BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: Implementation of Federal Communications Commission's Triennial Order - Mass Market	)))	**Docket No.: 03-00491**

AT&T'S RESPONSES TO BELLSOUTH'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

AT&T Communications of the South Central States, LLC ("AT&T"), pursuant to the Order on October 21, 2003 Status Conference issued by Director Jones of the Tennessee Regulatory Authority ("TRA") (hereinafter "*Procedural Order*"), Rule 26.02, 34.01, and 34.02 of the Tennessee Rules of Civil Procedure, subject to the General and Specific Objects filed on or about November 6, 2003 hereby submits the following Responses to BellSouth Telecommunications, Inc.'s (hereinafter "BellSouth") First Request for Production of Documents to AT&T Communications of the South Central States, LLC, served on October 24, 2003, as follows:

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 1:	Produce all documents identified in response to BellSouth's First Set of Interrogatories
Response:	AT&T specifically objects to this request to the extent that it is overly broad, unduly burdensome, irrelevant, oppressive and not reasonably calculated to lead to the discovery of admissible evidence pursuant to the *Procedural Order* and Rules 26.02, 34.01, and 34.02 of the Tennessee Rules of Civil Procedure and Rule 1220-1-2.11 of the Rules of Practice and Procedure of the TRA. Subject to the foregoing, and without waiving any objection, all identified documents have been attached to each specific interrogatory or attached herein.

REQUEST: BellSouth First Request for Production of Documents

DATED: October 24, 2003

POD 2: Produce every business case in your possession, custody of control that evaluates, discusses, analyzes or otherwise refers or relates to the offering of a qualifying service in the State of Tennessee.

Objection: AT&T objects to this request to the extent that it is not reasonably calculated to lead to the discovery of admissible evidence.

Pursuant to the *Procedural Order*, Rule 1220-1-2.11 of the Rules of Practice and Procedure of the TRA, the Triennial Review Order, Rules 26.01 and 34.01 Tennessee Rule of Civil Procedure, to the extent that this request seeks specific financial, business or proprietary information regarding AT&T's economic business model, AT&T objects to providing or producing any such information on the grounds that those requests presume that the market entry analysis is contingent upon AT&T's economic business model instead of the hypothetical business model contemplated by the Triennial Review Order. The Triennial Review Order explicitly contemplates that in considering whether a competing carrier economically can compete in a given market without access to a particular unbundled network element, the Commission must consider the likely revenues and costs associated with the given market based on the *most efficient business model* for entry rather than to a *particular carrier's business model.* TRO at ¶326. In particular, the FCC stated:

> In considering whether a competing carrier could economically serve the market without access to the incumbent's switch, the state commission must also consider the likely revenues and costs associated with local exchange mass market service . . . The analysis must be based on the *most efficient business*

[1] For the TRA's convenience, please see Attachment 1 to AT&T's Objections which sets forth the text of these relevant Paragraphs and Footnotes from the *TRO. Complete text of the Triennial Review Order is available @ www.fcc.gov.*

> *model* for entry rather than to any *particular carrier's business model.*

Id. [emphasis added]. Additionally, with respect to economic entry, in ¶517, the FCC stated that ". . . [t]he analysis must be based on the most efficient business model for entry rather than to any particular carrier's business model." Furthermore, in Footnote 1579 of Paragraph 517, the FCC clarified that ". . . [s]tate commissions should not focus on whether competitors operate under a cost disadvantage. State commissions should determine if entry is economic by conducting a business case analysis for an *efficient entry.*" [emphasis added].

In addition to these statements, the FCC also made numerous other references to the operations and business plans of an efficient competitor, specifically rejecting a review of a particular carrier's business plans or related financial information. See, ¶84, Footnote 275 ("Once the UNE market is properly defined, impairment should be tested by asking whether *a reasonable efficient CLEC* retains the ability to compete even without access to the UNE.") (citing BellSouth Reply, Attachment 2, Declaration of Howard A. Shelanski at ¶2(emphasis added)). See also, TRO at ¶115; ¶469; ¶485, Footnote 1509; ¶517, Footnote 1579; ¶519, Footnote 1585; ¶520, Footnotes 1588 and 1589; ¶581, and Footnote 1788.[1]

Accordingly, the FCC's *TRO* specifically contemplates the consideration of financial and related information of an *efficient "model" competitor* and not that of AT&T or any other *particular competitor.* As a result, discovery of AT&T financial information or business plans will not lead to the discovery of admissible evidence in this proceeding.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 3:	Produce all documents referring or relating to the average monthly revenues you receive from end user customers in Tennessee to whom you only provide qualifying service.
Objection:	See response to POD #2.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 4:	Produce all documents referring or relating to the average number of access lines you provide to end user customers in Tennessee to whom you only provide qualifying service.
Response:	See Response to POD #1. Subject to Objections, documents responsive to this request are attached to AT&T's Response to BellSouth's Interrogatories.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 5:	Produce all documents referring or relating to the average monthly revenues you receive from end user customers in Tennessee to whom you only provide non-qualifying service.
Objection:	See response to POD No. 1 and POD No. 2.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 6:	Produce all documents referring or relating to the average monthly revenues you receive from end user customers in Tennessee to whom you provide both qualifying and non-qualifying service.
Objection:	See response to POD No. 1 and POD No. 2.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 7:	Produce all documents referring or relating to the average number of access lines you provided to end user customers in Tennessee to whom you provide both qualifying and non-qualifying service.
Response:	See Response and Confidential Attachment 26 AT&T's Response to BellSouth's First Interrogatories.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 8:	Provide all documents referring or relating to the classifications used by AT&T to offer service to end user customers Tennessee (e.g., residential customers, small business customers, mass market customer, enterprise customers, or whatever type of classification that you use to classify your customers).
Response:	AT&T has no documents responsive to this request.

REQUEST:	Bellsouth First Request for Production of Documents
DATED:	October 24, 2003
POD 9:	Produce all documents referring or relating to the average acquisition cost for each class or type of end user customer served by AT&T, as requested in BellSouth's First Set of Interrogatories, No.34
Objection:	See response to POD No. 2. Subject to the foregoing, AT&T will supplement its response to this Request.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 10:	Produce all documents referring or relating to the typical churn for each class or type of end user customer served by AT&T, as requested in BellSouth's First Set of Interrogatories, No.35
Objection:	See response to POD No. 2. .Subject to the foregoing, AT&T will supplement its response to this Request.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 11:	Produce all documents referring or relating to how AT&T determines whether to serve an individual customer's location with multiple DSOs or with DS1 or larger transmission system.
Response:	AT&T has no documents responsive to this request.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 12:	Produce all documents referring or relating to the typical or average number of DSOs at which AT&T would choose to serve a particular customer with a DS1 or larger transmission system as opposed to multiple DSO, all other things being equal.
Response:	AT&T has no documents responsive to this request.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 13:	Produce all documents referring or relating to the cost of capital used by AT&T in evaluating whether to offer a qualifying service in a particular geographic market.
Objection:	See response POD No. 2. Subject to the foregoing, AT&T will supplement its response to this request.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 14:	Produce all documents referring or relating to the time period used by AT&T in evaluating whether to offer a qualifying service in a particular geographic market (e.g., one year, five years, ten years or some other time horizon over which a project is evaluated)?
Objection:	See response to POD No. 2. Subject to the foregoing, AT&T will supplement its response to this request.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 15:	Produce all documents referring or relating to your estimates of sales expense when evaluating whether to offer a qualifying service in a particular geographic market.
Objection:	See response to POD No. 2. Subject to the foregoing, AT&T will supplement its response to this request.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 16:	Produce all documents referring or relating to your estimates of general and administrative (G&A) expenses when evaluating whether to offer a qualifying service in a particular geographic market.
Objection:	See response to POD No. 2. Subject to the foregoing, AT&T will supplement its response to this request.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 17:	Produce all documents referring or relating to any complaints by AT&T or its end user customers about individual hot cuts performed by BellSouth since January 1, 2000
Response:	See AT&T's Response to BellSouth's First Set of Interrogatories. Attachment to Interrogatory No. 75 .

