40] For example, if in the extreme UNE switching were available for free, there would likely be a large increase in CLEC volumes and even perhaps reductions in retail prices as well. However, such short-term effects would not last, because the industry could not sustain itself under these conditions.

[41] *USTA v. FCC*, *op. cit.* The proposition that TELRIC prices are highly attractive to CLECs is reiterated in the *TRO*'s explanation of its wholesale switching trigger (at ¶ 505): "A competitive carrier that is considering deploying switching facilities for the purpose of providing a wholesale offering is likely to be encouraged to deploy if its deployment will eliminate switching priced at TELRIC rates." This same reasoning applies to self-deployment as well.

Q. DR. MAYO CLAIMS THAT THE ABSENCE OF UNE-P WOULD DISCOURAGE FACILITIES INVESTMENT [AT 49-61]. DO YOU AGREE?

A. No. Dr. Mayo's argument is essentially an "infant industry" claim that the availability of UNE-P increases industry investment because it permits CLECs to enter the market cheaply, develop their businesses and ultimately invest in their own facilities. This argument is not helpful to the Department. As discussed above, it is irrelevant to defining the geographic market or applying the FCC's triggers.

Q. DR. MAYO STATES (AT 21) THAT THE "TRIGGER ASPECT OF THE IMPAIRMENT ANALYSIS AND THE MORE DETAILED CASE STUDY ARE NOT TWO DIFFERENT IMPAIRMENT TESTS," SO THAT THE TWO TESTS SHOULD PRODUCE THE SAME RESULTS REGARDING IMPAIRMENT. DO YOU AGREE?

A. No. First, the tests have different goals. A trigger analysis simply identifies and counts CLECs providing basic exchange service to mass-market customers using their own switches. Its goal is to provide a *bright line* test—i.e., a test whose outcome is objective and unambiguous so that industry participants can determine the result in real time and use the information in their investment planning and entry decisions. Attempts to modify or "focus" the triggers would effectively produce a subjective test, and as a result, potential entrants and incumbents would be unable to predict the outcome reliably and thus unable to use the information in their business plans.

Second, there is no reason in economics to suppose that a properly conducted trigger analysis will produce the same result as a properly conducted case study of potential competition. The trigger analysis identifies current competition on the ground: *i.e.*, it identifies CLECs that have chosen to supply mass-market customers using their own switching facilities in different geographic markets. In contrast, an analysis of potential competition identifies those geographic markets in which CLECs *could* economically enter using their own switching facilities. Because UNE-P is currently available, it is perfectly possible—indeed, likely—that CLECs have entered markets using UNE-P even though UNE-L entry was sustainable, simply because UNE-P was more profitable than UNE-L. Thus, it would not be surprising to find that potential competition using CLEC switching was sustainable in geographic markets where no CLEC facilities-based competition can be currently observed – that is, where the triggers are not currently met.

Verizon MA's geographic market definition is correct

Q. HOW DOES VERIZON MA DEFINE THE RELEVANT GEOGRAPHIC MARKET?

A. Verizon MA appropriately recognizes that the MSAs are the relevant geographic market.[42] Verizon MA's support for using the MSA as the relevant geographic market is based upon some of the arguments mentioned above, such as the fact that mass market media advertising is usually conducted on an MSA basis.

[42] Initial Panel Testimony at 8-15.

While Verizon MA's position is that the MSA is the correct geographic market, it presented evidence on a density zone basis so as to provide the Department with an alternative to MSAs if the Department were not inclined to accept the entire MSA as the relevant geographic market. It follows that if Verizon MA passes the self-provisioning trigger test based on a density zone definition of the geographic market within an MSA—as it does as described in Verizon MA's *Initial and Supplemental Panel Testimony*—then it must also pass the trigger test based on an MSA definition of the geographic market.[43] Therefore, even though Verizon MA submitted evidence on a density zone basis, the Department can and should decide that the entire MSA is entitled to relief.

Q. WHAT EVIDENCE DID VERIZON MA PRESENT TO SUPPORT ITS CLAIM THAT IT HAS MET THE SELF-PROVISIONING TRIGGERS IN THE VARIOUS DENSITY ZONES OF THE BOSTON, PROVIDENCE, SPRINGFIELD, AND WORCESTER MSAS?

A. In its Initial Panel Testimony Verizon MA examined two sources of data at the wire center level, the Line Count Study that examined the standalone loops that Verizon MA leases to CLECs and the E911 database that was used to count the number of residential customers served by carriers that do not use Verizon MA's network to serve mass market customers. CLECs that lease stand-alone voice-grade UNE loops from Verizon MA, without also leasing switching, are necessarily using their own switches to provide service to the customers connected to those loops. In addition, Verizon MA used the residential listings in

[43] That is, if the correct geographic market is determined to be the MSA, and if three qualifying CLECs provide mass market service in one density zone—or even one wire center—in the MSA, then Verizon

the E911 database to identify residential customers of known cable telephony providers. These customers were then associated with Verizon MA wire centers based on their reported NPA/NXX. According to this analysis, multiple CLECs lease stand-alone UNE loops or bypass Verizon MA's network to serve mass market customers in the density zones 1, 2 and 3 areas of the Boston, Providence, Springfield, and Worcester MSAs.[44] Initial Panel Testimony at 5-26 and Attachments 1-4; Supplemental Panel Testimony at 1-5 and Attachment 1. As noted above, in its Supplemental Panel Testimony, Verizon MA presented additional evidence taking into account information received from CLECs in response to the Department's information requests. That data confirmed that CLECs are using their own switches to provide voice grade service that satisfies the FCC's mass market switching non-impairment triggers in the markets identified in the Initial Panel Testimony.[45]

The FCC Has Already Defined The Product Market For Use In The Mass Market Switching Analysis

Q. DR. PELCOVITS [AT 59-75] AND DR. MAYO [AT 25-35] ASSERT THAT THE DEPARTMENT MUST MAKE DETERMINATIONS REGARDING THE APPROPRIATE "PRODUCT MARKET" FOR THIS PROCEEDING. DO YOU AGREE?

A. No. The FCC determined that for applying the triggers described in the *TRO* ¶¶ 498-505, the product or customer market should be services provided to mass market customers, who "are analog voice customers that purchase only a limited

MA passes the self-provisioning trigger test throughout the MSA.

[44] Initial Panel Testimony at 5-26 and Attachments 1-4.

number of POTS lines, and can only be economically served via DS0 loops." *TRO* at ¶ 497. Therefore, the FCC has already defined the product for purposes of this proceeding.[46]

Business and Residential Customers Do Not Constitute Separate Markets

Q. DR. PELCOVITS (AT 71-72) SUGGESTS THAT THE DEPARTMENT SHOULD "REQUIRE EVIDENCE THAT BOTH RESIDENTIAL AND SMALL BUSINESS CUSTOMERS HAVE COMPETITIVE CHOICES BEFORE IT [REJECTS IMPAIRMENT] IN ANY GEOGRAPHIC MARKET." DR. MAYO (AT 27) WOULD ALSO EXCLUDE CLECS FROM CONSIDERATION THAT SERVED ONLY BUSINESS CUSTOMERS. DO YOU AGREE?

A. No. Dr. Pelcovits recommends that Department distinguish between service to business and to residential customers. The FCC has already defined the product market, and the only task for the Department is to determine the geographic market in which to apply that definition. The suggestion that the Department should redefine the product market here, even when the FCC has already done so, is misguided for several reasons.

First, the *TRO* makes clear that the product market for analyzing mass-market switching is mass-market local exchange service, regardless of whether the customers are business or residential. As the FCC found, "*[m]ass market*

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[45] Supplemental Panel Testimony at 1-5 and Attachment 1.

[46] Note that the product market focuses on the end-user services that ILECs and their competitors provide and not on particular components of the ILEC network. Thus, although the emergence of "wholesale markets" for network components is likely to be sufficient to demonstrate the lack of impairment, such markets are clearly not necessary to make such a determination.

customers are residential and very small business customers — customers that do not, unlike larger businesses, require high-bandwidth connectivity at DS1 capacity and above."[47] There is no distinction between business and residential customers; the only distinction is between mass market and enterprise customers.

Second, while the FCC suggested that it could treat small business locations differently than residential locations, it said it would do so "where it is appropriate in our analysis."[48] The fact that the FCC did not make such a distinction in the case of mass-market switching clearly indicates that it is not appropriate for a state commission to define such a "product market."

Third, from an economic perspective, the fact that residential and business customers pay different prices for basic service does not imply that those customers purchase services in different markets, as Dr. Pelcovits claims (at 49-54). The DOJ/FTC *Horizontal Merger Guidelines* observe that when price discrimination between two sets of customers would be profitable for a hypothetical monopolist, the agency will consider whether those customers fall into different product markets.[49] However, the fact that from time immemorial, regulated residential basic service prices have been held below the prices of comparable business services for public policy reasons in no way implies that a profit-maximizing firm would find it profitable or feasible to impose such price differences. In fact, the treatment of regulated prices on the industry was cited by

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47 *TRO* at ¶ 459 (emphasis added).

48 *TRO*, fn. 432.

49 Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, April 1992, at § 1.12 "Product Market Definition in the Presence of Price Discrimination."

the D.C. Circuit Court of Appeals as a deficiency of the previous FCC unbundling requirements:

> One reason for such market-specific variations in competitive impairment is the cross-subsidization often ordered by state regulatory commissions, typically in the name of universal service. This usually brings about undercharges for some subscribers (usually rural and/or residential) and overcharges for the others (usually urban and/or business)…Competitors will presumably not be drawn to markets where customers are already charged below cost, unless either (1) the availability of UNEs priced well below the ILECs' historic cost makes such a strategy promising, or (2) provision of service may, by virtue of economies of scale and scope, enable a CLEC to sell complementary services (such as long distance or enhanced services) at prices high enough to cover incomplete recovery of costs in basic service. The Commission never explicitly addresses by what criteria want of unbundling can be said to impair competition in such markets, where, given the ILECs' regulatory hobbling, any competition will be wholly artificial.[50]

In other words, Dr. Pelcovits overlooks the fact that the price differences between residential and business services are the result of regulatory fiat and not private profit-maximization, and thus those price differences, by themselves, do not imply that residential and business customers occupy different product markets under the *Merger Guidelines'* standard.

Fourth, the *TRO* itself outlines some of the economic reasons why all mass-market customers, business and residence alike, belong in the same product market for the purpose of its trigger analysis. In ¶ 459, the FCC spells out the characteristics of these customers that place them in a distinct product market: they are served by DS0 technology, they have small accounts, and they purchase service month-to-month rather than using a term discount. In addition, such

[50] *United States Telecom Ass'n. v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

customers are served through customer service centers rather than individual customer representatives, their services are marketed using mass market media rather than individual, customer-specific marketing, and they buy tariffed services rather than customized packages of network services solicited by formal Requests for Proposals. Residential and business mass-market customers are served using the same technologies (circuit switches and DS0 loops), and thus any supplier of mass-market business services offers and can supply mass market residential services if a profitable opportunity arises.

The Public Utilities Commission of Ohio already rejected this identical CLEC argument in the January 2004 order previously referenced and reiterated that finding in an Entry on Rehearing on February 4, 2004 (at 4). The PUCO observed that "[r]ather than reaching a tentative conclusion, the FCC has definitively stated, without distinction, that residential and small business customers are to be considered mass market customers for he purpose of performing the mass market analysis."

IDLC Issues Do Not Merit a Separate Product Market

Q. DR. PELCOVITS (AT 70) PROPOSES THAT THE DEPARTMENT TAKE INTO ACCOUNT HIS ALLEGATION THAT VERIZON MA CANNOT UNBUNDLE IDLC-SERVED LOOPS AND THUS CANNOT PROVIDE UNBUNDLED LOOPS TO CLECS IN THAT ALLEGED "PRODUCT MARKET" SEGMENT. IS IT CORRECT TO RESTRICT THE PRODUCT MARKET TO CUSTOMERS SERVED ON COPPER LOOPS

OR TO RESTRICT THE GEOGRAPHIC MARKET TO AREAS WHERE CUSTOMERS ARE NOT SERVED BY ILEC IDLC FACILITIES?

A. No. First, the FCC has already defined the product market for mass market switching, and it did not include any exceptions for loops on IDLC facilities. Given that the FCC had addressed IDLC-served loops in the *First Report and Order*, *UNE Remand Order*, and *Triennial Review Order*, the decision not to "carve-out" IDLC-served loops from its geographic market rule is significant. Second, FCC rules already require Verizon MA to provide an unbundled loop when a loop is currently served by IDLC, and Verizon MA follows FCC rules regarding precisely when and how it is required to provide unbundled loops in that situation. Third, to the extent loop-related factors have anything at all to do with the unbundling of local switching, the FCC already accounted for it in its consideration of hot cuts and batch cuts and based on those requirements for hot cuts, the FCC determined that three (and not four or two) switch-based CLECs serving mass market customers in a geographic market was sufficient to demonstrate the absence of impairment.

DSL Issues Do Not Merit a Separate Product Market

Q. DR. PELCOVITS (AT 55-56) ASSERTS THAT CLECS ARE PLACED AT A COMPETITIVE DISADVANTAGE BY THE MANNER IN WHICH ILECS PROVIDE DSL SERVICE. HE PROPOSES TO REFLECT THAT ALLEGED DISADVANTAGE BY FURTHER SUBDIVIDING THE "PRODUCT MARKET." IS THAT A RELEVANT CONCERN AND A VALID SOLUTION?

A. No. Once again, the FCC has already defined the product market here, and did not create any exception related to DSL-based service. The FCC addressed DSL issues in other parts of the *TRO*, but apparently did not view those issues as bearing on the switching analysis.

In any event, Dr. Pelcovits' approach is wrong as a matter of economics. The first circumstance cited by Dr. Pelcovits [at 56] is where the CLEC is unable to offer the same package of services as the ILEC. He cites the joint provision of DSL and basic exchange telephone service as an example of an ILEC package that CLECs would allegedly be unable to duplicate and concludes [at 56] that customers who demand DSL service but obtain local exchange service from the ILEC using DLC technology are "not in the same market as other customers in the same wire center for whom this competitive imbalance does not exist."

Dr. Pelcovits' conclusion does not follow from the asserted facts. Competition, in economics, does not require that all firms offer the same packages of goods and services as others. What matters for determining the extent of the product market is what happens if a hypothetical monopolist of the service attempts to hold its price above the competitive market level. In Dr. Pelcovits' case, Verizon MA is a minority supplier of broadband access to the Internet, and any local exchange customer that faces a price increase for combined local telephony and broadband Internet access can readily purchase Internet access (sometimes combined with video and local and long distance telephony) from another supplier. According to the most recent FCC data, broadband high-speed access lines in Massachusetts in June 2003 were comprised of about 25 percent

DSL, compared with 69 percent for cable and 6 percent for other wireline, optical fiber, satellite and fixed wireless systems.[51] Hence, Verizon MA cannot exercise power over the price charged to the subset of customers Dr. Pelcovits identifies, and by the *Horizontal Merger Guidelines'* standards, there is no reason to treat such customers as a separate market.

Access to ILEC Loops Does Not Merit a Separate Product Market

Q. DR. PELCOVITS CLAIMS (AT 63-65) THAT CABLE TELEPHONY PROVIDES NO EVIDENCE OF NON-IMPAIRMENT BECAUSE IT BYPASSES THE ILEC'S NETWORK ENTIRELY AND DOES NOT RELY ON THE ILEC'S LOOPS. DO YOU AGREE?