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 18:	Produce all documents referring or relating to a batch hot cut process used by any ILEC in the BellSouth region that is acceptable to AT&T or that AT&T believes is superior to BellSouth's batch hot cut process.
Response:	See response to Interrogatory No. 60. No responsive documents available.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 19:	Produce all documents referring or relating to an individual hot cut process used by any ILEC in the BellSouth region that is acceptable to AT&T or that AT&T believes is superior to BellSouth's individual hot cut process.
Response:	See response to Interrogatory No. 62. No responsive documents available.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 20:	Produce all documents referring or relating to a batch hot cut process used by any ILEC outside the BellSouth region that is acceptable to AT&T or that AT&T believes is superior to BellSouth's batch hot cut process.
Response:	See response to Interrogatory No. 64. No responsive documents available.

REQUEST:	BellSouth First Request for Production of Documents
DATED:	October 24, 2003
POD 21:	Produce all documents referring or relating to an individual hot cut process used by any ILEC outside the BellSouth region that is acceptable to AT&T or that AT&T believes is superior to BellSouth's individual hot cut process.
Response:	See response to Interrogatory No. 66. AT&T is compiling a response and will provide supplemental information at a later date.

SUBMITTED this 30th day of November, 2003.

BOULT CUMMINGS CONNER & BERRY

Henry Walker
414 Union Street
Suite 1600
Nashville, TN 37219
615-252-2363
hwalker@boultcummings.com

Attorney for AT&T Communications of
the South Central States, LLC

AT&T Response to BellSouth's
First Request for Production of Documents
TRA Dockets 03-00491 and 03-00526
November 26, 2003
Attachment I

relationship between retail competition and unbundling is complex. In many instances, retail competition depends on the use of UNEs and would decrease or disappear without those UNEs; thus, a standard that takes away UNEs when a retail competition threshold has been met could be circular.[391] While evidence of retail competition over non-incumbent LEC facilities is highly relevant to our impairment analysis as explained above,[392] retail competition that relies on incumbent LEC facilities – whether UNEs, resale, or tariffed services – does less to inform our impairment analysis.[393] We explain in greater detail below why we do not conduct an analysis of individual services, and the levels of competition for those services, below.[394]

115. *Impairment of Individual Requesting Carriers or Carriers Pursuing a Particular Business Strategy.* We will not, as some commenters urge, evaluate whether individual requesting carriers or carriers that pursue a particular business strategy are impaired without access to UNEs.[395] We recognize that section 251(d)(2) refers to "*the* telecommunications carrier seeking access," but such a subjective, individualized approach could give some carriers access to elements but not others, and could reward those carriers that are less efficient or whose business plans simply call for greater reliance on UNEs. Providing UNEs to carriers with more limited business strategies would also disregard the availability of scale and scope economies gained by providing multiple services to large groups of customers.[396] Thus, an entrant is not

[391] *See, e.g.*, GCI Jan. 27, 2003 *Ex Parte* Letter, Attach. at 1.

[392] *See supra* Part V.B.1.d.(ii); Verizon Jan. 14, 2003 *Ex Parte* Letter, Attach. at 2. Indeed, retail competition from multiple market participants that do not rely on incumbent LEC facilities at all may well demonstrate, as explained above, that barriers to entry in the relevant market at not so high as to make entry uneconomic.

[393] *See supra* para. 102.

[394] *See infra* Part V.B.2.c.

[395] *See, e.g.*, ALTS *et al.* Comments at 37-38; ACS Comments at 2-8 (arguing that that Commission must determine whether each competitor – including small competitive LECs – needs access to UNEs); GCI Comments at 19-20; Z-Tel Comments at 22-24; BellSouth Reply at 13 (arguing that the Commission should require individual competitive LECs to demonstrate both that they are "reasonably efficient" and that alternative elements are not available to them); NewSouth Reply at 11; Z-Tel Reply at 22; BellSouth NERA Reply Decl. at para. 135; Z-Tel Ford Reply Decl. at paras. 24-25; ACS Jan. 6, 2003 *Ex Parte* Letter at 9-11 (urging Commission to find Alaskan competitor not impaired); ACS Jan. 16, 2003 *Ex Parte* Letter (urging Commission to find Alaskan competitor not impaired); Letter from Karen Brinkmann, Counsel for ITTA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 1 (filed Jan. 27, 2003) (ITTA Jan. 27, 2003 *Ex Parte* Letter). *But see, e.g.*, Qwest Reply at 24-25. The Commission also disagreed with this approach in the *UNE Remand Order*. *See UNE Remand Order*, 15 FCC Rcd at 3725-27, paras. 53-54.

[396] For example, a carrier could claim that it would be unable to pursue a strategy of providing local exchange service to all people with the first name "Sam." Because of the relatively small number of people with that name, the cost of providing such service would likely be very high, and thus entry would be impossible without UNEs. However, an entrant could achieve a much lower average cost of service while serving these people, by pursuing a business strategy of providing service to all potential customers in the market. It might be able to further lower its costs by offering other services, such as vertical features and data services. Our determination is thus based on an entrant providing the full range of services and to all customers supported by the marketplace. Our analysis must, however, take into account diseconomies of scale and scope that might exist, such as limitations on what services customers are willing to purchase as a bundle from a single provider. *But see* BTI Comments at 6 (noting that (continued....)

impaired if it could serve the market in an economic fashion using its own facilities, considering the range of customers that could reasonably be served and the services that could reasonably be provided with those facilities. Furthermore, a carrier- or business plan-specific approach would be administratively unworkable for regulators, incumbent LECs, and new entrants alike because it would require case-by-case determinations of impairment and continuous monitoring of the competitive situation. Finally, we do not read *Verizon* to state the contrary.[397] While *Verizon* noted that smaller entrants may be in greater need of UNEs than larger carriers,[398] the Supreme Court made those factual observations in the context of defending unbundling in general, not in the context of requiring any particular kind of impairment analysis. Thus, we agree with commenters that argue we cannot order unbundling merely because certain competitors or entrants with certain business plans are impaired.[399] Rather, we will achieve needed granularity through consideration of other factors discussed below in Part V.B.2.