A. No. The fact that cable suppliers do not use ILEC local loops does not affect the inclusion of cable telephony providers as CLECs in the FCC's trigger analysis. The FCC's rule makes no exception for carriers that use their own loops. On the contrary, ¶ 115 of the *TRO* explicitly states the FCC's intention that it "will not…evaluate whether…carriers that pursue a particular business strategy are impaired without access to UNEs." Thus, the presence of full (loop and switch) facilities-based CLECs in the market indicates that potential entrants are not impaired without UNEs, even though that finding would make the UNEs unavailable to CLECs that followed a UNE-based business plan.

In addition, the FCC's three-CLEC trigger expressly accounts for the fact that CLECs do not provide switching as wholesale access to ILEC loops:

[51] FCC *High-Speed Services for Internet Access: Status as of June 30, 2003,* released December 2003, Table 7.

> Setting the trigger at three competitive facilities takes into consideration the likelihood that self-providers will not offer their service for wholesale, based on evidence that local exchange service providers have generally not shown an interest in providing wholesale services…[*TRO* at ¶ 501].

Furthermore, cable telephony is an unambiguous substitute for ILEC local exchange service, based on service characteristics, quality and price. Although several CLECs have testified that cable telephony does not meet the "comparable in quality" standard, their arguments are nothing more than claims that cable telephony is not *identical* to traditional telephone service offered by ILECs. Yet, this is not the standard. Given that consumers substitute cable telephony for traditional voice service, they have voted with their feet with respect to whether the service offered is "comparable" in quality. Therefore, the Department should include cable telephony in the trigger analysis as long as it is comparable in quality to traditional phone service.

Additional Criteria for Market Definition or CLEC Eligibility are Inappropriate.

Q. SEVERAL WITNESSES URGE THE DEPARTMENT TO CONSIDER ADDITIONAL CRITERIA IN APPLYING THE *TRO* TRIGGERS: MAYO AT 25-28, GILDEA AT 11-12, GILLAN AT 23-46 AND PELCOVITS AT 59-75. IS IT APPROPRIATE TO CONSIDER CRITERIA NOT INCLUDED IN THE TRIGGERS—SUCH AS MARKET SHARE TESTS, PROFITABILITY, ETC.—WHEN EVALUATING VERIZON'S REQUEST?

A. No. The value of the triggers is their simplicity and objective nature. That value is lost if the triggers become a complex, far-ranging—and lengthy—inquiry into

the economics of the local exchange market. Similarly, the value of the trigger process is undermined if the determination of the proper geographic market is allowed to depend upon such an inquiry. Under the self-provisioning trigger, a state "must find 'no impairment' when three or more unaffiliated competing carriers are serving mass market customers in a particular market with the use of their own switches."[52] The self-provisioning trigger is an objective test that simply requires the counting of unaffiliated competing carriers in a particular geographic market providing service to mass market customers. Once the market has been defined, other criteria, such as market share tests, profitability analyses, etc., are not to be taken into account. It is only if the Department determines that an ILEC has not met the self-provisioning triggers that it can conduct an analysis of the potential for CLECs to deploy their own switches to serve mass market customers in the relevant geographic market, given economic and operational conditions in that market.[53] But that is not the case in this instance because Verizon MA has provided evidence that it has met the self-provisioning triggers in certain geographic regions in its Massachusetts service territory.

Q. DR. MAYO ASSERTS THAT THE WIDER THE GEOGRAPHIC SCOPE OF THE MARKET, THE MORE CONSIDERATION THE DEPARTMENT SHOULD GIVE TO SUCH FACTORS AS THE "MAGNITUDE AND SCOPE" OF CLEC ENTRY (AT 25-26), AND "THE TYPES OF CUSTOMERS SERVED, THEIR LOCATIONS…, THE AVAILABILITY OF COLLOCATION SPACE…" (AT 26) DO YOU

[52] *TRO* ¶ 501.

[53] *TRO* ¶ 506.

AGREE WITH THIS APPLICATION OF THE FCC'S TRIGGER ANALYSIS?

A. No. As noted above, the purpose of a trigger — as opposed to a full-fledged potential deployment investigation — is to provide a bright line standard to the industry. In setting that trigger, it is perfectly appropriate for the regulator — in this case, the FCC — to weigh the costs and benefits of the trade-offs between the scope of the geographic market and the ubiquity of CLEC service within that market, and to embody those calculations in the levels at which the triggers are set. But once the triggers are in place, it is not appropriate to reconsider those same costs and benefits as reasons to modify or shade the application of the triggers. To do so would be to double-count those costs and benefits in unpredictable ways.

The level at which the FCC set its self-provisioning trigger (three competitors, not two or four) already embodies the FCC's view of the consequences of a finding of no impairment. If the Department were to take Dr. Mayo's opinion into account in implementing the FCC's triggers, it would be effectively changing the weight the FCC gave to its view of those consequences. At the end of the day, the Department should simply apply the FCC's trigger requirements without trying to adapt them to compensate for setting a wide rather than a narrow geographic market.

Inferences regarding impairment that might be drawn from individual CLECs' circumstances are explicitly <u>not</u> part of a trigger proceeding. As the FCC observed (with reference to its transport triggers),

> As the Commission has done in other circumstances, we adopt these triggers as a mechanism for determining impairment. Adopting triggers with objective criteria can avoid the delays caused by protracted proceedings and can minimize administrative burdens. Our selection of various thresholds, as in rate setting, is not an exact science. Rather, the thresholds are based on our agency expertise, our interpretation of the record, and our desire to provide bright-line rules to guide the industry in implementing section 251. Our effort to select triggers that precisely measure impairment for transport is hampered by the lack of verifiable data concerning competitors' facilities. Given these constraints, we adopt triggers that, in our reasoned judgment, minimize administrative burdens while still reasonably applying our impairment standard. [*TRO* at ¶ 403].

Q. DR. MAYO (AT 25-28) PROPOSES A NUMBER OF CIRCUMSTANCES IN WHICH CLECS SERVING MASS MARKET CUSTOMERS WITH THEIR OWN SWITCH SHOULD BE "IDENTIFIED" BUT NOT COUNTED (AT 8) IN THE TRIGGER ANALYSIS. DO YOU AGREE WITH THESE RESTRICTIONS?

A. No. In the first place, they are inconsistent with the FCC's trigger analysis which set the bar at three switched base CLECs, taking into account the fact that all CLEC competitors are not the same. Second, the purpose of the trigger is to indicate non-impairment, not effective competition, and the presence of one switch-based CLEC serving mass market customers indicates in a literal sense that entry is not impaired.

Q. DR. MAYO WOULD REJECT A CLEC FOR TRIGGER PURPOSES IF IT SERVED FEWER THAN X LINES OR LESS THAN Y PERCENT OF THE MARKET, IF IT IS "RETRENCHING," IF IT IS ADDING "MINIMAL" NUMBERS OF NEW CUSTOMERS, IF IT HAS MERGED WITH ANOTHER CLEC, OR IF IT SERVES A "RESTRICTED NICHE" OF

CUSTOMERS. MR. GILDEA [AT 11-12], DR. PELCOVITS [AT 67-70] AND MR. GILLAN [AT 44-46] SHARE SOME OF THESE VIEWS. ARE THEY ADEQUATE REASONS TO REJECT A CLEC FROM THE TRIGGER COUNT?

A. No. The FCC spelled out clearly in the *TRO* precisely what the process should be to account for alleged anomalies in the classification of CLECs:

> The analysis we prescribe with regard to mass market switching is as follows. First, where a state determines that there are three or more carriers, unaffiliated with either the incumbent LEC or each other, that are serving mass market customers in a particular market using self-provisioned switches, the state must find "no impairment" in that market. As described below, we recognize that there may be some markets where three or more carriers are serving mass market customers with self-provisioned switches, but where some significant barrier to entry exists such that additional carriers with self-provisioned switches are foreclosed from serving mass market customers…Where the self-provisioning trigger has been satisfied and the state commission identifies an exceptional barrier to entry that prevents further entry, the state commission may petition the Commission for a waiver of the application of the trigger, to last until the impairment to deployment identified by the state no longer exists. [*TRO* at ¶ 462, emphasis added]

Thus, the triggers are to be applied literally without further examination of the markets or the CLECs. If the Department identifies exceptional circumstances where CLECs are currently providing service to mass market customers using their own switches but barriers foreclosing further entry are present, the Department must petition the FCC for a waiver of the trigger rules. It cannot, as Dr. Mayo would have it do, simply ignore qualifying CLECs in applying the triggers.

Q. DR. MAYO (AT 27-28) WOULD EXCLUDE FROM CONSIDERATION ANY CLEC THAT SERVED MASS-MARKET CUSTOMERS USING

BOTH UNE-P AND UNE-L PLATFORMS. DOES THIS EXCLUSION MAKE ECONOMIC SENSE? IS SUCH A PROPOSAL CONSISTENT WITH THE *TRO*?

A. No. The availability of UNE-P at reduced rates means that some CLECs will serve customers with UNE-P even if it were profitable to serve the same customers with UNE-L. UNE-P and UNE-L are both factors of production that CLECs use to supply mass-market services. As the price of UNE-P falls, cost-minimizing firms will substitute UNE-P service for UNE-L, so that the geographic extent of actual switch-based competition in the presence of UNE-P will understate the areas in which the CLEC could profitably provide UNE-L service, just not as profitably as by using UNE-P. Finally, such a proposal is totally inconsistent with the TRO.

Q. DR. MAYO (AT 42) CLAIMS THAT VERIZON "ACKNOWLEDGED" IN ITS INITIAL PANEL TESTIMONY THAT VOICE OVER INTERNET PROTOCOL ("VOIP") "CANNOT AND SHOULD NOT" COUNT TOWARD THE TRIGGERS. DO YOU AGREE?

A. No. Dr. Mayo has misstated the position Verizon MA articulated in its Initial Panel Testimony. Verizon MA did not acknowledge that VoIP "cannot and should not" count towards the triggers. To the contrary, Verizon MA noted that carriers such as Vonage are currently offering service to end user customers using VoIP to substantially all of the 617, 508, 978, 781, 413, 774, and 339 area codes in Massachusetts, but pointed out that Verizon MA was "not able to identify the physical location of actual Vonage's customers" based on the information available

to it. Verizon MA Initial Panel Testimony at 22-23. As a result, Verizon MA did not, and has not, included Vonage in the data filed in support of its switching triggers case. The presence of Vonage should definitely be considered by the Department to the extent such information can be secured.

Moreover, it is somewhat hypocritical for AT&T's witnesses to suggest that VoIP should not be counted. AT&T, along with a number of other carriers, including but not limited to Qwest, Time Warner, and SBC Telecom, are actively rolling out VoIP as a complete substitute to traditional circuit-switched telephony over incumbent LEC loop facilities. *See* AT&T to Launch Internet-Based Telephone Service, Wall Street Journal, December 11, 2003. Clearly, AT&T is willing to bank on the fact that VoIP offers service that not only is sufficiently comparable to traditional telephony, but that provides substantial additional benefits to AT&T and its customers.

Q. MR. BARANOWSKI ON BEHALF OF AT&T PURPORTS TO APPLY THE FOUR CATEGORIES OF CLECS WHICH DR. MAYO ARGUES SHOULD BE EXCLUDED FROM THE COUNT FOR THE SELF-PROVISIONING SWITCHING TRIGGERS. WOULD YOU PLEASE COMMENT ON MR. BARANOWSKI'S APPROACH?

A. Mr. Baranowski's approach is flawed, since it relies on a methodology that has no basis in the *TRO.* As discussed above, Dr. Mayo creates CLEC categories and seeks to impose criteria on CLECs that can be counted for purposes of the switching self-provisioning triggers, that are not provided for in the *TRO,* and which accordingly, should be rejected by the Department. Mr. Baranowski simply adopts Dr. Mayo's

flawed criteria and purports to apply them to Verizon MA's evidence submitted in this proceeding. The application of such criteria in this proceeding is of no help to the Department, since the criteria identified are inconsistent with the criteria established by the FCC in the *TRO*.

Q. MR. BARANOWSKI (AT 15) ARGUES THAT TWO OF THE CLECS IDENTIFIED BY VERIZON MA DO NOT SERVE ANY OF THEIR CUSTOMERS OVER DS0 LINES. PLEASE RESPOND.

A. Mr. Baranowski states that, based on their responses to certain information requests issued by the Department and CLECs, that *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** have both indicated that they do not offer service at the DS0 level. Baranowski Direct at 15. Verizon disagrees. Verizon MA provided information on these carriers in its Supplemental Testimony based on their responses to DTE Information Request 16, where both *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** provided specific line count information on a wire center basis, that suggests that they are providing DS0 voice grade loops, not voice grade equivalents. In any event, even if Mr. Baranowski were correct, it would have no impact on whether Verizon MA meets the switching self-provisioning triggers within the markets it has identified since the number of remaining carriers in the wire centers in which these CLECs indicated they were serving mass market customers exceed the three required to meet that trigger.

Q. CLEC COALITION WITNESS GILLAN (AT 43) CLAIMS THAT CLECS THAT ARE AFFILIATED WITH OTHER ILECS DO NOT COUNT TOWARDS THE TRIGGERS. IS THIS CORRECT?

A. Not at all. In fact, the FCC explicitly stated that affiliates of incumbent LECs serving the mass market outside of the incumbent's territory can count toward the mass market switching triggers. In particular, the FCC found that "competitive deployment" by "large, independent incumbent LECs expanding into adjacent areas" "could be considered by states in determining whether the triggers . . . have been satisfied in specific markets." *TRO* ¶ 440 & n. 1352. Therefore, while it is true that Verizon affiliates serving the mass market do not count toward the triggers, affiliates of other incumbents operating out-of-franchise do.

Q. SEVERAL OF THE CLECS ARGUE THAT THE REQUIREMENT THAT A CLEC BE "ACTIVELY PROVIDING VOICE SERVICE" GIVES THE DEPARTMENT THE DISCRETION TO EXAMINE EACH CLEC'S BUSINESS PLAN AND TO DETERMINE IF THE CLEC IS ADDING ADDITIONAL CUSTOMERS USING UNE-L.[54] IS THIS ALLOWED BY THE *TRO*?

A. No, it is not. The evidence that a CLEC is "actively providing voice service" is satisfied by evidence that it is currently serving mass market customers using its own switching. Verizon MA has proven this for each of the qualifying carriers. Moreover, determining whether a carrier is "likely to continue" providing voice service to mass market customers does not give the Department the discretion to

[54] Gillan Direct at 35-37; Mayo Testimony at 33 n.24.

examine the viability of a particular CLEC's business plan or whether the CLEC is adding new customers. Indeed, the FCC found that states could not look at issues such as the "financial stability or well-being of the competitive switching providers" in applying the triggers. *TRO* ¶ 500. The FCC was clear that, in examining whether a CLEC is "likely to continue" to "offer[] and [be] able to provide service," the state commission may look only at whether a CLEC has affirmatively indicated that it is exiting the market altogether – such as by filing a notice to terminate service – not at evidence that the carrier may be losing customers to its competitors, or increasing its reliance on a UNE-P strategy. *Id.* and n. 1556.

Q. THE CLEC COALITION PANELISTS ARGUE THAT UNE-P DOES NOT DISCOURAGE INVESTMENT AND CLAIM THAT ILECS SEEK TO STIFLE COMPETITION BY ELIMINATING CLEC ACCESS TO UNE-P. PLEASE RESPOND TO THESE ARGUMENTS

A. The CLEC Coalition Panelists devote a substantial portion of their testimony to an issue that Verizon MA does not raise, and that is not relevant to this proceeding – namely, whether UNE-P is good for competition or discourages investment. *See* Gillan Direct at 1-17. Verizon MA does not dispute that it disagrees with the CLEC Coalition's views that UNE-P encourages investment in facilities-based competition and that UNE-P advances fair competition. Indeed, this debate was placed squarely before and addressed by the FCC in its *Triennial Review.* However, this debate is irrelevant to the trigger analysis before the Department. Regardless of any parties' view of the merits of UNE-P versus UNE-L, the FCC's trigger analysis requires only that the Department apply the objective triggers described in the *TRO,* and

eliminate Verizon MA's obligation to provide local switching as a UNE in those markets in which the triggers are met. 47 C.F.R. § 51.319(d)(2)(iii)(A) ("Local switching triggers").

The CLEC Coalition completely mischaracterizes Verizon MA's "motives" in seeking relief from its obligation to provide switching in the identified markets. Verizon MA is seeking relief in markets in which the FCC's switching self-provisioning triggers have been met and thus where CLECs are not impaired without access to ILEC-provided switching. The CLEC's suggestion that by making the showing required by the FCC Verizon is somehow seeking to "monopolize" the market or stifle competition is completely without merit. Indeed, what Verizon MA is seeking is fair competition.

Q. MR. GILLAN (AT 30-33) ARGUES THAT A CLEC USING AN "ENTERPRISE SWITCH" CANNOT COUNT TOWARD THE TRIGGERS, EVEN IF THOSE SWITCHES ARE ALSO USED TO SERVE MASS MARKET CUSTOMERS. DO YOU AGREE?

A. No. The *TRO* does not support Mr. Gillan's argument. First, if a CLEC is actually serving mass market customers from its own switch, then it is irrelevant that the CLEC *also* uses that switch to serve enterprise customers. The FCC expressly noted that "[t]he evidence in the record shows that the cost of providing mass market service is *significantly reduced* if the necessary facilities are already in place and used to provide *other higher revenue services* [i.e., enterprise services]." *TRO* ¶ 508 (emphasis added).

Second, if a CLEC is serving mass market customers from its switch, it is also irrelevant that the switch is used primarily to serve enterprise customers. The out-of-context statements from the *TRO* that Gillan cites in his direct testimony (at 38) (*TRO* ¶ 435, 437, 441, 508) concern whether switches that serve *exclusively* enterprise customers are sufficient evidence of non-impairment for mass market switching in a potential deployment analysis. They do *not* concern whether switches that *actually* serve mass market customers using analog lines count toward the triggers even if they also serve enterprise customers – they unequivocally do. Indeed, the FCC's primary concern with counting switches that currently serve *only* enterprise customers, was that in order to use those same switches to serve mass market customers, CLECs would have to deploy additional equipment or secure additional collocation space. *TRO*, ¶ 441 ("[I]n order to enable a switch serving large enterprise customers, competitive LECs may need to purchase additional collocation space, and purchase additional cabling and power.") To the extent the CLEC is currently serving mass market customers with its switch, it has already deployed the equipment necessary to do so, and provides evidence that it is not impaired, provides evidence that it is not impaired, and should be counted towards the triggers.

IV. DEDICATED TRANSPORT

A. THE CLECS' OPPOSITIONS TO VERIZON MA'S TRANSPORT CASE REST ON ERRONEOUS INTERPRETATIONS OF THE FCC'S RULES

Q. WHICH CLECS HAVE FILED TESTIMONY WITH RESPECT TO VERIZON MA'S DEDICATED TRANSPORT CASE?

A. Only AT&T, Conversent and the Loop/Carrier Coalition ("the LTCC," consisting of Broadview, Choice One, Covad and XO Communications) have filed testimony responding to Verizon MA's dedicated transport case. No other party – including MCI or any of the other carriers whose transport facilities Verizon MA identified in its Supplemental Panel Testimony and Attachment 3 thereto as satisfying the FCC's various dedicated transport triggers – contests any aspect of that case.

Q. WHAT IS YOUR RESPONSE TO THE CLECS' TESTIMONY REGARDING DEDICATED TRANSPORT?

A. Of the few CLECs who filed testimony regarding Verizon MA's dedicated transport case, only Conversent even attempted to present specific factual evidence about particular transport routes. We address Conversent's claims in Part C below. For now it suffices to say that Conversent's testimony takes issue with only 16 of the transport routes Verizon MA has identified as satisfying the FCC's transport triggers.

In contrast to Conversent, AT&T and the LTCC offer no evidence or argument that any particular routes identified by Verizon MA in its Supplemental Panel Testimony do not satisfy the FCC's dedicated transport triggers. Verizon MA has offered evidence that specific, identified transport routes deployed by AT&T and three of the four members of the LTCC go towards satisfying the various FCC triggers, yet these carriers have elected to submit almost no evidence regarding those routes or any other routes on their own transport networks.

Rather, these carriers presume – without citing the *TRO* or any other authority – that an immutable burden of proof and burden of production with respect to all facts hangs over Verizon MA in this proceeding, and never shifts to the CLECs, even though Verizon MA has offered far more evidence than necessary to meet any reasonable obligation imposed on it and even though much of the critical evidence that the Department should review is in the exclusive control of the CLECs themselves.

Q. WHAT IS YOUR RESPONSE TO THE CLAIMS OF AT&T AND THE LTCC THAT THEIR FIBER TRANSPORT FACILITES DO NOT COUNT TOWARD THE TRANSPORT TRIGGERS?

A. The testimony of these CLECs relies entirely on unsupportable interpretations and misstatements of the FCC's Order to argue that *none* of their pervasive and robust fiber transport facilities in Massachusetts "counts" toward the FCC's transport triggers. Their arguments are wrong on at least four levels.

First, the CLECs would have the Department believe that CLECs construct their fiber networks *not* to provide connectivity from one point to another. This claim is clearly false given how telecommunications networks are constructed in the 21st century.

Second, AT&T and the LTCC would have the Department believe that the FCC in the *TRO* proceeding conducted a detailed review of competitive carriers' transport facilities, and then devised triggers for the state commissions that apply to *no* CLEC transport facilities here in Massachusetts or anywhere else in the country. That is plainly wrong. The *TRO* itself makes clear that the FCC

intended the transport triggers to apply to competitive networks materially identical to the networks described by the CLECs in this proceeding. In the *TRO*, the FCC explained that CLECs "generally use dedicated transport as a means to aggregate end-user traffic to achieve economies of scale."[55] "When carriers self-deploy transport facilities, they typically deploy fiber rings" that connect one or more ILEC central offices, and then use those self-deployed fiber facilities to "backhaul" traffic to their switches.[56] This is exactly the sort of network architecture that AT&T and the LTCC have acknowledged deploying in Massachusetts – and now claim that the Department cannot consider when applying the FCC's transport triggers.

Third, the FCC made clear in its rules that *all networks capable* of providing DS1s and DS3s "count" toward the transport triggers. For example, the FCC's rules require state commissions to consider the networks of "intermodal providers of service" when applying the transport triggers.[57] In applying the triggers, the only issue is whether a carrier's network is *capable* of providing DS3 and DS1 transport between ILEC wire centers. There can be no doubt that the networks deployed by the CLECs in Massachusetts are capable of transporting traffic between Verizon MA wire centers.

Fourth, the legal arguments offered by AT&T and the LTCC are without merit. AT&T claims that *none* of its extensive fiber transport facilities in Massachusetts "counts" for purposes of the FCC's transport triggers because

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55 *TRO* ¶ 370.

56 *TRO* ¶ 370.

traffic from an AT&T collocation arrangement at a Verizon MA wire center may pass through an AT&T switch location before being delivered to an AT&T collocation arrangement at another Verizon MA wire center. Because its transport network may (or may not) involve an intervening switch or switching location, AT&T has refused to submit hard evidence concerning its own transport network and wholesale and retail business operations in this proceeding, let alone rebut Verizon MA's evidence on a route-by-route basis as required by the FCC. AT&T's position is flatly wrong given that the FCC expressly said in the *TRO* that a dedicated transport route "*may pass through one or more intermediate wire centers or switches*."[58]

Likewise, the LTCC argues that CLEC transport facilities that connect Verizon MA wire centers to a CLEC switch but do not directly connect Verizon MA wire centers to each other should not be counted towards the transport triggers. Nowhere in the *TRO*, however, did the FCC require that dedicated transport routes *directly* connect ILEC wire centers, and it in fact states expressly that "a 'route' may connect wire centers or switches that are not directly connected to each other."[59] No CLEC has denied its ability to carry traffic from one Verizon MA wire center at which it is collocated to the CLEC's switch and

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[57] 47 C.F.R. § 51.319(e)(1)(ii), (2)(i)(A), (2)(i)(B) (wholesale triggers for DS1 and DS3 transport, and self-provisioning trigger for DS3 transport).

[58] The FCC defined a dedicated transport "route" as "a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC wire centers or switches. A route between two points (*e.g.*, wire center or switch 'A' and wire center or switch 'Z') may pass through one or more intermediate wire centers or switches (*e.g.*, wire center or switch 'X'). Transmission paths between identical end points (*e.g.*, wire center or switch 'A' and wire center or switch 'Z') are the same 'route,' irrespective of whether they pass through the same intermediate wire centers or switches, if any." 47 C.F.R. § 51.319(e).

[59] *TRO* ¶ 402, note 1246.

then out to another Verizon MA wire center at which the CLEC is collocated. Taken together, the transport facilities connecting collocation arrangements in two Verizon MA wire centers to a CLEC switch thus comprise a dedicated transport route between the two Verizon MA wire centers.

AT&T makes a similarly erroneous argument. It argues that it "typically" would have no transport facilities that count toward the triggers because two ILEC wire centers on a given route may be connected to separate pieces of fiber within a single cable and therefore do not directly connect to one another.[60] This argument is incorrect. AT&T has admitted that *****BEGIN PROPRIETARY*****

*****END PROPRIETARY***** which is all the FCC's rules require.[61] They do not require a direct connection.

The Department should reject all of these arguments as contrary to the plain language and purpose of the FCC's rules.

Q. AT&T, BROADVIEW AND XO OWN EXTENSIVE FIBER FACILITIES IN MASSACHUSETTS THAT THEY OPERATE AT AN OCN LEVEL AND USE FOR DEDICATED TRANSPORT. SHOULD THOSE TRANSPORT FACILITIES "COUNT" TOWARD THE FCC'S TRANSPORT TRIGGERS?

[60] Rebuttal Testimony of John P. Lynott and Anthony Fea on behalf of AT&T Communications of New England at 24-25 ("Lynott/Fea Testimony"). AT&T's use of the word "typically" tips its hand and implies that in some instances it has indeed directly connected two ILEC wire centers on the same fiber strands. AT&T declines to assist the Department in its investigation by identifying those routes.

[61] *See* AT&T Response to Conversent's Information Request CONV-ATT-2-1.

A. Yes. AT&T, Broadview and XO do not dispute that they own and use fiber transport facilities that provide physical connections among Verizon MA wire centers, and are fully capable of providing dedicated transport among Verizon MA wire centers:

?? AT&T told the FCC in the TRO proceeding that it has over *17,000 route miles of local fiber, over 1,000 collocations in ILEC switching offices*, and transport facilities that typically *connect one or more ILEC wire centers*.[62]

?? As noted above, AT&T has also stated that it has *****BEGIN PROPRIETARY*****

*****END PROPRIETARY*****[63]

?? Broadview reports that *****BEGIN PROPRIETARY*****

*****END PROPRIETARY*****[64]

?? XO admits that *****BEGIN PROPRIETARY*****

[62] Comments of AT&T Corporation, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98, and 98-147 (Apr. 5, 2002), at iv; Declaration of Michael Lesher and Robert J. Frontera on behalf of AT&T Corp., at 4. See Exhibit G.1.

[63] *See* AT&T Responses to Information Requests DTE-1-3 and CONV-ATT-2-1.

*****END PROPRIETARY*****[65]

The Department should find – as the FCC clearly intended – that the CLECs' fiber facilities "count" toward the FCC's transport triggers. The FCC requires only that a CLEC has "deployed its own transport facilities" and be "operationally ready to use those facilities to provide DS3 transport along the particular route."[66] The facilities of AT&T, Broadview and XO clearly meet this test.

Q. AT&T ARGUES THAT, UNDER THE FCC'S RULES, DEDICATED TRANSPORT FACILITIES CANNOT BE ROUTED THROUGH AN INTERMEDIATE SWITCH.[67] MUST CLEC TRANSPORT FACILITIES RUN DIRECTLY BETWEEN TWO VERIZON MA WIRE CENTERS TO "COUNT" UNDER THE FCC'S TRANSPORT TRIGGERS?

A. No. AT&T's argument that its ubiquitous dedicated transport facilities in Massachusetts cannot be counted for purposes of the FCC's triggers rests on its erroneous assertion that "*dedicated* transport facilities are, by definition, facilities that *do not* rely on switching functionality to establish the end-to-end path."[68] The FCC's rules say precisely the opposite. The FCC's definition of "dedicated transport" expressly states that "[a] route between two points (e.g., wire center or

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64 Broadview Response to Information Requests DTE-1-3 and DTE-1-7.

65 *See* XO response to Information Requests DTE-1-1 and DTE 1-3.

66 47 C.F.R. §§ 51.319(e)(2)(i)(A)(1), (B)(1).

67 Lynott/Fea Testimony at 14, 22, 23, 34.

68 *Id.* at 22 (emphasis in original). The LTCC makes essentially the same argument by claiming that Verizon MA improperly included in its transport analysis carriers who stated that their transport facilities run only between their own switch and Verizon MA wire centers, thus ignoring the obvious fact that the transmission facility does not end at the CLEC switch but can and usually does continue on to another Verizon MA wire center. *See* LTCC Panel Testimony at 19.

switch 'A' and wire center or switch 'Z') *may pass through one or more intermediate* wire centers or *switches* (e.g., wire center or switch 'X')."[69] For purposes of the FCC's rule, only the end points are relevant in defining the route, even when an intermediate point is a switch. In sum, if CLEC fiber networks provide a physical connection between two or more Verizon MA wire centers – *****BEGIN PROPRIETARY***** *****END PROPRIETARY***** those facilities count toward the FCC's triggers, even if these carriers have chosen to route those facilities through centralized switching facilities.[70] Using the CLECs' faulty logic, Verizon MA would not be required to provide UNE interoffice facilities ("IOF") between two of its wire centers if it did not have a direct route between the two end points. Yet in many cases, Verizon MA routes traffic between two end offices through an intermediate office, such as a tandem switch.

The FCC's definition of a route as including intermediate switching makes sense. For example, AT&T has deployed nationwide an "intelligent optical network," capable of aggregating lower-rate customer traffic, including DS1 and DS3 speeds, "up to high-speed (OC-48 or OC-192) pipes for routing across the network by the intelligent optical switches."[71] Again, the issue underlying the FCC's transport triggers analysis is whether CLECs would be impaired on a given route if the ILEC no longer had to make available dedicated transport as a UNE on that route. The FCC's rules make clear that what matters is whether a CLEC

[69] 47 C.F.R. § 51.319(e) (emphasis added); *see TRO* ¶ 401.

[70] *See TRO* ¶ 401.

network is capable of transmitting traffic between ILEC wire centers, regardless of the structure of the CLEC's network, the equipment used, or the path of the traffic. If a sufficient number of CLECs can transmit traffic from one Verizon MA wire center to another, switched or not, then CLECs will not be impaired in the absence of UNE dedicated transport from Verizon MA.

Q. TO BE DEDICATED TRANSPORT FOR PURPOSES OF THE TRIGGERS, DOES THE FCC REQUIRE A PERMANENT DEDICATED CIRCUIT BETWEEN TWO ILEC WIRE CENTERS?