116. For similar reasons, we decline to make impairment determinations on an incumbent LEC-by-incumbent LEC basis.[400] The "impair" inquiry of section 251(d)(2) focuses on requesting carriers, not incumbent LECs.[401] We recognize, however, that many aspects of our impairment analysis may coincidentally turn on the incumbent LEC, such as potential revenue opportunities, geographic areas (as explained below in Part V.B.2.b regarding Geographic Granularity), and costs. Likewise, we do not resolve here disputes between particular incumbent LECs and requesting carriers over compliance with the Act and our rules.[402] Such disputes are better handled in an enforcement context, not in a rulemaking.

(Continued from previous page) ———————————

competitive LECs cannot compete with incumbent LEC scale economies); Eschelon Comments at 11-14 (noting that a competitive LEC that serves geographically dispersed customers may not be able to construct a duplicative network).

397 *See* NewSouth Reply at 11; Z-Tel Ford Reply Decl. at para. 24.

398 *See Verizon*, 535 U.S. at 503 n.20, 510 n.27.

399 *See* Competitive Enterprise Institute Comments at 3 (cautioning Commission against setting different standards for different carriers); Verizon Comments at 42-43; BOC Shelanski Decl. at para. 39 (pointing out that antitrust law focuses on harms to competition, not harms to individual competitors). *But see, e.g.*, Eschelon Comments at 8 (noting that smaller, newer competitive LECs may face higher hurdles than larger, established competitive LECs).

400 *See, e.g.*, ACS Jan. 6, 2003 *Ex Parte* Letter at 9-11 (arguing that unbundling is no longer warranted for Alaskan incumbent subject to substantial retail competition).

401 47 U.S.C. § 251(d)(2)(B) (The unbundling inquiry asks whether denial of a UNE "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.").

402 *See, e.g.*, Letter from Frederick W. Hitz, III, Director, Rates and Tariffs, General Communication, Inc., to William Maher, Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 11, *in* Letter from John T. Nakahata, Counsel for GCI, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Nov. 21, 2002) (GCI Nov. 21, 2002 *Ex Parte* Letter); ACS Jan. 6, 2003 *Ex Parte* Letter at 6-9; Letter from Frederick W. Hitz, III, Director, Rates and Tariffs, General Communication, Inc., to William Maher, Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2-10, *in* Letter from John T. Nakahata, Counsel for GCI, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Jan. (continued....)

469. While incumbent LECs reference the Commission's determination in multiple section 271 orders that BOCs provision hot cuts at a level of quality that offers efficient competitors a meaningful opportunity to compete,[1433] and argue that performance data show that current hot cut performance is satisfactory, even as the number of hot cuts has increased,[1434] we find that the number of hot cuts performed by BOCs in connection with the section 271 process is not comparable to the number that incumbent LECs would need to perform if unbundled switching were not available for all customer locations served with voice-grade loops.[1435] In the

(Continued from previous page)

Letter). *But see* Letter from W. Scott Randolph, Director – Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 6 (dated Dec. 23, 2002) (Verizon Dec. 23, 2002 Hot Cut *Ex Parte* Letter) (claiming that Verizon's current internal guidelines contemplate as many as 150 hot cuts per central office). Verizon's filing, however, provides no evidence that the company has actually been able to perform hot cuts at such volumes consistently over a long-term period, as would be required upon any transition away from unbundled switching. Moreover, while Verizon claims that its guidelines could be adjusted to permit more than 150 hot cuts per day if necessary, Verizon provides no evidence that its current processes are sufficient to meet that increased demand.

[1433] *See, e.g., SWBT Texas 271 Order*, 15 FCC Rcd at 18490-93, paras. 268-73.

[1434] *See* Verizon Dec. 23, 2002 Hot Cut *Ex Parte* Letter at 3. Verizon states that between 2000 and 2001, its hot cut volume increased by 50% in Massachusetts (14,114 to 21,089), 40% in Pennsylvania (22,184 to 31,592), and more than 200% in New Jersey (3,918 to 11,845). *Id.* at 3. Verizon claims that its on-time performance in those states was 98.41%, 97.56%, and 95.91%, respectively. *Id.* Qwest also contends that its hot cut performance is excellent. Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 5 (filed Jan. 7, 2003) (Qwest Jan. 7, 2003 *Ex Parte* Letter); *see also* Letter from Lawrence E. Sarjeant, Vice President Law and General Counsel, USTA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 3 (filed Dec. 11, 2002) (USTA Dec. 11, 2002 *Ex Parte* Letter) (stating that "USTA incumbent LEC members are able to perform hot cuts in volumes and timeframes that, in the context of their particular circumstances, support the finding that the removal of switching from the UNE list will not impair the ability of competitive LECs to provide local exchange and exchange access services"). Verizon states that its performance data show that it "routinely meets 95 percent or more of its installation appointments on time." Verizon Comments at 102.

[1435] Based entirely on the Commission's prior findings in section 271 orders, Chairman Powell and Commissioner Abernathy claim that incumbent LEC hot cut processes cannot be a source of impairment. *See Chairman Powell Statement* at 4-5; *Commissioner Abernathy Statement* at 5-6. To begin with, the dissenters completely ignore the volume of evidence in the record of this proceeding that hot cuts create significant barriers to providing service, offering no response or explanation whatsoever. Moreover, contrary to their contentions, the Commission's prior findings in section 271 orders do not support a finding here that competitive carriers would not be impaired if they were required to rely on the hot cut process to serve all mass market customers. At most, these orders found that the specific companies at issue "will be able to handle reasonably foreseeable demand volumes." *Commissioner Abernathy Statement* at 6 (quoting *Bell Atlantic New York 271 Order*, 15 FCC Rcd at 3993, para. 89). Leaving aside the fact that these orders applied only to specific BOCs in specific states and by no means make any findings with respect to BOCs or incumbent LECs generally, these orders examined the adequacy of hot cuts at a time when competitive LECs were principally using unbundled local circuit switching to compete for mass market customers. Indeed, the BOCs frequently relied on evidence of customers being served by unbundled loops combined with unbundled local circuit switching to support their Track A findings of sufficient facilities-based competition. *See, e.g., BellSouth Georgia/Louisiana 271 Order*, 17 FCC Rcd at 9026-27, para. 15; *SBC California 271 Order*, 17 FCC Rcd at 25656, para 12; *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global*
(continued....)

states where section 271 authorization has been granted, unbundled local circuit switching has been available and, accordingly, the BOCs' hot cut performance has generally been limited.[1436] Moreover, we find that the issue is not how well the process works currently with limited hot cut volumes, rather the issue identified by the record identified is an inherent limitation in the number of manual cut overs that can be performed, which poses a barrier to entry that is likely to make entry into a market uneconomic.[1437] Our finding is also corroborated by the comments of

(Continued from previous page)

Networks Inc for Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 01-9, Memorandum Opinion and Order, 16 FCC Rcd 8988, 8990, para. 224 (2001) (*Verizon Massachusetts 271 Order*); *Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Vermont*, CC Docket No. 02-7, Memorandum Opinion and Order, 17 FCC Rcd 7625, 7630-31, para. 11 (2002) (*Verizon Vermont 271 Order*); *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota , Utah, Washington and Wyoming*, WC Docket No. 02-314, Memorandum Opinion and Order, 17 FCC Rcd 26303, 26317, para. 29 (2002) (*Qwest 9-State 271 Order*); *see also* Letter from Brad E. Mutschelknaus, Counsel for Broadview *et al.*, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (filed Jan. 21, 2003) ("Notably, all four of the RBOCs have relied, in one or more States, upon the presence of UNE-P, to advance their bids for Section 271 authority."). And Chairman Powell and Commissioner Abernathy repeatedly voted to approve orders characterizing such deployment as "facilities-based competition" for purposes of meeting section 271's requirement of the "presence of a facilities-based competitor." *See, e.g., Qwest 9-State 271 Order*, 17 FCC Rcd at 26303, para. 29 (stating that Qwest satisfies Track A, section 271(c)(1)(a)); *SBC California 271 Order*, 17 FCC Rcd at 25657, para. 15 (stating that SBC satisfies Track A, section 271(c)(1)(a)); *Verizon Vermont 271 Order*, 17 FCC Rcd at 7630-31, para. 11 (stating that Verizon satisfies Track A, section 271(c)(1)(a)). Furthermore, even in those states where there was not significant unbundled switching-based competition (*see Commissioner Abernathy Statement* at 6-7 n.12) when the Commission granted the section 271 applications for those states, the availability of unbundled loops combined with unbundled switching as a mode of entry informed the Commission's determination of reasonably foreseeable demand volumes. Here, we must consider the adequacy of current hot cut practices for handling the volumes that would be expected if competitive LECs were denied unbundled access to unbundled local circuit switching – something that was by no means "reasonably foreseeable" in the context of the section 271 orders. The section 271 orders thus tell us very little about a BOC's ability to provision large batches of cut overs in a timely and reliable manner under these circumstances. In Broadview's experience, for example, Verizon's performance measures do not apply to bulk migrations on a project-managed basis. Broadview Jan. 15, 2003 *Ex Parte* Letter at 4; *see also Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a/ Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, CC Docket No. 02-67, Memorandum Opinion and Order, 17 FCC Rcd 12275, 12326, para. 109 n.309 (2002). Accordingly, the Commission's section 271 holdings by no means find that incumbent LEC performance is now adequate to meet the demands of UNE-L-based competition. Finally, our decision does not overlook the possibility that if in some markets the incumbents' ability to perform batch hot cuts does not pose impairment, the states may simply make findings to this effect.

[1436] BiznessOnline.Com Feb. 14, 2003 *Ex Parte* Letter at 9-10.

[1437] The dissents assert that the majority makes unwarranted assumptions about incumbent LECs' ability to handle increased volumes in the absence of unbundled loops combined with unbundled local circuit switching. *Chairman Powell Statement* at 5; *Commissioner Abernathy Statement* at 5. It appears that they would support a finding of no impairment based on affidavits and declarations submitted by incumbent LECs attesting to their willingness and ability to handle any requested volume of hot cuts. *Commissioner Abernathy Statement* at 5. We find, however, incumbent LECs' promises of future hot cut performance insufficient to support a Commission finding that the hot cut process does not impair the ability of a requesting carrier to provide the service it seeks to offer without at least some sort of unbundled circuit switching. While incumbent LECs state that they have the capacity to meet any (continued....)

state commissions, most notably the New York Department, which concluded that "Verizon would need to dramatically increase the number of hot cut orders per month if UNE-P was terminated and CLEC customers were switched."[1438] The New York Department concluded that "it would take Verizon over 11 years to switch all the existing UNE-P customers to UNE-L."[1439] Indeed, the New York Department is currently examining ways to "migrat[e] large volumes of customers from Verizon's switches to CLECs' switches more efficiently."[1440] For those reasons, the Commission's prior findings in section 271 orders do not support a finding here that competitive carriers would not be impaired if they were required to rely on the hot cut process to serve all mass market customers.

470. Competitive carriers also argue that the cost of hot cuts, exacerbated by churn, creates a cost disparity that makes it uneconomic to serve mass market customers.[1441] Competitors seeking to use their own switches must incur the costs associated with a hot cut, including both the charges assessed by the incumbent LEC and their own costs of managing and participating in the hot cut process.[1442] The hot cut cost assessed by the incumbent LEC is a non-recurring per-line charge on competitive carriers that connect their own switches to unbundled loops.[1443] The record shows that the cost of connecting each customer to the competitive LEC's switch makes it difficult to compete.[1444] Although hot cut costs vary among incumbent LECs, we

(Continued from previous page)

reasonable foreseeable increase in demand for stand-alone loops that might result from increased competitive LEC reliance on self-provisioned switching, there is little other evidence in the record to show that the incumbent LECs could efficiently and seamlessly perform hot cuts on a going-forward basis for competitors who submit large volumes of orders to switch residential subscribers. As described above, moreover, we ascribe more weight to actual evidence of competitive entry serving the relevant market than to predictive claims of incumbents' ability to handle hypothetical volumes – and the incumbents have been unable to offer compelling evidence that they have actually provisioned hot cuts in the requisite quantity. Moreover, where incumbent LECs have undergone comprehensive testing of their loop provisioning processes, state commissions have found difficulties regarding hot cut performance. Indeed, in its initial comments in this proceeding, the New York Department recognized the hot cut process as one of the "major issues that hamper the development of facilities based competition," and concluded that "[u]ntil hot cuts can be performed in much greater volumes, competitive LECs' lack of access to the UNE-P will materially diminish their ability to provide local service." New York Department Comments at 3.

[1438] New York Department Comments at 4 n.18.

[1439] *Id.*

[1440] *Id.* at 3.

[1441] *See, e.g.*, WorldCom Comments at 33 ("[A]fter a comprehensive evaluation, WorldCom concluded that it did not make economic sense to spend additional capital necessary to attempt . . . to enter the mass market through end-to-end facilities-based service.").

[1442] BiznessOnline.Com Feb. 14, 2003 *Ex Parte* Letter at 4-5.

[1443] *See, e.g.*, ASCENT Comments at 36; Letter from Kimberly Scardino, Senior Counsel, WorldCom, to Michelle Carey, Chief, Competition Policy Division, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1-2 (filed Nov. 15, 2002) (WorldCom Nov. 15, 2002 Customer Churn *Ex Parte* Letter).

[1444] *See, e.g.*, AT&T Comments at 216; ASCENT Comments at 36; GCI Comments at 36; WorldCom Comments at 86; ASCENT Reply at 7. If the competitive LEC uses unbundled incumbent LEC loops, this "loop access" cost (continued....)

BellSouth's average retail local revenues.[1504] However, as discussed above, there was significant disagreement concerning whether entry would be economic for larger wire centers.[1505]

485. All of these studies, including those provided by the BOCs, strongly support the need for a more granular analysis of impairment. We have insufficient evidence in the record, however, to conduct this granular analysis. Such an analysis would require complete information about UNE rates, retail rates, other revenue opportunities, wire center sizes, equipment costs, and other overhead and marketing costs. While some of this information was submitted to us, or is available to us from other sources, the available data do not sufficiently facilitate a granular inquiry into precisely where entry is economic. That market-specific data is needed is indicated by the significant variation in the costs and revenues an efficient entrant is likely to face. For example, costs appear to vary significantly among locations and types of customers.[1506] The recurring and non-recurring charges for critical UNE inputs such as collocation, loops, and transport often vary substantially between states.[1507] Within a state UNE loop rates can vary tremendously among rate zones.[1508] Parties also agree that the average cost per customer for collocation and equipment varies according to the number of customers served in a wire center, which is likely to depend on the size of the wire center and the likely market share of an efficient competitor.[1509] Some costs also vary according to the total size of the market served.[1510] The revenue estimates, which depend on customers' predicted expenditures on local voice service, were particularly controversial, and appear to have had a significant impact on the results.[1511] Retail rates can vary between states, by the type of customer, and within the state.[1512]

[1504] BellSouth Jan. 30, 2003 *Ex Parte* Letter at 8.