A. No. Contrary to the claim of AT&T, the FCC's *TRO* definition of "dedicated transport" – which is the only definition that matters for purposes of applying the transport triggers – does not require dedicated transmission paths between pairs of incumbent LEC central offices or wire centers that are "always open."[72] The FCC defined dedicated transport as a facility on which a certain amount of capacity is "dedicated to a particular customer or carrier."[73] The FCC's definition is consistent with how the most modern telecommunications networks are constructed.

AT&T is attempting to re-write the *TRO* by imposing an engineering definition of "dedicated transport" that means a dedicated circuit that is permanently established between two points and is always on. The *TRO*, however, clearly provides that dedicated transport includes transport routed

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[71] http://www.att.com/news/item/0,1847,4206,00.html; *see also* http://www.att.com/news/item/0,1847,12517,00.html.

[72] Lynott/Fea Testimony at 32 ("The essence of dedicated transport is that its connections are always 'open,' that is, the circuits are always available because they are dedicated to the user.").

[73] 47 C.F.R. § 51.319(e)(2) (emphasis added); *see TRO* ¶ 361 ("Dedicated interoffice transmission facilities (transport) are facilities dedicated to a particular customer or competitive carrier that it uses for transmission among incumbent LEC central offices and tandem offices.").

through switching facilities, so long as the transport is used to provide bandwidth dedicated to a particular customer or carrier. The CLEC transport facilities identified by Verizon MA in Attachment 3 to its Supplemental Panel Testimony meet that definition. Indeed, under AT&T's definition of dedicated transport, CLECs could design their transport in such a way that the triggers would never be met.

Q: AT&T AND THE LTCC ARGUE THAT VIRTUALLY NONE OF THE EXTENSIVE, ROBUST TRANSPORT FACILITIES DEPLOYED BY CLECS QUALIFY AS DEDICATED TRANSPORT FOR PURPOSES OF THE FCC'S TRIGGERS BECAUSE THEY ARE "BACKHAUL" FACILITIES. ARE THE CLECS CORRECT?

A: No. AT&T and the LTCC contend that the FCC's exclusion of backhaul transport facilities from the definition of the UNE – *i.e.*, the dedicated transport facilities Verizon and other ILECs are required to provide CLECs as a UNE at TELRIC prices -- means that CLECs' backhaul transport, or "entrance facilities" cannot be considered when applying the FCC's transport triggers.[74] "Backhaul" facilities are simply the portion or "leg" of the transport facility that takes traffic from the Verizon wire center to the CLEC switch.

This argument confuses the FCC's definition of the "dedicated transport *UNE*" (that only ILECs are required to provide, not CLECs) with the CLEC competitive transport facilities (provided only by CLECs, not ILECs) that are

[74] Lynott/Fea Testimony at 10, 21-22, 23, 33; *see* LTCC Panel Testimony at 18, alleging that the fiber optics installed in CLEC collocation arrangements are likely "not being used to provide transport

evaluated under the FCC's triggers. AT&T and other CLECs do not have UNE obligations, however; therefore, the UNE definition of dedicated transport does not apply to their networks. Nor does it have anything to do with the fundamental purpose of the FCC's transport trigger analysis, which is to determine whether there are sufficient competitive transport facilities on a particular transport route that CLECs are not impaired without use of ILECs' networks.

Second, the *TRO* explicitly recognizes that CLECs use their self-provisioned transport facilities to "backhaul" traffic, and then expressly classifies those facilities as *dedicated transport*. For example, in Paragraph 361 of the *TRO*, the FCC states that:

> Competing carriers generally use interoffice transport as a means to aggregate end-user traffic . . . *by using dedicated transport* to carry traffic from their end users' loops, often terminating at incumbent LEC central offices, through other central offices to a point of aggregation. Ultimately, the traffic is carried to the competitor's switch or other equipment, often from an incumbent LEC central office along a circuit generally known as an entrance facility.[75]

That is exactly what "backhaul" means – and the FCC clearly intends to count it as dedicated transport.

Third, excluding CLEC backhaul transport facilities from the facilities subject to the transport triggers makes no sense in light of the FCC's factual findings on competitive transport facilities in the *TRO* or the FCC's goals in formulating its transport triggers. The *TRO* makes clear that the FCC excluded backhaul transport facilities from the ILEC UNE requirement for dedicated

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between two ILEC wire centers, but instead are being used to carry traffic from a wire center to a CLEC switch."

[75] (Emphasis added); *see also TRO* ¶ 370.

transport precisely because backhaul facilities are the most competitive segment of the transport market.[76] Backhaul facilities are the very transport facilities that competing carriers have been most successful in self-provisioning. The argument against considering backhaul facilities for purposes of the FCC's trigger analyses would mean that, even if there were three or more competitors with competitive fiber in every ILEC wire center in the country, all of which were backhauling traffic to central hub facilities prior to routing that traffic to other ILEC wire centers, nonetheless, no transport competition would be deemed to exist. In other words, AT&T and the LTCC are saying that if there are *so many* CLEC competitive transport facilities that they justify a national FCC finding of no impairment for one type of UNE ("backhaul" connections between ILEC and CLEC switching offices), then the FCC intended that those same pervasive CLEC facilities *should be ignored* for purposes of assessing impairment for another UNE (connections from one ILEC switching office to another). This is illogical and clearly not what the FCC intended.

Fourth, excluding transport backhaul facilities from the trigger analysis would mean that *most if not all* of competitive fiber that AT&T, MCI, and other CLECs have admitted deploying would not "count" simply because competitive networks are not configured in precisely the same way as ILECs' networks. In the *TRO*, however, the FCC expressly declares that the purpose of the transport trigger analysis is not to identify CLEC transport that mirrors ILEC networks, but

[76] *See TRO* ¶ 367 n.1122 ("Competing carriers agree that the most competitive type of transport is the link between an incumbent LEC wire center and a competitor's network.").

to "identify[] specific point-to-point routes where carriers *have the ability* to use alternatives to the incumbent LEC's network."[77]

Q. PLEASE RESPOND TO THE LTCC'S CONTENTION [AT 19], THAT VERIZON MA IMPROPERLY INCLUDED IN ITS SELF-PROVISIONING TRIGGER ANALYSIS CLECS WHO STATED THAT THEY HAVE NOT DEPLOYED TRANSPORT FACILITIES BETWEEN VERIZON MA WIRE CENTERS.

A. As demonstrated above, the operative requirement for inclusion in the trigger analysis is not whether a CLEC has deployed transport facilities directly from one Verizon MA wire center to another, but whether it can use its own transport facilities to carry traffic – directly or indirectly, switched or unswitched – between collocation arrangements at a given pair of Verizon MA wire centers. Of the CLECs identified by the LTCC, only Sprint and Choice One have arguably denied this kind of deployment. Sprint has admitted that it has obtained dark fiber from a third party vendor[78] but has deliberately avoided stating whether that fiber is leased pursuant to a long-term IRU, which would qualify Sprint as a self-provider under the trigger.[79]

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

[78] See Response of Sprint to Information Request Conv-Sprint-1-1.

[79] See Rule 319(e)(3)(i)(A)(1). Sprint also avoided a full response to Information Request DTE-1-2, asking it to list the Verizon MA wire centers to which it had obtained transport from a third party (not Verizon MA). In response, Sprint stated only that it had not obtained any such transport "for the provisioning of local service." Of course, the FCC's triggers in no way exclude from consideration transport facilities that are used for interstate, rather than local, purposes. Further, Sprint is a party to this proceeding but has failed to offer any testimony contesting Verizon MA's evidence that Sprint has self-deployed dark fiber and lit transport along the routes stated in Attachment 3 to Verizon MA's Supplemental Panel Testimony. The Department should consider Sprint's failure in considering this issue.

The other CLECs identified by the LTCC do not deny that they are capable of transmitting traffic between Verizon MA wire centers. Rather, their responses to the Department's Information Requests – like AT&T's, see below – are carefully phrased to hide this capability behind the false notions that dedicated transport must run directly from one Verizon MA wire center to another and cannot pass through intermediate CLEC switches. For example, CTC states in response to Information Request DTE-1-1 only that it has not "deployed its own transport facilities between any ILEC wire centers in Massachusetts." CTC is thus taking the incorrect AT&T/LTCC view that transport facilities between a Verizon MA wire center and a CLEC switch cannot form a part of a larger transport route that satisfies an FCC trigger. Moreover, CTC's claim conflicts with its later statement, in response to Information Request CONV-CTC-1-1 that it has deployed dark fiber dedicated transport on at least one route.

The LTCC also alleges that *****BEGIN PROPRIETARY*****

*****END PROPRIETARY***** should not be counted toward the self-provisioning trigger because they "indicated that their facilities were between their switch and a wire center and not between ILEC wire centers …."[80] Such transport facilities emphatically do count towards satisfying the trigger, because they are connected together at the CLEC switch and enable the CLEC to transmit traffic between Verizon MA wire centers in the absence of UNE dedicated transport from Verizon MA.

[80] LTCC Panel Testimony at 19-20.

Q. **THE LTCC CLAIMS (AT 22) THAT VERIZON MA IMPROPERLY INCLUDED IN ITS SELF-PROVISIONING TRIGGER ANALYSIS WHOLESALE CARRIERS FOR WHOM THERE IS NO EVIDENCE THAT THEY PROVIDE END-USER SERVICE. IS THE LTCC CORRECT?**

A. No. Those carriers are properly included in Verizon MA's self-provisioning transport trigger analysis. (*See* Attachments 3B and 3E to Verizon MA's Supplemental Panel Testimony). The *TRO* expressly provides that "the self-provisioning trigger may be satisfied on a route by a combination of carriers' facilities that were self-deployed to provide wholesale transport to other carriers and facilities self-deployed by carriers to serve their own needs."[81] Consistent with this statement, nothing in the specific FCC rules governing the self-provisioning transport trigger require that a carrier have self-deployed transport facilities *for its own use*. Consequently, even if the carriers identified by the LTCC were strictly wholesale carriers (which Verizon MA does not concede), they are properly counted towards the self-provisioning trigger.

Q: PLEASE ADDRESS THE CLECS' ARGUMENT THAT IN ORDER TO SHOW THAT A TRANSPORT FACILITY IS "OPERATIONALLY READY," VERIZON MA MUST SHOW THAT THE CLEC IS ACTUALLY PROVIDING SERVICE OVER THAT FACILITY.

A: AT&T and the LTCC argue that in order to satisfy the FCC's transport triggers, Verizon MA must demonstrate that a CLEC that has deployed transport facilities

[81] *TRO* ¶ 408, note 1264.

at issue is "operationally ready" to provide transport over that facility, and that the only "reliable" or "effective and practical" way of demonstrating this is to produce evidence that the CLEC is "actually providing service" over that route.[82] The CLECs further allege that Verizon MA must show that the CLEC has performed "the necessary engineering, provisioning, and administrative tasks to ensure that service can be provided…."[83] Finally, both AT&T and the LTCC claim that these fictional requirements are "consistent" with the FCC's alleged requirement that evidence be provided that CLECs "offer service" between the two wire centers on a given route.[84]

The CLECs' allegations fail at almost every level. To begin with, the FCC's "operationally ready" requirement applies only to the triggers for DS1 and DS3 transport. The "operationally ready" language is notably absent in the FCC's self-provisioning trigger for dark fiber, and the wholesale trigger for dark fiber requires only that the carrier be operationally ready *to lease* the facility, not to provide service over it.[85]

Second, the "operationally ready" standard for DS1 and DS3 transport evaluates whether the facility is *capable of operation* on that route, not whether it *is actually operating*. Nowhere does the *TRO* or the FCC's rules state that in order to qualify for the transport triggers, a CLEC must have performed every possible engineering and administrative step to provision its transport facility or

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82 *See* LTCC Panel Testimony at 20 (self-provisioning trigger) and 24 (applying same to wholesale triggers); Lynott/Fea Testimony at 13, 14, 26 (self-provisioning trigger) and 38 (applying requirement to wholesale triggers).

83 LTCC Panel Testimony at 20; Lynott/Fea Testimony at 14.

84 *Id*.

that it must actually be providing service over that facility. Had the FCC intended such a requirement, it easily could have said so, by using the phrase "actually providing service" in place of its uniform use of the term "operationally ready."

Third, the requirement of the *TRO* that a CLEC "offer service" over its facilities applies only to high capacity loops, not to dedicated transport. In contrast to the rules on loops, none of the FCC's Rules for the dedicated transport triggers includes any requirement that the CLEC "offer service" over its facility.[86] The LTCC's claim to the contrary is not based on the rules themselves but on a casual reference in a sentence of the *TRO*, taken out of context.[87]

To be counted as operationally ready, it is enough to show that the competing carrier has the facilities in place, and the facilities are *capable of operation* on that route, even if making that facility operational requires some extra steps. Indeed, the only specific content the FCC gave to the "operationally ready" requirement was that a carrier have transport facilities and fully provisioned collocation arrangements in place in ILEC offices at both ends of a route.

The evidence before the Department easily meets this standard. Verizon MA has offered evidence that the CLECs identified on Attachment 3 of its Supplemental Panel Testimony have fully operational collocation or CATT arrangements at each of the Verizon MA wire centers identified in that

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[85] *See* Rule 319(e)(3)(i)(A) and (B).

[86] *See id*. and Rules 319(e)(1)(ii) and 319(e)(2)(i)(A) and (B).

[87] In ¶ 401 of the *TRO*, the FCC explained that a CLEC's transport path between two Verizon wire centers need not mirror the path used by Verizon. The FCC did not there attempt to promulgate a standard of transport facility readiness.

Attachment. Verizon MA has also offered evidence, based on both its own wire center survey[88] and the admissions of CLECs, that the CLECs have deployed their own fiber facilities to these collocation arrangements and are capable of transmitting traffic between the pairs of wire centers shown on Attachment 3. With a few limited exceptions, this evidence is uncontroverted. With this in mind, it is telling that AT&T and XO have not claimed in their testimony that they are not operationally ready to provide transport over their fiber facilities. Broadview has made such a claim, but only that it is not operationally ready to provide transport *to third parties*,[89] which is not relevant here because Verizon MA has not asserted that Broadview is a wholesale provider of transport.

Finally, it is worth noting that Verizon MA's evidence on this score would even meet the groundlessly elevated standard asserted by the CLECs. That a CLEC has built an operational collocation arrangement in a wire center and has deployed fiber to that arrangement is strong evidence that such facility is actually in service. There is no rational basis to conclude that a carrier would go to the expense of deploying such facilities and then not use them. (Even in that event, the facility would still qualify as dark fiber transport under the FCC's rules.)

Q: AT&T CLAIMS THAT THE SELF-PROVISIONING TRANSPORT TRIGGER REQUIRES VERIZON MA TO SHOW THAT A CARRIER SELF-PROVISIONS TRANSPORT AT A TOTAL CAPACITY OF NO

[88] *See* Attachment B to Verizon MA's response to Attorney General Information Request 1-1.

[89] *See* LTCC Panel Testimony at 35.

MORE THAN TWELVE DS3-LEVEL FACILITIES.[90] IS THIS AN ACCURATE STATEMENT OF THE FCC'S RULES?

A: No. AT&T is attempting to re-write the FCC's self-provisioning trigger for DS3s. The FCC's rules unambiguously provide that a state commission shall find no impairment where three or more competing carriers have "deployed their own transport facilities and [are] operationally ready to provide dedicated DS3 transport along the particular route."[91] There is no "ceiling" in the FCC's rules on the number of DS3s provided on self-provisioned transport facilities, as AT&T erroneously claims. The ceiling AT&T refers to applies to the number of DS3 transport *UNEs* that ILECs such as Verizon MA are required to lease to CLECs if a state commission finds that a route *does not* meet the DS3 self-provisioning trigger.