[1505] *See supra* Part VI.D.4.a.

[1506] *See supra* note 1498.

[1507] *See supra* note 1301.

[1508] Most states have adopted three rate zones, which is the minimum required by the Commission. *See Local Competition Order*, 11 FCC Rcd at 15882-83, para. 765. Some states have adopted four zones.

[1509] *See supra* Part VI.D.6.a.(i).

[1510] AT&T Jan. 17, 2003 *Ex Parte* Letter at 2-3, 7-8 (discussing collocation space costs, which relate to the number of customers served, and backhaul costs, which relate to the distance between the customers' premises and the competitive LEC's switch); WorldCom Jan. 8, 2003 Switching *Ex Parte Letter*, Attach. at 7 ("Economies of scale are critical to the level and structure of costs incurred by the CLECs.").

[1511] There is significant disagreement concerning what revenues to use in calculating net profits. AT&T, WorldCom, and Z-Tel argue that retail rates should not be relied upon, and that instead we should examine the cost disparity the competitor suffers using UNE-L relative to the incumbent. AT&T Jan. 17, 2003 *Ex Parte* Letter at 3; WorldCom Jan. 8, 2003 Switching *Ex Parte Letter* at Attach. A, 3-6. SBC and BellSouth argue that we should examine whether entry is economic using typical retail revenues. SBC Jan. 14, 2003 Unbundled Switching *Ex Parte* Letter at 3. In its study SBC used the typical retail revenue charged by WorldCom for its nationwide offering of combined local and long distance service, called The Neighborhood. *Id.* BellSouth suggests using the incumbent's average retail per-line local revenues, or the price of the incumbent's retail local offerings as the basis for determining competitor's revenues. BellSouth Jan. 30, 2003 *Ex Parte* Letter at 2-8.

Other revenues from mass market customers,[1513] and additional revenue opportunities from other types of customers,[1514] may also vary between and within states. Therefore, we expect that the states will consider the economic factors discussed here on a market-by-market basis and will determine whether it is appropriate to find "no impairment" in any particular market. This approach is consistent with our standard, which requires a determination of impairment on a granular basis, and with the dictates of *USTA*.[1515]

(ii) State Actions and Determinations

486. In this section, we ask state commissions to take certain actions designed to alleviate impairment in the markets over which they exercise jurisdiction. We also set forth a detailed process by which states may perform analysis on a more granular basis, and may identify where competing carriers are not impaired without access to unbundled switching.

(a) Incumbent LEC Batch Cut Processes

487. We have found that a seamless, low-cost batch cut process for switching mass market customers from one carrier to another is necessary, at a minimum, for carriers to compete effectively in the mass market.[1516] We conclude that the loop access barriers contained in the

(Continued from previous page)

[1512] *See supra* note 1303.

[1513] Revenues associated with related services purchased by mass market customers, such as vertical features, are not included in residential rates, and may vary among the states and within a state. Revenues can also vary according to the state Subscriber Line Charge (SLC) and the state and federal access charges that can be applied. FCC Reference Book at 1; *MAG Plan Order*, 16 FCC Rcd at 19636-37, 19669, paras. 47, 131. Many state commissions report setting intrastate access charges above cost. GAO Report on Universal Service at 18.

[1514] Additional revenue opportunities are likely to be greatest in areas with large numbers of enterprises, especially if some of those enterprises are heavy users of telecommunications services.

[1515] *USTA*, 290 F.3d at 422-26.

[1516] Commissioner Abernathy emphasizes that despite the availability of a managed hot cut process in some states, carriers with their own switches have been increasing their reliance on unbundled switching. *See Commissioner Abernathy Statement* at 5 n.9. However, the record evidence demonstrates that competitive LECs have been forced to abandon plans to provide switch-based services to mass market customers because of the difficulties associated with the current hot cut process. *See supra* para. 466. Moreover, Commissioner Abernathy overlooks the fact that current market conditions warrant the availability of unbundling at a minimum, to transition to competitive switch deployment. *See* WorldCom Reply at 155. More importantly, Commissioner Abernathy fails to recognize that the record evidence indicates that incumbent LECs are not well-equipped to handle hot cut volumes even with the existence of a procedure to manage bulk migrations on a project-managed basis. Indeed, in New York, where Verizon has worked with carriers such as Broadview and AT&T to handle bulk migrations on a project-managed basis, there continue to be quality issues associated with hot cuts. Broadview Jan. 15, 2003 *Ex Parte* Letter at 6. This fact is illustrated by an order issued by the New York Department confirming that although the New York hot cut process is "working" and is "well refined . . . at least at current volumes," "an efficient bulk-hot-cut process and rate is critical to the development of facilities-based competition," and thus instituted a proceeding to address that problem. *See* BiznessOnline.Com Feb. 14, 2003 *Ex Parte* Letter at 9 n.26 (citing Order Instituting Proceeding, *Proceeding on Motion of the Commission to Examine the Process, and Related Costs of Performing Loop Migrations on a More Streamlined (e.g., Bulk) Basis*, Case 02-C-1425 (Nov. 22, 2002)).

approaches. Finally, because there generally are no performance intervals associated with these approaches, incumbent LECs are not subject to financial penalties for inadequate performance.

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

(i) Other Operational and Economic Impairment

476. Above we have concluded that economic and operational barriers associated with the hot cut process justify a national finding that requesting carriers are impaired without access to unbundled local circuit switching. We have, however, asked states to identify markets in which requesting carriers are not impaired without access to unbundled local circuit switching, pursuant to the guidance set forth below.[1469] In doing so, we ask the states to examine evidence of sources of impairment other than hot cuts, in the manner we describe below, as the record shows that requesting carriers may be impaired without access to unbundled incumbent LEC local circuit switching because of operational and economic factors other than those associated with hot cuts. Commenters have alleged that these barriers – which include poor incumbent LEC performance in fulfilling unbundling, collocation, and other statutory obligations, difficulties in performing customer migrations between competitive LECs, difficulties in performing collocation cross-connects between competing carriers,[1470] and the significant cost disadvantages competitive carriers face in obtaining access to the loop and backhauling the circuit to their own switches[1471] – can be sufficient to hinder or prevent entry even if impairment caused by hot cuts were fully resolved. Although these factors *do not* form the basis of our national impairment finding,[1472] we recognize that the record evidence indicates that these factors may give rise to impairment in a given market, even setting aside the problems associated with hot cuts, and that they therefore will be relevant to state commissions' determinations with respect to unbundled local circuit switching. We describe these potential barriers here.

[1469] State commissions can alternatively make a finding that there is impairment based on other economic and operational factors in the manner explained below.