Q: PLEASE RESPOND TO THE CLECS' CLAIM THAT IT IS NOT REASONABLE TO INFER THAT OCN LEVEL FIBER FACILITIES ARE USED FOR DS1 AND DS3 TRANSPORT.[92]

A: We explained in our Initial Panel Testimony that competing carriers very typically build fiber networks at an OCn capacity and then "channelize" that capacity down to the lower DS3 and DS1 speeds required by customers. Thus, it is reasonable to conclude that the transport routes at issue here have been channelized to those levels. AT&T, however, argues in its testimony that the FCC determined that carriers generally configure transport facilities at much higher capacity levels than a DS3, such as an OCn level, so that such transport would be inapplicable for the self-

[90] Lynott/Fea Testimony at 12.

[91] 47 C.F.R. § 51.319(e)(2)(i)(A)(1).

provisioning trigger.[93] Likewise, the LTCC claims that "in our experiences, many carriers deploy only OCn terminations in many instances, meaning that they do not provision in many instances, DS3s or quite frequently do not provide DS1 circuits."[94]

Neither of these arguments withstands scrutiny. AT&T's statement that carriers "generally configure" their transport facilities at an OCn level is a mere truism that in no way contradicts Verizon MA's conclusion that those carriers then channelize that transport down to DS3 and DS1 levels. Indeed, the *TRO* itself states that the transport networks deployed by CLECs and ILECs alike invariably consist of OCn-level fiber, not pure DS3 or DS1 facilities.[95] That the FCC nevertheless went ahead and promulgated its DS1 and DS3 dedicated transport triggers indicates that it too was aware that the omnipresent OCn-level transport facilities are regularly brought down to DS3 and DS1 levels.

AT&T and the LTCC offer no hard evidence in support of their theories. Indeed, both of them carefully phrase their testimony in general, speculative terms only and avoid specifics. Neither AT&T nor the LTCC identifies any particular routes on their own networks incapable of providing DS3 or DS1 level transport, nor do they suggest that this may be the case on even some of their fiber routes. More generally, no carrier on which Verizon MA relies in its dedicated transport case has

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92 Lynott/Fea Testimony at 33; LTCC Panel Testimony at 16.

93 Lynott/Fea Testimony at 33.

94 LTCC Panel Testimony at 16.

95 *See, e.g.*, *TRO* ¶ 372, n. 1144 (citing AT&T's comment that "most carriers, including incumbent LECs, typically operate their transport networks at the OC48 capacity."), *id.* ("When carriers deploy new transport facilities, they deploy fiber optic facilities."); *id.* ("Incumbent LECs generally operate their interoffice transport networks at OCn capacity levels").

testified that it has *not* channelized its transport routes, or any particular ones, down to the DS3 or DS1 level.

Finally, the arguments of AT&T and the LTCC are put to rest by the overwhelming evidence in the record demonstrating that carriers in Massachusetts, including many if not all of those relied on by Verizon MA, have in fact channelized their transport networks down to provide DS3 and DS1 service. Many CLECs stated, in response to the Department's Information Requests, that they have actually deployed, obtained or offer dedicated transport at the DS1 and/or DS3 levels. For example:

?? Paetec has obtained a total of 28 *DS3s* from Metromedia Fiber, TCG (AT&T) and Neon in Massachusetts, and "Each DS-3 is channelized and is capable of supporting 28 DS-1s."[96]

?? Richmond Networks *****BEGIN PROPRIETARY*****

[97]

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[99]

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[96] *See* Response of Paetec Communications to Information Request DTE-1-2.

[97] *See* Response of Richmond Networks to Information Request DTE-1-3.

[98] *See* Response of Allegiance to Information Request DTE-1-3.

[99] *See* Responses of Focal, Covad and SBC to Information Request DTE-1-2 and 1-3.

[100] *See* Responses of Level 3 to Information Requests DTE-1-1, 1-2 and 1-3.

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[101]

*****END PROPRIETARY*****

This undisputed evidence – coupled with Verizon MA's Initial Panel Testimony that the Massachusetts tariffs of Allegiance, MCI and AT&T offer transport at a range of speeds including DS3 and, with respect to Allegiance, DS1[102] – is far more than sufficient to allow the Department to conclude that CLECs channelize their transport facilities and that the routes at issue here are available at DS3 and DS1 levels. The Department can reasonably reach no other conclusion in light of the absence of any evidence from the CLECs that a particular route or set of routes is not available at these speeds.

Q: PLEASE ADDRESS AT&T'S LENGTHY SPECULATION THAT CLECS MIGHT BUILD THEIR TRANSPORT NETWORKS WITHOUT DIRECTLY CONNECTING VERIZON MA WIRE CENTERS.

A: All of the CLECs filing rebuttal testimony claim not to be "operationally ready" to provide dedicated transport between two or more Verizon MA wire centers. For example, AT&T claims that a fiber cable running between two Verizon MA wire centers does not show that there is dedicated transport deployed between those wire centers, because there are many fiber strands in a cable and a CLEC may not use the same strand to connect those wire centers, though they both would be connected to

[101] *See* Responses of WilTel Local Network to Information Requests DTE-1-1and 1-3.

[102] Verizon MA Initial Panel Testimony at 41-42. *See also* Supplemental Panel Testimony at 8, stating that Neon advertises on its website that its network includes available capacity at the DS3 level.

the CLEC's switch.[103] AT&T then argues that CLECs may have operational and financial reasons not to build a network of direct, unswitched connections between Verizon MA wire centers.[104]

Whether or not these ruminations about CLECs' networks are accurate, they are irrelevant here: the FCC's definition of "dedicated transport" is a facility on which a certain amount of capacity is "dedicated to a particular customer or carrier." The FCC does not require a dedicated circuit. Therefore, the Commission does not need to evaluate what, if any, reconfiguring would be required for AT&T to dedicate circuits because AT&T's current network architecture already counts toward the transport triggers, regardless of whether it has dedicated circuits. AT&T admits that *****BEGIN PROPRIETARY*****

*****END PROPRIETARY*****[105] AT&T's transport facilities are thus operationally ready to provide dedicated bandwidth to a particular customer or carrier.

B. AT&T'S AND THE LTCC'S EXPANSIVE INTERPRETATIONS OF THE FCC'S WHOLESALE TRANSPORT TRIGGERS HAVE NO BASIS IN THE *TRO* OR THE FCC'S RULES.

Q: AT&T ASSERTS THAT THE REQUIREMENT OF OPERATIONAL READINESS "NEED[S] TO BE EXPANDED" FOR THE WHOLESALE TRANSPORT TRIGGER. AT&T AND THE LTCC THEN LIST MANY CRITERIA THEY CLAIM VERIZON MA MUST SHOW TO SATISFY

[103] Lynott/Fea Testimony at 24-26.

[104] *Id.* at 27-31.

THE WHOLESALE TRANSPORT TRIGGERS.[106] DO THE CLECS ACCURATELY STATE THE FCC'S RULES?

A. No. AT&T has offered no basis whatsoever for its claim that the Department should expand the FCC's "operationally ready" requirement for purposes of the wholesale transport triggers. Certainly, nothing in the way the FCC uses the term "operationally ready" in the *TRO* implies that the FCC intended that term to impose additional requirements on the wholesale trigger not found in the self-provisioning trigger. Nor have the CLECs offered any grounds for their laundry list of alleged wholesale trigger criteria. Most of those requirements have no basis in the *TRO* or the FCC's rules and arise solely from the CLECs' misreading of the *TRO*, including their improper conflation of the triggers for loops with the triggers for transport.

The CLECs claim that Verizon MA must show that each wholesale provider "has sufficient systems, methods and procedures for pre-ordering, ordering, provisioning, maintenance and repair, and billing." Of course, the FCC's rules on the wholesale triggers for dedicated transport contain no such requirements,[107] and none of these purported criteria have any bearing on whether a carrier is operationally ready to provide service over a particular transport facility.

The same reasoning applies to the CLEC's assertion that Verizon MA must show that each wholesale provider is capable of providing transport "in

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[105] AT&T Response to Information Requests CONV-ATT-2-1.

[106] *See* Lynott/Fea Testimony at 38-39; LTCC Panel Testimony at 25.

[107] *See* Rules 319(e)(1)(ii) (regarding DS1 transport), 319(e)(2)(i)(A) and (B) (regarding DS3 transport) and 319(e)(3)(i)(A) and (B) (regarding dark fiber).

reasonably foreseeable quantities." The CLECs can point to no language in the *Order* or the dedicated transport trigger rules requiring that a certain minimum volume of capacity be available on a transport facility in order to satisfy the wholesale triggers.

Likewise, the CLECs have taken the "comparable in quality" language of the transport trigger rules out of context. For example, Rule 319(e)(1)(ii) states that:

> A state commission shall find that a requesting telecommunications carrier is not impaired without access to dedicated DS1 transport along a particular route where two or more competing providers not affiliated with each other or with the incumbent LEC, ***including intermodal providers of service comparable in quality to that of the incumbent LEC*** each satisfy the conditions in paragraphs (e)(1)(ii)(A) through (e)(1)(ii)(D) of this section.

(Emphasis added).[108] Obviously, the requirement of comparable quality applies only to *intermodal* carriers, not to other competing wireline carriers. As Verizon MA's case does not depend on the transport facilities of any intermodal carrier, this requirement is immaterial to this proceeding.

The CLECs offer no basis for their assertion that only carriers who "reasonably can be expected to provide wholesale … transport on a going forward basis" can be counted towards satisfying the wholesale triggers.[109] Indeed, the FCC expressly stated in ¶ 415 of the *TRO* that state commissions *should not* evaluate the financial stability or well-being of the competitive transport providers

[108] Rules 319(e)(2)(i)(A) and (B) contain similar language with respect to the DS3 triggers. Rule 319(e)(3), applicable to dark fiber transport, contains no reference at all to carriers providing service comparable in quality to that of the ILEC.

[109] Lynott/Fea Testimony at 39; LTCC Panel Testimony at 25.

offered to satisfy the wholesale transport triggers. Moreover, while the FCC did state that there should be some reasonable expectation that wholesale *loop* providers are operationally capable of continuing to provide capacity to a customer location, *see* ¶ 338 of the *TRO*, that language is conspicuously absent from ¶415 and the transport trigger rules, indicating that the FCC did not intend such a requirement to apply to transport.

Finally, AT&T suggests the wholly unsupportable proposal that a wholesale provider must be able to provide service "in a commercially reasonable time frame" in order to guarantee that it will sign up customers.[110] In this instance, AT&T has left the dictates of the *TRO* far behind. Nowhere in that order does the FCC even remotely provide that a competitive CLEC who offers transport on a wholesale basis satisfy certain provisioning intervals in order to be counted towards the applicable trigger.

Q. AT&T AND THE LTCC ALSO ASSERT THAT VERIZON MA HAS FAILED TO SHOW THAT THE WHOLESALE CARRIERS IN ATTACHMENT 3 TO VERIZON MA'S SUPPLEMENTAL PANEL TESTIMONY ARE WILLING IMMEDIATELY TO PROVIDE TRANSPORT OR DARK FIBER ON A WIDELY AVAILABLE BASIS ON THE ROUTES IDENTIFIED. DO YOU AGREE?

A. Absolutely not. There is substantial evidence before the Department demonstrating that the wholesale carriers identified by Verizon MA in its Supplemental Panel Testimony Attachment 3 are willing to provide transport

[110] Lynott/Fea Testimony at 39.

facilities to other carriers in Massachusetts on a widely available basis, including on the routes at issue here.[111] Verizon MA submitted in its Initial Panel Testimony evidence that three of those ten carriers – Fibertech, AboveNet (formerly MFN) and Neon – run advertisements on their websites seeking to lease their dedicated transport to other carriers, without exceptions for particular routes.[112] Verizon MA also offered evidence that three additional wholesale transport providers – Williams Local, AboveNet and AT&T – have Massachusetts tariffs on file offering dedicated transport to other carriers. *See id*., Attachment 8.

This evidence is augmented and strongly reinforced by the CLECs' responses to the Department's Information Requests, which in fact formed much of the basis of Verizon MA's Supplemental Panel Testimony. For example, three CLECs – *****BEGIN PROPRIETARY*****

*****END PROPRIETARY***** – admit in response to Information Request DTE-1-4 that they either currently provide dedicated transport to other carriers in Massachusetts or could do so if asked. Likewise, MCI has conceded that it has "transport capacity … available for use by the other carriers at the wire center locations listed in response to question 1," *****BEGIN PROPRIETARY*****

[111] The term "immediately" does not add an additional criterion to the wholesale triggers rules but was intended only to reiterate the "operationally ready" requirement of the rules, as is clear from ¶ 414 of the *TRO*, which states that the operationally ready standard "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 immediately to provision service along the route*." (Emphasis added.)

[112] *See* Verizon MA Initial Panel Testimony at 45-46.

*****END PROPRIETARY*****[113]

In addition, for each of the ten wholesale transport providers identified in Verizon MA's Supplemental Panel Testimony, at least one CLEC has stated in response to Information Request DTE-1-2 that it has actually obtained transport to a Verizon MA wire center from that provider. In some cases, three or four CLECs have obtained transport from a given provider.[114] For example, *****BEGIN PROPRIETARY*****

*****END PROPRIETARY***** *See* Proprietary Exhibit 1 hereto.

This evidence demonstrates not merely the kind of "occasional" agreement between carriers on "unique circumstances" posited by AT&T,[115] but a systemic, pervasive system of wholesale access to DS1 and DS3 transport and dark fiber widely available throughout the Commonwealth, including on the routes identified by Verizon MA as meeting the FCC's triggers.

In addition to this affirmative evidence – for the most part undisputed – equally important is the absence of evidence to the contrary. None of the ten carriers that Verizon MA has identified as wholesale providers in Massachusetts has stated in response to the Department's or any party's Information Requests that it does not or cannot offer to other carriers transport at the relevant capacity

[113] MCI's Revised Response to DTE-1-4, referencing MCI's Revised Response to DTE-1-1. MCI's failure to mention dark fiber is immaterial, in that Verizon has not identified MCI as a wholesale provider of dark fiber. *See* Attachment 3C to Verizon MA Supplemental Panel Testimony.

[114] *See* Proprietary Exhibit 1 attached hereto, which shows the CLECs who stated, in response to Information Request DTE-1-2 or DTE-1-3, that they have obtained dedicated transport to a Massachusetts wire center from the various wholesale transport providers identified by Verizon MA.

[115] Lynott/Fea Testimony at 44.

over any particular facilities Verizon MA identified in Attachment 3 to its Supplemental Panel Testimony.[116]

Further, the CLECs have now had the opportunity to file testimony in response to Verizon MA's case, but they have, almost universally, failed to testify that any of the dedicated transport facilities identified by Verizon MA as meeting the wholesale transport triggers is not in fact operationally ready, widely available and offered for lease to other carriers. Indeed, of the ten wholesale providers identified by Verizon MA, only two (AT&T and XO) have even filed testimony concerning the transport case, and they offer virtually no testimony as to specific facts which would eliminate particular routes from consideration. The only specific claims they do make – that they themselves should not be counted towards the wholesale triggers – are based entirely on mischaracterizations of the *TRO,* and are addressedbelow.

In sum, Verizon MA has offered substantial evidence that the carriers identified on Attachment 3 to its Supplemental Panel Testimony actually do make their transport facilities in Massachusetts available to other carriers on a widely available basis, without exception. In the absence of any evidence from the CLECs showing any such exceptions – that a particular carrier does not offer its network at wholesale or that a carrier does not make particular routes widely

[116] The LTCC's assertions that the Department should use the silence of CLECs *against* Verizon and not "count" towards the triggers those CLECs who have not responded to the Department's Information Requests (LTCC Panel Testimony at 34) is nonsense that would turn the rules of evidence and the administrative process on their heads. Verizon MA has offered evidence that each of the carriers and routes identified in its Attachment 3 satisfies the FCC's triggers. No evidentiary rule or practice could possibly justify requiring Verizon MA to obtain "evidence from the carriers themselves verifying [Verizon's] claim" before Verizon MA's own evidence could be considered. Indeed, if the silence of the CLECs leaves Verizon's testimony as the only evidence before the Department on an issue, the Department has no option but to make findings consistent with that evidence.

available – the Department has no basis for distinguishing the routes that CLECs undeniably do offer at wholesale from those that they allegedly do not offer. The Department can only conclude that there are no such differences, and that the wholesale providers identified by Verizon MA are indeed willing immediately to provide transport over the routes at issue here to other carriers on a widely available basis.

Q. PLEASE COMMENT ON THE CLAIMS OF AT&T AND THE LTCC THAT TO BE "WIDELY AVAILABLE", SERVICE MUST BE MADE AVAILABLE ON A COMMON CARRIER BASIS, FOR EXAMPLE THROUGH A TARIFF OR STANDARD CONTRACT.[117]

A. The CLECs are fabricating these new standards from whole cloth. Neither AT&T nor the LTCC offers any citation to the *TRO* or any other authority for such a proposition, because there is none. Nowhere does the *Order* state such standards or even imply that "widely available" requires a tariff to be on file or that the carrier make use of a standard contract. Indeed, in ¶ 414 of the *TRO*, the FCC states that the purpose of the "widely available" requirement is to ensure that the competitive carriers counted toward the triggers are willing to offer capacity on their networks "on a wholesale basis." The order imposes no procedural restrictions on how a carrier must offer its transport facilities on a wholesale basis, such as through tariff or standard contract, and the Department should simply apply the commonplace meaning of the term "wholesale" to the FCC's statement. Consequently, the

[117] *See* LTCC Panel Testimony at 25; Lynott/Fea Testimony at 39.

willingness of a carrier to offer its transport facilities to another carrier is all that is required here. The evidence submitted by Verizon MA amply meets this standard.

In any event, it is worth reiterating that Verizon MA has offered evidence above showing that seven of the ten carriers it has identified as wholesale providers in Attachment 3 to its Supplemental Panel Testimony advertise their wholesale transport services on their websites, have a tariff on file for such services or have admitted that their transport facilities are available to other carriers on a wholesale basis. Thus, these carriers satisfy even the improperly elevated standard proposed by AT&T and the LTCC.

Q. PLEASE COMMENT ON THE CLAIMS OF AT&T AND THE LTCC THAT VERIZON MA MUST ALSO DEMONSTRATE THAT EACH WHOLESALE PROVIDER IS ACTUALLY OFFERING SERVICE OVER THE ROUTES AT ISSUE, HAS EQUIPPED ITS NETWORK TO FACILITATE NUMEROUS WHOLESALE CUSTOMERS AND HAS DEVELOPED APPROPRIATE SYSTEMS AND PROCEDURES TO MANAGE A WHOLESALE BUSINESS.[118]

A. This is another example of AT&T and the LTCC manufacturing criteria and requirements for the FCC's triggers that simply are nowhere to be found in the *TRO* or the FCC's rules. As discussed above, none of the FCC's rules for the wholesale transport triggers requires proof that the wholesale providers actually offer service over their facilities.[119] Rather, those rules require only that the

[118] *See* LTCC Panel Testimony at 24; Lynott/Fea Testimony at 35-36.

[119] *See* Rules 319(e)(1)(ii), 319(e)(2)(i)(B) and 319(e)(3)(i)(B).

carrier be willing to provide service over its facilities (or lease dark fiber) if requested. As for the other "requirements" created by the CLECs, the FCC's rules impose no such OSS-type requirements or other efficiency standards on a carrier for that carrier to be counted towards satisfaction of the transport triggers.

Q. PLEASE COMMENT ON AT&T'S CONTENTION THAT THE DEPARTMENT COULD FIND IMPAIRMENT EVEN IF IT FINDS THAT A TRIGGER HAS BEEN SATISFIED.[120]

A. AT&T is wrong. To be clear, the *TRO* holds out the possibility that a state commission might seek a waiver if a trigger is met on a given route "where some significant barrier to entry exists such that deploying additional facilities is entirely foreclosed" such as a municipal moratorium on obtaining rights-of-way or lack of collocation space.[121] AT&T's argument is pure speculation, however, as neither AT&T nor any other party has submitted any evidence of any such "significant barriers to entry" in this proceeding that would warrant the Department concluding that, despite the fact that a trigger is met on a particular route, it should seek a waiver from the FCC.

Q. AT&T CLAIMS (AT 44 OF LYNOTT/FEA TESTIMONY) THAT IT SHOULD NOT BE COUNTED TOWARDS THE WHOLESALE TRIGGER. DO YOU AGREE?

A. No. The sole basis for AT&T's argument is its statement in response to DTE-1-4 that it "does not offer dedicated transport facilities to other carriers connecting to

[120] *See* Lynott/Fea Testimony at 40.

[121] *TRO* ¶ 411.

any Verizon wire center in Massachusetts."[122] In light of AT&T's overly narrow belief that "dedicated transport" includes only unswitched transport running directly from one Verizon MA wire center to another, AT&T's response to DTE-1-1 means only that AT&T does not provide such unswitched, direct transport to other carriers. It provides no evidence relevant to AT&T's ability, willingness or practice of providing switched, indirect dedicated transport on a wholesale basis.

AT&T unquestionably provides wholesale transport, including at DS1 and DS3 levels. As noted above, *****BEGIN PROPRIETARY*****

*****END PROPRIETARY***** AT&T advertises its wholesale transport services on its website and has a competitive access tariff on file with the Department.[123] And in its 2002 Annual Report (Form 10-K) filed with the SEC, AT&T reported that it provides "wholesale transport services." The pertinent paragraph in AT&T's 10-K provides:

> TRANSPORT
>
> AT&T Business Services provides wholesale networking capacity and switched services to other carriers. AT&T Business Services offers a combination of high-volume transmission capacity, conventional dedicated line services and dedicated switches services on a regional and national basis to Internet Service Providers (ISPs) and facility-based and switchless resellers. AT&T Business Services' wholesale customers are primarily large tier-one ISPs, competitive local exchange carriers, regional phone companies, interexchange carriers, cable companies and systems integrators. . . AT&T Business Services also has sold dedicated network capacity

[122] Lynott/Fea Testimony at 44.

[123] *See* Exhibit 8 to Verizon MA's Initial Panel Testimony and AT&T website http://service.att.com/servicelibrary/business/ext/files/FLACCSDM.pdf.

through indefeasible rights-of-use agreements under which capacity is furnished for contract terms as long as 25 years.[124]

On the basis of this evidence, AT&T is properly counted towards satisfaction of the wholesale triggers.

Q. **AT&T CLAIMS THAT XO SHOULD NOT BE COUNTED TOWARDS THE WHOLESALE TRIGGER. DO YOU AGREE?**

A. No. Contrary to AT&T's claim, *****BEGIN PROPRIETARY*****

*****END PROPRIETARY***** In light of XO's faulty view that transport circuits between ILEC wire centers means only direct connections (*see e.g.,* LTCC Rebuttal Testimony at 19-20), XO's response to this Information Request, like AT&T's, says nothing about XO's willingness, ability or practice of providing transport facilities to other carriers which *indirectly* connect two Verizon wire centers by passing through an intermediate CLEC switch.[125] Given XO's failure to offer evidence on this issue and Verizon's evidence that at least one other carrier has in fact obtained dedicated transport from XO in Massachusetts,[126] XO is properly included in the wholesale trigger analysis.

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[124] AT&T Annual Report Form 10-K for 2002 (filed March 31, 2003). *See* Exhibit G.3

[125] For the same reason, XO's statement that "Although it is possible that XO may have provisioned a transport circuit between two central offices, XO does not make such services widely available on a wholesale basis as required under the FCC's trigger analysis," LTCC Panel Testimony at 37, is equally irrelevant. It addresses only direct transport and says nothing about whether XO's *indirect* transport routes between Verizon MA central offices are widely available to other carriers.

[126] *See* Proprietary Exhibit 1 filed herewith.

C. RESPONSES TO THE HANDFUL OF SPECIFIC FACTUAL ALLEGATIONS IN CLEC TESTIMONY

Q. DID CLECS RAISE SPECIFIC FACTUAL ISSUES ABOUT THE DIRECT TRANSPORT ROUTES IDENTIFIED BY VERIZON MA IN ITS INITIAL AND SUPPLEMENTAL PANEL TESTIMONY?

A. Conversent raises specific factual questions and concerns about some of the transport routes that Verizon MA has identified as meeting one or both of the FCC's triggers. Conversent attempts to provide a route-by-route analysis of sixteen routes where it is currently leasing unbundled dark fiber transport from Verizon MA. The approach taken by Conversent stands in stark contrast to the generalized denials offered by AT&T and others. In the section below, we address these factual issues, and show that most of them stem from simple misunderstandings about the evidence or can otherwise be easily resolved.

Q. CONVERSENT ASSERTS THAT ALLEGIANCE CANNOT BE COUNTED TOWARD THE SELF-PROVISIONING TRIGGER FOR DARK FIBER ON FOUR INTEROFFICE ROUTES[127] AND ANOTHER CARRIER CANNOT BE COUNTED ON EIGHT INTEROFFICE ROUTES[128] BECAUSE THESE CARRIERS HAVE STATED THAT THE DARK FIBER THEY UTILIZE ALONG THESE ROUTES IS NOT OBTAINED UNDER A LONG TERM IRU. CONVERSENT MAKES A SIMILAR ARGUMENT FOR ITSELF ON AN ADDITIONAL ROUTE CLAIMING THAT IT HAS NEITHER

[127] The four routes identified by Conversent are: Backbay – Harrison St.; Bowdoin – Cambridge Tandem; Newton – Cambridge Tandem; Waltham Spring – Newton;

[128] The eight routes identified by Conversent are: Braintree – Brockton; Braintree – Quincy; Backbay – Harrison St.; Bowdoin – Cambridge Tandem; Franklin St. – Harrison St.; Franklin St. – Quincy; and Lowell – Lawrence.

DEPLOYED ITS OWN FIBER NOR OBTAINED DARK FIBER PURSUANT TO A DARK FIBER IRU BETWEEN THE LOWELL AND LAWRENCE WIRE CENTERS. DO YOU WISH TO RESPOND?

A. Yes. Importantly, Conversent does not deny that Allegiance and *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** have operational collocation arrangements in place in the respective Verizon MA wire centers (that comprise the twelve interoffice routes) in question.[129] Conversent also does not dispute that it has operational collocation arrangements in place in Verizon MA's Lowell and Lawrence wire centers nor does it deny that it obtains dark fiber from a third-party wholesale provider which enables Conversent to connect to these two Verizon MA wire centers. The crux of Conversent's argument is simply that these carriers obtain dark fiber from a wholesale dark fiber provider on a shorter-term basis rather than on a long term IRU basis. Even if Conversent's claims prove to be factually correct, the net effect would be to eliminate only 6 transport routes from Verizon MA's case, because the remaining routes addressed by Conversent's argument satisfy the wholesale dark fiber trigger in any event (*see* below), thereby demonstrating non-impairment with respect to those routes.

Q. CONVERSENT ASSERTS THAT THE LEXINGTON - WALTHAM WEST AND WALTHAM SPRING - WALTHAM WEST ROUTES CANNOT BE COUNTED AS MEETING THE SELF-PROVISIONING TRIGGER

[129] Verizon MA acknowledges the reported purchase of the assets of Allegiance by XO and that, should this transaction be completed, Allegiance and XO could no longer be counted as separate entities in Verizon MA's triggers analysis. In part for this reason, Verizon MA suggests that it may be beneficial

BECAUSE VERIZON MA FAILED TO DEMONSTRATE FOR THREE CARRIERS ***BEGIN PROPRIETARY* ***END PROPRIETARY*** THAT THE DARK FIBER EACH HAS SELF-PROVISIONED INTO VERIZON MA'S WIRE CENTERS TERMINATES IN A COLLOCATION ARRANGEMENT. DO YOU AGREE?**

A. No. Conversent's testimony is misleading because it suggests a distinction for purposes of the *TRO* between traditional collocation arrangements and Cable Access Transport Termination ("CATT") arrangements. Contrary to Conversent's assertions, the FCC recognized in the *TRO* that there are a variety of arrangements outside of the ILEC's networks through which carriers obtain dedicated transport among ILEC wire centers. For purposes of applying the self-provisioning trigger, the FCC specifically noted that "[c]ollocation may be in a more traditional collocation space or fiber can be terminated on a fiber distribution frame, or the like, to which other competing carriers collocated in that central office can obtain a cross connect under non-discriminatory terms." *TRO* ¶ 406, n 1257. The FCC went so far as to state that "We find it beneficial to count for purposes of this test all types of collocation arrangements, including those that may not qualify for collocation under section 251(c)(6)." Thus, under the *TRO* all three carriers must be counted as meeting the self-provisioning trigger on these two routes.

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for it to file a compliance analysis of the routes that satisfy the FCC's transport triggers, after the Department has made its determinations regarding trigger candidates.

Q. CONVERSENT NEXT ASSERTS THAT VERIZON MA FAILED TO SHOW THAT THE FACILITIES OF ***BEGIN PROPRIETARY* ***END PROPRIETARY*** ARE "OPERATIONALLY READY" TO PROVIDE TRANSPORT INTO OR OUT OF A VERIZON MA CENTRAL OFFICE. CONVERSENT GOES ON TO ARGUE THAT BECAUSE OF THE TIME AND WORK REQUIRED TO MAKE DARK FIBER THAT TERMINATES AT A CATT OPERATIONALLY READY, DARK FIBER THAT TERMINATES AT A CATT INSTEAD OF A COLLOCATION ARRANGEMENT CANNOT BE COUNTED TOWARD THE TRIGGER. DO YOU AGREE?**

A. No. Conversent ignores that other carriers may already have established fiber transport connections between their collocation arrangement/s and *****BEGIN PROPRIETARY*****

*****END PROPRIETARY***** CATT arrangements in the Verizon MA wire centers that comprise the Lexington – Waltham West, and Waltham West – Waltham Spring routes. To the contrary, Verizon MA's central office inspection revealed that at least three carriers *****BEGIN PROPRIETARY*****

*****END PROPRIETARY*****

have fiber cables installed to one or both of the Subject Carriers' CATT arrangements within the Lexington wire center.[130] From there, Verizon MA confirmed that the Subject Carriers have fiber cables between their CATT arrangements and manhole zero. Similarly, in the Waltham West wire center Verizon MA's inspections determined that at least two carriers *****BEGIN**

PROPRIETARY* ***END PROPRIETARY*** have fiber cables in place that connect their collocation arrangements with the Subject Carriers' CATT arrangements and that each of these CATT arrangements has two fiber cables that go on to manhole zero. Finally, in the Waltham Spring wire center Verizon MA found that at least two carriers ***BEGIN PROPRIETARY*** ***END PROPRIETARY*** CATT arrangement and that both of the Subject Carriers have fiber cables that connect their CATT arrangements to manhole zero.