[1470] *See, e.g.*, BiznessOnline.Com Feb. 14, 2003 *Ex Parte* Letter.

[1471] *See* UNE-P Coalition Comments at 44-46; WorldCom Jan. 8, 2003 *Ex Parte* Letter at 3 (noting that switching has high fixed costs that must be spread over a large number of customers if a competitive carrier is to achieve cost efficiencies similar to those enjoyed by the incumbent LEC).

[1472] The evidence in the record is not sufficiently detailed to conclude that impairment exists on a national basis due to these factors, as they vary on a geographic basis.

(2) the costs of backhauling voice circuits to their switches from the end offices serving their customers, which as noted above, include the costs associated with collocation in the incumbent LECs' central offices.[1576]

516. As discussed above, we find that the record does not contain sufficient detail concerning the scope and scale of the barrier posed by the costs associated with migration and backhaul in particular markets to permit us to determine whether and where there may be exceptions to our national finding that competing carriers cannot economically serve the mass market without access to unbundled local switching.[1577] Accordingly, we ask state commissions to examine, on a granular basis, evidence that may demonstrate that requesting carriers are not impaired without access to unbundled local circuit switching.

517. *Evidence of Whether Entry is Economic.* In considering whether a competing carrier could economically serve the market without access to the incumbent's switch, the state commission must also consider the likely revenues and costs associated with local exchange mass market service, as detailed below.[1578] Specifically, state commissions must determine whether entry is likely to be economic utilizing the most efficient network architecture available to an entrant.[1579] While most comments have focused on the UNE-L strategy,[1580] in which a requesting carrier combines the incumbent's loops and transport with its own switch, collocation and backhaul, state commissions must also consider whether new technologies provide a superior means of serving customers. The analysis must be based on the most efficient business model for entry rather than to any particular carrier's business model. Because this analysis involves comparing the potential revenues to the potential costs of entry, a state will necessarily be weighing advantages and disadvantages an entrant has in attempting to serve mass market customers. In judging whether entry is economic, states must also consider how sunk costs and competitive risks affect the likelihood of entry.[1581]

[1576] *See infra* Part VI.D.6.a.(i) (discussing possible economic impairment).

[1577] *See id.*

[1578] *See infra* para. 519.

[1579] Consistent with the impairment standard we adopt today, state commissions must determine whether competitors are unable economically to serve the market. State commissions should not focus on whether competitors operate under a cost disadvantage. State commissions should determine if entry is economic by conducting a business case analysis for an efficient entrant. This involves estimating the likely potential revenues from entry, and subtracting out the likely costs (accounting for scale economies likely to be achieved). We note that for switching, at least, parties have submitted business case analyses to demonstrate the likely profitability of entry. *See* SBC Jan. 14, 2003 Unbundled Switching *Ex Parte* Letter; BellSouth Jan. 30, 2003 *Ex Parte* Letter; *see also* AT&T Jan. 17, 2003 *Ex Parte* Letter; WorldCom Jan. 8, 2003 Switching *Ex Parte* Letter.

[1580] SBC Jan. 14, 2003 Unbundled Switching *Ex Parte* Letter; BellSouth Jan. 30, 2003 *Ex Parte* Letter; AT&T Jan. 17, 2003 *Ex Parte* Letter; WorldCom Jan. 8, 2003 Switching *Ex Parte* Letter; AT&T Oct. 4, 2002 *Ex Parte* Letter; BiznessOnline.Com Feb. 14, 2003 *Ex Parte* Letter; PACE Dec. 11, 2002 *Ex Parte* Letter.

[1581] We reject the dissenters' "bootstrapping" argument that other UNEs should not be considered in our impairment analysis. *Chairman Powell Statement* at 11-12; *Commissioner Abernathy Statement* at 7-8. First, we (continued....)

(Continued from previous page)

note that consideration of these factors only arises where the competitive triggers have not been met. Second, we note that even though nondiscrimination and pricing obligations under section 251(c)(3) and 252 for each individual UNE certainly lower the cost of entry, these provisions do not necessarily establish that they will lower costs sufficiently to make entry economic without access to any one particular element. Even if interconnection and unbundling are performed as efficiently as is technically feasible, these costs must still be considered in our business case analysis to determine whether entry is uneconomic without access to a particular network element.

To illustrate, even if the unbundling of transport significantly lowers the cost of entry, the cost of using unbundled transport (priced at TELRIC) is still a cost that competitors will likely have to incur to provide local exchange service, and should be included in a business case analysis for determining whether entry is economic. Furthermore, to the extent that transport is needed to extend the loops from the subscriber's wire center to the competitor's collocation, that is an additional cost that should be included in a business case analysis. And even if a market would otherwise be capable of sustaining switch deployment, if an incumbent lacked sufficient collocation space, then, the additional cost (including securing building, additional space, power, etc.) should be considered in the business case analysis. Similarly, if competing carriers were unable to cross connect their cages, a competitive voice LEC would not be able to engage in line splitting with a competitive data LEC, reducing its potential revenues. The dissent is incorrect to conclude that this analysis equates calculating a cost for purposes of a business case analysis with "a source of competitive disadvantage." *Chairman Powell Statement* at 12; *see also Commissioner Abernathy Statement* at 8.

The dissents mischaracterize our intention. Unlike in the *UNE Remand Order*, we do not intend that the availability of any UNE at state established wholesale (TELRIC) rates could by itself constitute impairment without considering all costs and revenues in a business case analysis. Rather, we are requiring the states to conduct an analysis of whether entry is economic by comparing the potential revenues to the potential costs of providing a particular service. Mass market switching, in isolation, is not a service and thus cannot be easily evaluated. Instead, to evaluate the feasibility of self-deploying a switch, states should perform a business case analysis of providing local exchange service. As described, the potential revenues include basic service, vertical features, access charges, *see infra* para. 519, revenues beyond just "switching" revenues. Likewise, costs include the forward-looking, TELRIC costs of the other elements necessary to provide local service. *See infra* para. 520. The cost factors listed should not be considered in isolation, but only in the context of a broad business case analysis that examines all likely potential costs and revenues.

Contrary to the dissents' assertions, our determination of whether competitors are impaired without unbundled switching does not depend on, and is not directly related to, whether loops or transport are unbundled. Rather than compelling the unbundling of switching, the fact that such complementary inputs may be available on an unbundled basis serves to lower the cost of providing service and thereby makes facilities-based entry more likely to be economic. Indeed, the alternative to assuming that competitors will use UNEs priced at TELRIC as complementary inputs would be to conduct the business case analysis using the cost of self-provisioning all of the elements necessary to provide local exchange service. Such an analysis, however, would lead to significantly greater unbundling, as the costs of self-providing these elements is likely much higher than obtaining them from the incumbent priced at TELRIC. For example, the cost of self-providing a loop could be extremely high and using that cost in the business case analysis for switching would always lead to a finding of impairment. Thus, we reject such an approach and in our business case analysis consider the minimum cost of entering the market, which includes the wholesale (forward-looking, TELRIC) prices of UNEs purchased from the incumbent LEC that are necessary to provide the relevant service. Moreover, we note that to the extent that incumbent LECs believe that TELRIC prices are too low, as they claim, (*see, e.g.*, BellSouth Comments at 25; Verizon Comments at 32), it should make it easier to satisfy this business case analysis for determining whether switching can be self provisioned in a market.