Furthermore, while Conversent is correct that the standard interval shown in Verizon MA's tariff for an application to augment a collocation arrangement is 76 business days, a CLEC can request that an augment be expedited. Moreover, contrary to the misleading picture that Conversent attempts to paint for the Department, Verizon MA's actual experience in completing augments involving placing fiber cables from a collocation arrangement to a CATT arrangement generally has been significantly shorter than the tariffed 76 business day interval. According to Verizon MA records, excluding augments that experienced a delay caused by the CLEC itself, Verizon MA's average completion interval on 35 cable augments completed over the past two years was approximately 53 business days. Moreover, the average completion interval on the jobs that were completed in 2003 was approximately 48 business days. Thus, the amount of time required to augment a carrier's collocation arrangement in order to connect to a third-

[130] *See* Attachment B to Verizon MA's Reply to Information Request AG 1-9.

party's CATT arrangement should not be viewed as a barrier to obtaining dark fiber or DS1 or DS3 transport from a wholesale provider other than Verizon MA.

Q. CONVERSENT ARGUES THAT ***BEGIN PROPRIETARY* ***END PROPRIETARY*** DARK FIBER CANNOT BE COUNTED ON 15 OF THE ROUTES THAT VERIZON MA IDENTIFIED BECAUSE THAT CARRIER HAS CLAIMED THAT THE DARK FIBER IT HAS DEPLOYED ON 12 OF THE ROUTES "IS NOT OPERATIONALLY READY TO PROVIDE TRANSPORT" AND FURTHER THAT IT "DOES NOT HAVE ANY DEDICATED TRANSPORT CIRCUITS" ALONG THE OTHER THREE ROUTES?**

A. As explained in Verizon MA's Initial Panel Testimony, the Company conducted a physical inspection of various collocation and CATT arrangements in place in several of its wire centers. Verizon MA counted in its filing only those carriers that have self-provisioned fiber cables connecting transmission equipment installed and operating in a carrier's collocation arrangement to manhole zero (or to a CATT arrangement located in the same wire center building that in turn connects to manhole zero.) In highlighting only a small portion of *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** Conversent misrepresents the facts. Both of those responses read as follows: *****BEGIN PROPRIETARY***xxxxxxxxxxxxxxxx**

[131]

[131] The twelve routes identified in CONV-ATT 1-1 are: Boston Backbay – Boston Harrison; Boston Bowdoin Sq – Boston Franklin; Boston Bowdoin Sq – Cambridge Tandem; Boston Franklin – Boston Harrison; Braintree – Brockton; Lexington – Waltham West; Lowell – Lawrence; Newton –

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PROPRIETARY*** (emphasis added) As discussed above, the assertion that interoffice fiber does not constitute "dedicated transport" because it connects two or more Verizon wire centers together via a CLEC switch is without merit. *****BEGIN PROPRIETARY*****

*****END PROPRIETARY***** claim is irrelevant, in that the self-provisioning trigger for dark fiber does not require that the fiber be operationally ready.[132] *****BEGIN PROPRIETARY***** *****END PROPRIETARY***** fiber transport facilities on all fifteen of these routes must be counted under the FCC's *TRO* rules.

Q. CONVERSENT PRESUMES THAT SPRINT HAS NOT OBTAINED DARK FIBER PURSUANT TO A LONG TERM IRU BECAUSE SPRINT DID NOT EXPLAIN WHETHER THE DARK FIBER THAT IT OBTAINED FROM A

Cambridge Tandem; Quincy – Braintree; Waltham Spring – Newton; Waltham Spring – Waltham West; and Worcester – Framingham. The three routes listed in CONV-ATT 2-1 are: Boston Franklin – Quincy; Framingham – Marlboro; and Framingham – Waltham West.

THIRD-PARTY VENDOR, BETWEEN THE BOSTON BACK BAY – BOSTON HARRISON AND THE BOSTON BOWDOIN – CAMBRIDGE TANDEM OFFICES, IS PROVIDED PURSUANT TO A LONG TERM IRU. SHOULD THE DEPARTMENT RELY ON CONVERSENT'S PRESUMPTION?

A. No. As noted above, Sprint has failed to state clearly in response to Information Requests of the Department and of Conversent whether the dark fiber it has obtained from a third party is on a long-term IRU basis. In light of that failure and Sprint's failure to file any testimony or other evidence contesting Verizon MA's case with respect to Sprint's own facilities, the Department should conclude that Sprint has self-provisioned dark fiber on these two routes. Nevertheless, if appropriate, Verizon MA would be willing to modify its conclusions to incorporate any additional information Sprint might provide.

Q. CONVERSENT NEXT CHALLENGES VERIZON MA'S DARK FIBER WHOLESALE TRIGGERS FINDINGS ON FOUR ROUTES. FIRST, CONVERSENT'S WITNESS GRAHAM ASSERTS THAT IT IS HIS EXPERIENCE THAT NEON NO LONGER OFFERS DARK FIBER TRANSPORT ON A WHOLESALE BASIS, THOUGH HE ACKNOWLEDGES THAT NEON FORMERLY DID OFFER SUCH TRANSPORT AND CURRENTLY OFFERS LIT TRANSPORT AT LEVELS OF DS-1 AND ABOVE. SHOULD THE DEPARTMENT COUNT NEON AS A WHOLESALE DARK FIBER PROVIDER?

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[132] *See* Rule 319(e)(3(i)(A).

A. Yes. Mr. Graham's presumption conflicts with the information NEON has published on its website.[133] NEON advertises Dark Fiber Services among its service offerings, and even characterizes its dark fiber service offering as "A Unique Resource Upon Which To Build a Robust Communications Network." NEON explains on its website that it "has built a 2,000-mile fiber optic network utilizing advanced AllWave™ and TrueWave® fiber from Lucent Technologies, on which selected strands on specific routes are available to customers." NEON's website states that [it] "provides individual dark fiber strands to our customers on an up-front, leased basis. The timing and quantity of fiber strands available is determined on an individual case basis, depending on NEON's current and projected fiber inventory."

Moreover, Mr. Graham's beliefs are belied by CTC's response to the Department's Information Request, in which CTC indicated that *****BEGIN PROPRIETARY*****

*****END PROPRIETARY***** Accordingly, the Department should dismiss Mr. Graham's claim and instead treat NEON as a wholesale provider of transport services ranging from DS3 to OC 48 as well as a wholesale provider of dark fiber.

Q. CONVERSENT ALSO ASSERTS THAT VERIZON MA HAS FAILED TO DEMONSTRATE THAT THE FIBER FACILITIES OF FOUR WHOLESALE PROVIDERS ***BEGIN PROPRIETARY***

*****END**

[133] http://www.neoninc.com

PROPRIETARY* TERMINATE IN COLLOCATION ARRANGEMENTS. DO YOU AGREE?**

A. Absolutely not, for all the reasons stated above. It makes no practical difference whether a wholesale transport provider's fiber facilities are made available to other carriers from a collocation arrangement or CATT arrangement as long as the retail carrier can obtain connectivity to the wholesaler in the same wire center. Moreover, as noted above, the FCC has already found that fiber that terminates in a non-traditional collocation arrangement, such as CATT, satisfies its wholesale trigger.

V. HIGH CAPACITY LOOPS

A. GENERAL CONTENTIONS REGARDING LOOP TRIGGERS

Q. THE LTCC CLAIMS THAT VERIZON MA FACES A SIGNIFICANT BURDEN IN SATISFYING TRIGGERS, AND HAS FAILED TO PUT FORTH SUFFICIENT EVIDENCE FOR THE DEPARTMENT TO FIND NON-IMPAIRMENT UNDER THE TRIGGERS AT ANY CUSTOMER LOCATION AT THIS TIME.[134] WHAT IS YOUR RESPONSE?

A. The Department must apply the triggers using all available data, including data in the hands of the CLECs. Verizon MA based its loop trigger case on the facts available to it. Verizon MA does not have independent data about where other carriers have deployed loop facilities. This information was and is in the hands of those carriers. Thus, Verizon MA—as well as the Department—is dependent on data provided by the CLECs. Verizon MA drew reasonable conclusions from the

data the CLECs provided, some of which is incomplete or artfully phrased to avoid providing direct responses to the Department's information requests. Absent evidence from the CLECs to the contrary, Verizon MA's conclusions are based on information provided by the CLECs, are reasonable and should be relied upon by the Department.

Q. THE LTTC CRITICIZES VERIZON MA FOR NOT APPLYING THE TRIGGERS SEPARATELTY TO DS1, DS3 AND DARK FIBER.[135] IS THIS ACCURATE?

A. No. Verizon MA applied the triggers separately to each loop capacity.

Q. HOW DID VERIZON MA IDENTIFY THE CAPACITY OF THE LOOP FACILITIES DEPLOYED BY THE CLECS IT COUNTED TOWARDS THE TRIGGERS?

A. Department Information Request 11 asked carriers to specify the capacity or capacities of the facilities deployed by the carrier in Massachusetts. ***BEGIN PROPRIETARY***

END PROPRIETARY

[134] LTCC Rebuttal Panel Testimony at 7.
[135] LTTC Rebuttal Panel Testimony at 13.

The remaining carriers did not give a specific response for each customer location. *****BEGIN PROPRIETARY*****

*****END PROPRIETARY*****

Q. DID VERIZON MA SIMPLY ASSUME THAT ALL OCn FACILITIES NECESSARILY ARE CHANNELIZED INTO DS1 AND DS3 CIRCUITS AS CLAIMED BY THE LTTC?[136]

A. No. However, as outlined above, where CLECs gave vague or incomplete answers that failed to identify the capacity of loops deployed or the capacity at which service

[136] LTTC Rebuttal Panel Testimony at 15.

is provided over that loop, Verizon MA reasonably concluded that the loop could be used at the DS1 or DS3 level.

Q. HOW DID VERIZON MA IDENTIFY WHETHER A CLEC HAD DEPLOYED DARK FIBER TO A PARTICULAR LOCATION?

A. Department Information Request 11 asked carriers to identify dark fiber they provide (either its own or obtained through an IRU) at each customer location. ***BEGIN PROPRIETARY***

END PROPRIETARY

However, for the reasons outlined in our Supplemental Panel Testimony, evidence of lit fiber deployment is also evidence of dark fiber. It is standard industry network engineering design (as well as sound economics) to maintain spare dark fibers when deploying loop facilities. Consequently, where carriers did not specify that they do not have dark fiber deployed or provided vague responses, Verizon MA concluded (and absent evidence to the contrary, the Department should find) that those carriers have maintained dark fiber at each location identified in Attachment 4 to Verizon MA's Supplemental Panel Testimony.

Q. DID ANY OF THE CARRIERS IDENTIFIED IN ATTACHMENT 4 TO VERIZON MA'S SUPPLEMENTAL PANEL TESTIMONY DENY

SATISFYING THE TRIGGER AT ANY OF THE CUSTOMER LOCATIONS IDENTIFIED?

A. No.

Q. AT&T ENCOURAGES THE DEPARTMENT TO PETITION THE FCC FOR A WAIVER AT ANY CUSTOMER LOCATON AT WHICH THE LOOP TRIGGERS ARE MET.[137] HAVE THE CLECS PROVIDED ANY BASIS FOR SUCH A WAIVER?

A. No. Paragraph 336 of he *TRO* grants state commissions the "analytical flexibility" to petition the FCC for a waiver to maintain an ILEC's unbundling obligation at a particular customer location where impairment remains due to the existence of a barrier to further competitive facilities deployment until the barrier identified in the waiver petition no longer exists. This flexibility appears to apply only with respect to the self-provisioning trigger. In any event, none of the other parties have provided evidence of the existence of a barrier to the deployment of further competitive facilities at any customer location identified in Attachment A to Verizon MA's Supplemental Panel Testimony to support a Department petition for waiver to the FCC.

Q. PLEASE COMMENT ON THE LTTC'S DEFINITION OF "CUSTOMER LOCATIONS".[138]

A. The LTTC claims that the FCC defined customer locations as "the connection between the relevant service central office and the network interface device ("NID")

[137] AT&T Lynott/Fea Testimony at 40-41.

[138] LTTC Rebuttal Panel Testimony at 16.

or equivalent point of demarcation at a specific customer premises." However, this is the definition of a loop, not a customer location. *See TRO* n. 620. As outlined in our Supplemental Panel Testimony, a customer location is a building.

B. THE SELF-PROVISIONING TRIGGER

Q. HAVE AT&T AND LTTC CORRECTLY DESCRIBED THE SELF-PROVISIONING TRIGGER?

A. No. AT&T states that a CLEC can satisfy the DS3 self-provisioning trigger only if it is serving ***only one or two DS3s*** of demand at a specific customer location.[139] This is a blatant misreading of the FCC's rules for DS3 loops. Rule 319(a)(5)(1)(A) requires a finding of non-impairment where two or more unaffiliated CLECs have deployed their own DS3 facilities (or have deployed DS3 facilities by attaching their own optronics to activate dark fiber transmission facilities obtained under a long-term indefeasible right of use) and are serving customers via those facilities at that location. There is no requirement that the CLECs provide service over no more than two DS3s. Thus, the test is whether a CLEC has deployed ***any*** DS3s and is using them to serve its end-user customers, not how many they have deployed.

AT&T appears to rely on Rule 319(a)(5)(iii), which limits the number of DS3 UNE loops that an ***ILEC*** must provide to a maximum of two for any single customer location if DS3 loops are available as unbundled loops at that location. This rule, however, has nothing to do with counting ***CLEC*** facilities for purposes of applying the DS3 triggers, or anything to do with the triggers at all. Indeed, AT&T's claim makes no sense. For example, a CLEC that has deployed 6 DS3s to

[139] AT&T Lynott/Fea Testimony at 12.

a customer location is clearly not impaired without access to an ILEC's unbundled DS3 loops. It would make no sense to find that where two CLECs have deployed DS3 loops that impairment still exists simply because one has provisioned more that two DS3s.

AT&T and LTCC incorrectly claim that the self-provisioning trigger requires that the providers be operationally ready [140] and have access to the entire location.[141] However the self-provisioning trigger for dark fiber and DS-3 loops do not contain either of these requirements. *See* 47 C.F.R. §§ 51.319(a)(5)(i) and (6)(i); *TRO* ¶¶ 332-333.

Q. DO YOU AGREE WITH THE LTTC'S SUGGESTION THAT THE FCC'S IMPAIRMENT CHARACTERISTICS ARE FACTORS THAT THE TRIGGER ANALYSIS MUST SHOW HAVE BEEN OVERCOME?[142]

A. No. The *TRO* made clear that if a trigger has been met, there is no impairment and no need to do a further analysis of operational and economic factors that might affect impairment in the absence of a trigger showing. Specifically, the FCC stated that if a state commission finds that either trigger is met for a specific loop capacity at a specific customer location, the state commission must make a finding of non-impairment, and the ILEC will no longer be required to unbundle that loop capacity to that customer location. *TRO* ¶ 328; see also 47 C.F.R. §51.319(a)(4)-(6). In establishing the number of CLECs necessary to satisfy the triggers at two, the FCC has already avoided "the risk of failing to accommodate unusual circumstances

[140] AT&T Lynott/Fea Testimony at 14; LTTC rebuttal Testimony at 20.

[141] AT&T Lynott/Fea Testimony at 14; LTTC rebuttal Testimony at 17

unique to [a] single provider that may not reflect the ability of other competitors to similarly deploy." *TRO* ¶ 329 at n. 974. The FCC has already found that its impairment assumption is overcome where the triggers are met, and the Department cannot reach a contrary result. In other words, the FCC's rules mandate that the Department find that the national finding of impairment has been overcome for the relevant loop capacity at any customer location meeting one of the loop triggers.