Chairman Powell also asserts that we improperly considered factors that have "characteristics that are not linked to natural monopoly." *Chairman Powell Statement* at 12. As an initial matter, we note that our switching analysis avoids finding impairment on the basis of "natural monopoly" characteristics associated with elements that (continued....)

518. State commissions should also consider how the existence of universal service payments and implicit support flows will impact competitors' ability to serve the specific market. As discussed in Part V.B.3 above, universal service payments and implicit support flows have been used to ensure the universal availability of local exchange service at affordable rates.[1582] These payments and support flows are likely to affect whether entry is economic, and therefore our impairment standard requires that they be taken into consideration. Particularly significant is the fact that implicit support flows have been incorporated into retail rates, such that retail rates for particular services may vary significantly from the cost of providing those services. State commissions should consider how competitors' ability to serve the market is facilitated in those areas where rates are "above cost," and is impeded where rates are "below cost," while recognizing that rates are likely to change over time in response to competition.[1583]

519. *Potential Revenues.* In determining the likely revenues available to a competing carrier in a given market, the state commission must consider *all* revenues that will derive from service to the mass market, based on the most efficient business model for entry. These potential revenues include those associated with providing voice services, including (but not restricted to) the basic retail price charged to the customer, the sale of vertical features, universal service payments, access charges, subscriber line charges, and, if any, toll revenues.[1584] The state must

(Continued from previous page)

are complementary inputs (such as loops), because it assumes competitors will use UNEs purchased at TELRIC rates, where they are available. When we list various cost factors for state commissions to consider in their impairment analysis, we do so only because we determined that they were likely costs of entry, and were therefore relevant to a business case analysis.

[1582] *See infra* Part V.B.3. Section 254 of the 1996 Act requires that federal support mechanisms be "explicit and sufficient to achieve the purposes of this section", and should be based on a set of principles enumerated in section 254(b), including the principle that consumers in rural and high-cost areas should have access to telecommunications services at rates that are reasonably comparable to those charged in urban areas. 47 U.S.C. § 254(b). Section 254(f) permits states to adopt regulations "to preserve and advance universal service within that [s]tate," provided that these regulations are "not inconsistent with the Commission's rules to preserve and advance universal service." 47 U.S.C. § 254(f). States may also adopt regulations providing additional definitions and standards to promote universal service, but only to the extent that "such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms." *Id.*

[1583] As discussed above in Part V.B.3., to the extent that unbundling tends to create pressures to reduce or eliminate these implicit support flows, we note that the states may choose to rebalance rates, adopt an explicit and portable support mechanism, and/or exempt rural and small incumbent LECs from unbundling obligations as provided in section 251(f)(1) of the Act.

[1584] *See, e.g.*, Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3, 11 (filed Sept. 25, 2002) (AT&T Sept. 25, 2002 *Ex Parte* Letter); SBC Jan. 14, 2003 Unbundled Switching *Ex Parte* Letter. The dissents' claim that considering, in the impairment analysis, retail rates that are low as a result of implicit universal service subsidies will "perpetuate reliance on UNE-P" is wrong. To begin with, our analysis considers such rates only if the triggers are not met. Moreover, the dissenters voted to approve an impairment analysis that specifically takes such rates into account. As mentioned, our general impairment standard – which Chairman Powell proposed and the Commission voted unanimously to approve – asks "whether all potential revenues from entering a market exceed the costs of entry, taking into account consideration of any countervailing advantages that a new entrant may have." *See supra* para. (continued....)

also consider the revenues a competitor is likely to obtain from using its facilities for providing data and long distance services and from serving business customers.[1585] Moreover, state commissions must consider the impact of implicit support flows and universal service subsidies on the revenue opportunities available to competitors. State commissions must ensure that a facilities-based competitor could economically serve all customers in the market before finding no impairment.[1586] Consideration of potential revenues is consistent with our standard, as described in Part V above, and with the guidance of the *USTA* decision.[1587]

520. *Potential Costs.* Similarly, the state must consider all factors affecting the costs faced by a competitor providing local exchange service to the mass market.[1588] If the state

(Continued from previous page)

84. This analysis requires examination of "prices," *see supra* para. 85, which, as the Order states in a section proposed by Chairman Powell and approved unanimously by the full Commission, may be low as a result of implicit universal service subsidies. *See supra* para. 164 ("[T]he impairment standard adopted by the Commission and reflected in the more granular state commission proceedings mandated by this Order addresses the existence of implicit support flows in several ways. . . . Our impairment standard . . . provides for consideration of whether entry is economic by taking into account the potential revenue opportunities available."). In the same section, again proposed by Chairman Powell and approved unanimously by the full Commission, we explicitly "recognize that 'below-cost' local exchange rates will tend to discourage competitive facilities-based entry, and the absence of such entry will be considered as evidence of impairment." *See supra* para. 168. As Chairman Powell and Commissioner Abernathy agreed, however, consideration of such evidence will not "perpetuate reliance" on UNEs. Specifically, facilities-based competitive entry may still occur because "new entrants using alternative technologies may have lower costs than the incumbent LEC even when UNE rates are set at reasonable levels" and because "[o]ur impairment standard also provides for consideration of evidence concerning the full range of revenue opportunities available" such as "premium" services "attractive to customers even when priced well above the incumbent LEC's rate for local exchange service." *See supra* para. 168 & n.543. Competing carriers can also gain access to the same universal service subsidies available to incumbent carriers by applying for "eligible telecommunications carrier" status. 47 U.S.C. § 214(e)(6); *see also* 47 U.S.C. § 254(e). These subsidies should encourage entry and, even where our deployment triggers are not met, the availability of the subsidies must be taken into account in determining whether entry is uneconomic. In addition, "the statute contains an exemption from the unbundling requirements for rural carriers and provides for state modification or suspension of the unbundling requirements for incumbent carriers serving, in the aggregate, less than two percent of the nation's access lines." Id

[1585] This analysis will therefore take into account the scale and scope economies available to carriers using existing facilities to provide a variety of services to all customers that are likely to be served by an efficient entrant.

[1586] Thus, in determining whether impairment exists in a market including a particular group of customers, the typical revenue to be obtained from *all* customers in that group must be considered, to ensure that an entering competitor will be able to serve all customers.

[1587] The *USTA* decision expressed concern that in some markets incumbent LECs' prices were above cost, and that the Commission failed to take this gap, and the advantage it conferred on competitors, into consideration in its impairment analysis in the *Local Competition Order*. *USTA*, 290 F.3d at 422-23. As discussed in Part V.B.3. (discussion of implicit support flows) *supra*, our standard, involving a granular analysis examining both the cost and revenues associated with entry, automatically incorporates competitive LECs' advantages such as these, and therefore addresses the *USTA* decision's concern about these situations.

[1588] The dissents argue that any consideration of the same factors that were considered in the *UNE Remand Order* is impermissible according to the *USTA* decision. *Chairman Powell Statement* at 11 n.30; *Commissioner Abernathy Statement* at 6 n.16. The use of factors common to the *UNE Remand Order* is beside the point. In this Order, we have fundamentally changed the formula (*i.e.*, the unbundling framework and standard) by which we consider these (continued....)