Q. AT&T CRITICIZES VERIZON MA FOR NOT DETERMINING OWNERSHIP OF FACILITIES IDENTIFIED AS SATISFYING THE SELF-PROVISIONING TRIGGER.[143] IS THIS CORRECT?

A. No. As outlined in our Supplemental Panel Testimony, Verizon MA counted those facilities identified by CLECs in response to DTE Information Request 11, which specifically asked carriers to provide a list of the customer locations in Massachusetts to which they have deployed their own DS1, DS3, or dark fiber facilities or dark fiber obtained under an IRU.

Q. THE LTTC CLAIMS THAT THE WHOLESALE TRIGGER APPLIES TO DARK FIBER LOOPS.[144] IS THIS CORRECT?

A. No. The dark fiber trigger is a self-provisioning trigger, not a wholesale trigger. As the FCC explained:

> When applying the Self-Provisioning Trigger to eliminate an incumbent LEC's requirement to unbundle dark fiber loops at a particular customer location, the mere existence of two unaffiliated competitive providers (in addition to the incumbent LEC) that have deployed fiber to that location, ***whether or not they are offering***

[142] LTTC Rebuttal Panel Testimony at 14.
[143] AT&T Lynott/Fea Testimony at 17.
[144] LTTC Rebuttal Panel Testimony at 24.

> ***dark fiber to other carriers to serve end-user customers at that location***, will satisfy the Self-Provisioning Trigger for dark fiber loops and require a finding of no impairment at that location.

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

Q. PLEASE COMMENT ON AT&T'S CLAIM THAT SPECIFIC CARRIERS SHOULD NOT COUNT TOWARDS THE SELF-PROVISIONING TRIGGERS.

A. AT&T claims that some carriers identified by Verizon MA should not count towards the self-provisioning trigger based on misrepresentations of discovery responses or an incorrect application of the trigger:

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C. THE COMPETITIVE WHOLESALE TRIGGER

Q. HAVE AT&T OR LTTC CORRECTLY DESCRIBED THE WHOLESALE TRIGGER FOR LOOPS?[145]

A. No. The LTTC and AT&T blend together the wholesale trigger for loops and transport, suggesting that to count towards the wholesale loop trigger, the loop facility must be operationally ready. The LTTC and AT&T also claim that the alternative provider must have equipped its network to facilitate numerous wholesale customers and developed the appropriate procedures to manage a wholesale business. AT&T claims that wholesale loops must provide a connection into Verizon MA's central office. However, the wholesale triggers for DS1 and DS3 loops do not contain any of these requirements. Thus, the wholesale loop trigger does not require any showing that each wholesale carrier (a) has sufficient systems, methods and procedures for ordering, preordering, provisioning, maintenance and repair, and billing; (b) possesses the ability to immediately provision wholesale high capacity loops to each specific location identified; or (c) has the ability to provide wholesale high capacity loops in reasonably foreseeable quantities, including having reasonable quantities of additional currently installed capacity. Finally, AT&T's and the LTTC's claims notwithstanding, the triggers do not require a showing that Verizon MA's OSS are capable of handling ASRs that are provisioned to a wholesale provider's facilities.

Q. PLEASE COMMENT ON AT&T'S CONTENTION THAT VERIZON MA MUST SHOW THAT EACH WHOLESALE PROVIDER REASONABLY

[145] AT&T Lynott/Fae Testimony at 35-40; LTTC Rebuttal Panel Testimony at 24-27.

CAN BE EXPECTED TO PROVIDE WHOLESALE LOOPS ON A GOING FORWARD BASIS.[146]

A. The FCC instructed state commissions not to undertake a financial viability analysis with respect to each provider. *TRO* ¶ 338. However, in stating that there should be some reasonable expectation that wholesale loop providers are operationally capable of continuing to provide wholesale loop capacity to that customer location, the FCC did not place the burden on making such a showing on any particular party. *See Id.* Indeed, only the wholesaler has the information necessary to make such a showing. No party has provided any evidence suggesting that the carriers identified in Attachment 4 to Verizon MA's Supplemental Panel Testimony as wholesalers are not operationally capable of continuing to provide wholesale loop capacity to the specific customer locations identified as satisfying the wholesale trigger. The parties silence on their wholesale capabilities give the Department every reason to believe they can continue providing wholesale service at the specific locations identified in Attachment 4 to the Supplemental Panel Testimony

Q. THE LTTC CRITICIZES VERIZON MA'S CONCLUSION THAT CLECS HAVE ACCESS TO THE ENTIRE CUSTOMER LOCATION BASED ON ITS OBSERVATION THAT SEVERAL ALTERNATIVE PROVIDERS PROVIDE "LIT BUILDING" LISTS TO PROSPECTIVE BUYERS THAT IDENTIFY A SPECIFIC FLOOR OR SUITE AND DO NOT PROVIDE ACCESS TO THE REMAINING UNITS.[147] HOW DO YOU RESPOND?

[146] AT&T Lynott/Fae Testimony at 39.
[147] LTTC Rebuttal Panel Testimony at 17.

A. Again, the wholesalers possess the factual information about whether they have access to the entire customer location to which they have deployed their loops. Building owners' restrictions on such access are generally the exception, not the rule. ***BEGIN PROPRIETARY*** ***END PROPRIETARY*** identified some building locations as not having access to the entire location. As a result, Verizon MA did not include these CLECs at these locations in its trigger analysis contained in Attachment 4 to its Supplemental Panel Testimony. The LTTC, however, presents a broad generalization with no factual support, and does not identify any of the carriers or customer locations identified in Attachment 4 as ones at which an alternative provider restricts its wholesale offerings. Nor did any of the CLECs identified as satisfying the wholesale trigger present any evidence that their access to those locations is restricted. Absent evidence of such restrictions, the Department should conclude that a CLEC has access to the entire customer location.

Q. PLEASE COMMENT ON AT&T'S AND THE LTTC'S CONTENTION THAT IF A CARRIER IS REQUIRED TO CONSTRUCT FACILITIES IN ORDER FOR THE SERVICE TO BE MADE AVAILABLE, THEN THE SERVICE IS NOT WIDELY AVAILABLE.[148]

A. It is unclear what AT&T and the LTTC mean by "constructing" facilities. Undoubtedly the installation of new aerial or buried cable is construction of a loop (See 47 C.F.R. § 51.319 (a)(8)(ii)), and Verizon MA did not count any CLEC towards the wholesale trigger where their fiber cables have not already been

[148] AT&T Lynott/Fae Testimony at 39; LTTC Rebuttal Panel Testimony at 26.

installed. However, the FCC found that attaching or changing electronic and other equipment that are ordinarily attached to activate a DS1 loop to be "routine network modifications" by an ILEC. *Id.* The same holds true for CLECs. As stated in our Supplemental Panel Testimony, where a wholesaling CLEC has deployed dark fiber or a fiber optic loop, Verizon MA concluded that a carrier that holds itself out as a wholesaler would provide DS1 loops by adding or changing the electronics to activate a DS1. Such activity would not constitute construction.

Q. PLEASE COMMENT ON AT&T'S AND THE LTTC'S CLAIM THAT TO BE "WIDELY AVAILABLE", SERVICE MUST BE MADE AVAILABLE ON A COMMON CARRIER BASIS, FOR EXAMPLE, THROUGH A TARIFF OR STANDARD CONTRACT.[149]

A. The DS1 and DS3s provided by the carriers identified in Attachment 4 to Verizon MA's Supplemental Panel Testimony are offered on a common carrier basis through a tariff, standard contract, or general service/product guide on that company's web page. Specifically, MCI's DS1 and DS3 services are governed by the terms and conditions contained in its products service guide on its web page.[150]

Q. HAS AT&T CORRECTLY DESCRIBED HOW VERIZON MA IDENTIFIED BUILDINGS THAT SATISFY THE WHOLESALE TRIGGERS?

A. No. As stated in our Supplemental Panel Testimony, we relied primarily on CLEC responses to discovery. DTE Information Request 12 asked carriers to indicate "for

[149] AT&T Lynott/Fea Testimony at 39; LTTC Rebuttal Panel Testimony at 25-26.

[150] *See* http://global.mci.com/publications/service_guide/products/, http://global.mci.com/publications/service_guide/products/products_currently_available/.

each facility identified" in response to DTE Information Request 11 whether it is providing the facility to itself, or on a wholesale basis to another unaffiliated provider. Verizon MA then investigated the wholesale facilities provided by these carriers through public sources.

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[151] *See* http://www.level3.com/672.htm, http://www.level3.com/userimages/dotcom/pdf/Service_Summaries.pdf, and

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Significantly, ***none*** of these carriers denied that they offer high capacity loops on a wholesale basis at the customer locations identified in Attachment 4 to Verizon MA's Supplemental Panel Testimony.

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

Q. THE CLECS PRESENT TRANSITION PLANS IN THE EVENT THE DEPARTMENT FINDS NO IMPAIRMENT ON CERTAIN DEDICATED

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http://www.level3.com/userimages/DotCom/pdf/Metro_PL_USEng_NA_Letter_forscreen.pdf, and http://www.level3.com/userimages/DotCom/pdf/Level3story_USEng_Global_Letter_forscreen.pdf

TRANSPORT ROUTES OR CUSTOMER LOCATIONS. SHOULD THE DEPARTMENT ADDRESS A TRANSITION PLAN IN THIS NINE-MONTH CASE?

A. No. The Department should not address a transition plan in this nine-month case. The FCC's loop rules limit the nine-month state loop proceedings to the impairment review contained in rules 319(a)(4) – (6). 47 C.F.R. §51.319(a)(7). Likewise, the transport rules limit the nine-month transport proceedings to the impairment review contained in rules 319(e)(1) – (3). The trigger rules do not discuss adoption of a transition plan. 47 C.F.R §§ 51.319(a)(4) – (6) and (e)(1) – (3). Thus, while the FCC expected state commissions to develop a transition plan for transport routes and customer locations where it found no impairment, it did not require them to do so in the initial nine-month review. Given the significant amount of work the Department must complete in its nine-month triggers review, it should not add an issue that could extend its decision-making process beyond the nine-month deadline. Instead, as detailed below, the Department can (and should) address the transition period issue in a separate arbitration proceeding to determine the terms for amendments to interconnection agreements in connection with the *TRO*.

Q. DOES THE *TRO* OFFER GUIDANCE ON A TRANSITION MECHANISM ONCE NON-IMPAIRMENT IS FOUND FOR A PARTICULAR UNE?

A. Yes. Recognizing that "the unbundling provisions of section 251 are implemented to a large extent through interconnection agreements between individual carriers," the FCC rejected BOC requests for Commission intervention in the contract modification process:

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

TRO ¶ 700 (emphasis added). The FCC explained that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and 252." *Id.* ¶ 701. The same holds true for any change in an ILEC's unbundling obligations as a result of a state's trigger analysis.

Consistent with the framework adopted in the *TRO,* on October 2, 2003, Verizon posted on its website a draft interconnection agreement amendment reflecting the new rules, and it sent industry letters to CLECs notifying them that such draft TRO amendment was available (and that, pursuant to the *TRO*, October 2nd is deemed to be the negotiation request date for future arbitrations of that amendment).[152]

Q. DOES VERIZON'S DRAFT AMENDMENT ADDRESS STATE FINDINGS OF NON-IMPAIRMENT?

A. Yes. Section 3.8.2 of the draft amendment provides as follows:

> 3.8.2 Other Nonconforming Facilities. With respect to any Nonconforming Facility not addressed in Section 3.8.1 above [regarding switching], Verizon will notify ***CLEC Acronym TXT*** in writing as to any particular unbundling facility previously made available to ***CLEC Acronym TXT*** that is or becomes a Nonconforming Facility, as defined herein [e.g., a loop at a specific customer location or transport facility along a particular route]. The Parties acknowledge that such notice was issued prior to the execution of this Amendment with respect to certain

[152] This industry letter can be found at http://www22.verizon.com/wholesale/clecsupport/content/1,16835,east-wholesale-resources-2003_industry_letters-clec-10_02b,00.html, and the draft amendment can be found at http://www22.verizon.com/wholesale/attachments/industry-letters/TROAmendment-v102203.pdf.

> Nonconforming Facilities [e.g., OCn transport and dark fiber entrance facilities]. During a transitional period of thirty (30) days from the date of such notice, Verizon agrees to continue providing the Nonconforming Facilities addressed in the subject notice(s) to ***CLEC Acronym TXT*** under the terms of the Agreement. At the end of that thirty (30) day period, unless ***CLEC Acronym TXT*** has submitted an LSR or ASR, as appropriate, to Verizon requesting disconnection of the Nonconforming Facility, Verizon shall convert the subject Nonconforming Facilities to an analogous access service, if available, or if no analogous service is available, to such other service arrangement as Verizon and ***CLEC Acronym TXT*** may agree upon (e.g. a separate arrangement at market-based rates or resale); *provided however*, that where there is no analogous access service, if ***CLEC Acronym TXT*** and Verizon have failed to reach agreement as to a substitute service within such thirty (30) day period, then Verizon may disconnect the Nonconforming Facilities; and *provided further*, that with respect to any dark fiber facility that, pursuant to the terms of this Amendment, is (or becomes) a Nonconforming Facility, the transition period shall be ninety (90) days from the date of the aforementioned notice; and *provided further*, that unless the parties have been able to negotiate a suitable transitional services agreement for such dark fiber facilities within that ninety (90) day period, Verizon shall no longer be obligated to provide the Nonconforming Facilities in question to ***CLEC Acronym TXT***. Where the Nonconforming Facilities are converted to an analogous access service, Verizon shall provide such access services at the month-to-month rates, and in accordance with the terms and conditions, of Verizon's applicable access tariff, with the effective bill date being the first day following the thirty (30) day notice period. ***CLEC Acronym TXT*** shall pay all applicable termination charges, if any, for any Nonconforming Facilities that ***CLEC Acronym TXT*** requests Verizon to disconnect, or that Verizon disconnects as a result of the Parties' failure to reach agreement on a substitute service.

Thus, upon the effective date of any Department finding of non-impairment with respect to loop or transport facilities, Verizon MA would not simply stop providing loops or transport to CLECs. Instead, Verizon MA would provide Massachusetts CLECs with 30 days' notice that (a) it intends to discontinue provisioning, as a UNE, the applicable facility in the subject location(s), and (b) upon the passage of the 30 day period, unless the CLEC submits LSRs/ASRs (as appropriate) to disconnect the subject facility, VZ ***will***

continue provisioning the facility as an access service (where an analogous access service exists).

Q. HAVE ANY CLECS IN MASSACHUSETTS PROVIDED INPUT WITH RESPECT TO NEGOTIATION OF A *TRO* AMENDMENT?

A. Yes. A number of carriers (including parties to this case) have submitted letters to Verizon commenting upon changes associated with the *TRO*, including Verizon's draft *TRO* amendment. However, thus far relatively few carriers have provided many substantive comments on that amendment. If the parties are unable to reach agreement on an amendment within 135 days after October 2, 2003, either party may request arbitration.[153] The transition mechanism described above and contained in the model amendment for nonconforming facilities – including, without limitation, for loops and/or transport facilities in respect to which the Department finds no impairment– is reasonable and appropriate. However, if Verizon and the CLECs cannot agree to such a mechanism, this issue should be decided by the Department in the context of a separate Section 252 arbitration proceeding determining terms for *TRO* amendments. Verizon MA filed such a petition with the Department on February 20, 2004.

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes.

[153] *See TRO* ¶ 703.