(Continued from previous page)

factors. Thus, as stated above and unlike in the *UNE Remand Order*, they may play a role in our analysis, but are not individually dispositive of an impairment determination. *See supra* para. 106 ("While we no longer rely on, or formally examine, the five UNE Remand factors as a basis for our analysis of impairment, these factors still play a role in our analysis as they relate to the barriers to entry we have identified above."). Moreover, the dissents' claims that the factors we require states to examine as part of their granular inquiries are inconsistent with the *USTA* decision are wrong. *Chairman Powell Statement* at 9-11; *Commissioner Abernathy Statement* at 6 n.16. Their arguments are predicated upon a mischaracterization of *USTA* and are inconsistent with the Commission's decision in other sections of this Order that they have affirmatively supported.

For example, the dissents argue that the switching analysis relies on costs that are merely ordinary start-up costs and that these costs may not be taken into account under *USTA*. *Chairman Powell Statement* at 9; *Commissioner Abernathy Statement* at 7-8. As an initial matter, we note that these costs are only considered if the automatic triggers are not met. Moreover, although the Commission's switching analysis requires the states to examine certain factors that may contribute to the start-up costs of a new entrant, this is not the end of the inquiry. Consistent with the unbundling analysis applied in the rest of the Order and the guidance from *USTA*, we have examined these costs to determine whether, as balanced against the potential revenues that may be achieved, they are *sufficiently large* to prevent entry. That is, the inquiry we adopt today considers whether, after weighing all the costs associated with entry against the potential revenues and offsetting advantages, entry into the market is economic. A cost disparity that is typical of, and has not prevented, entry into the industry is insufficient to justify impairment under our standard. With respect to the factors themselves, there is general agreement in the record that the relevant start-up costs associated with entry into the local market include purchasing collocation, transmission equipment, transport, and loops. Indeed, in the cost studies submitted by the BOCs themselves they largely utilize the very same factors that we require the states to consider. *USTA* did not require us to ignore the costs associated with these factors; rather, the court directed us to set a higher threshold for determining when these costs, considered cumulatively, are sufficiently large as to create impairment. While any single cost factor may appear to be a small hindrance, it is only by considering the cumulative effect of all cost factors that the total potential hindrance to entry can be fully evaluated.

Notably, in criticizing our switching analysis, the dissents appear to attack the very impairment standard that they proposed, voted for, and applied to the Commission's analysis of transport and loops – other sections of the Order that they affirmatively supported. For example, Chairman Powell complains that "the Majority's switching decision conflates an impairment standard that properly asks whether entry is 'uneconomic' with the question of whether entry is profitable." *Chairman Powell Statement* at 14. We are at a loss to understand his complaint. The switching section in no way states a requirement to consider "profitability" – that is discussed in the general impairment section which was proposed by Chairman Powell and adopted unanimously by the Commission. The general impairment standard that Chairman Powell proposed and the Commission adopts unanimously asks "whether all potential revenues from entering a market exceed the costs of entry, taking into account consideration of any countervailing advantages that a new entrant may have." *See supra* para. 84. Furthermore, the general impairment section makes clear, in a passage proposed by Chairman Powell and adopted unanimously, that this analysis "is based on determining whether entry would be *profitable* without the UNE in question." *See supra* para. 85 (emphasis added). We merely ask whether entry is economic, and it is Chairman Powell that engages in bootstrapping, criticizing the very standard that he has proposed we consider.

Similarly, Chairman Powell claims that applying in the switching section the impairment standard he proposed and the Commission unanimously adopted "has converted the impairment standard into a protector of individual business plans." *Chairman Powell Statement* at 11. The Order's general impairment section, which again was proposed by Chairman Powell and adopted unanimously, devotes an entire paragraph to explaining why our impairment analysis does not entail assessing individual business plans. That paragraph – entitled "Impairment of Individual Requesting Carriers or Carriers Pursuing a Particular Business Strategy" states that "[w]e will not, as some commenters urge, evaluate whether individual requesting carriers or carriers that pursue a particular business strategy are impaired without access to UNEs." *See supra* para. 115. Rather, we explain, "an entrant is not (continued....)

commission determines that a UNE-L strategy is the most efficient means of serving the customer, these costs would likely include (among others):[1589] the cost of purchasing and installing a switch;[1590] the recurring and non-recurring charges paid to the incumbent LEC for

(Continued from previous page)

impaired if it could serve the market in an economic fashion using its own facilities, concerning the range of customers that could reasonably be served and the services that could reasonably be provided with those facilities." *Id.* This same analysis applies in the switching section no less than it does in the other sections of this Order. *See supra* note 1579 (stating that "[t]he business case analysis pertains to "an efficient entrant" and an estimation of the "likely potential revenues" and the "likely costs").

Chairman Powell claims that "the Majority directs states to consider whether price and revenue reductions that result from additional competitive entrants can form the basis of impairment." *Chairman Powell Statement* at 13. This is simply false, as we do not direct states to consider any such thing. While we recognize that an academically pure interpretation of the impairment standard proposed by Chairman Powell and adopted unanimously in this item might take such reductions into account, we agree with Chairman Powell that a more administratively practicable approach would be to consider prevailing prices and revenues. Accordingly, we expect states to consider prices and revenues prevailing at the time of their analyses. We believe that these are reasonable proxies for likely prices and revenues after competitive entry and will result in a more administrable standard.

Finally, Chairman Powell maintains that our switching analysis "ignores the fact that the rates for collocation and hot cuts as well as other UNEs, are not within the control of the incumbent LEC and therefore are not cognizable under section 251(d)(2)." *Chairman Powell Statement* at 12. This claim is doubly wrong. First, each of these factors is within the incumbent LEC's control. The statute is clear that incumbent LECs are free to negotiate rates for UNEs, hot cuts, and collocation irrespective of statutory standards. *See* 47 U.S.C. § 252(a) ("[A]n incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251."). Second, to the extent that these factors are impacted by forces beyond the incumbent LEC's control – for example, to negotiate UNE rates, an incumbent LEC must come to an agreement with a requesting carrier – there is no basis whatsoever for Chairman Powell's claim that they "are not cognizable under section 251(d)(2)." The text of the section 251(d)(2) does not mention or in any way suggest such a limitation. *See* 47 U.S.C. § 251(d)(2) ("In determining what network elements should be made available . . ., the Commission shall consider, at a minimum, whether . . . the failure to provide access to such network element would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."). And the impairment standard proposed by Chairman Powell and adopted unanimously by the Commission requires consideration of "the costs of entry," which necessarily includes some factors entirely beyond the incumbent LEC's control. *See supra* para. 84. Indeed, with respect to high-capacity loop facilities, the Chairman proposed and the Commission unanimously approved consideration of multiple criteria outside the control of incumbent LECs, including, among other things, "local topography such as hills and rivers," "availability of reasonable access to rights-of-way," and "building access restrictions/costs." *See supra* para. 335; *see also id.* at para. 410 (listing similar criteria for transport).

[1589] Note that these costs are likely to be affected by whether the entrant is using the same facilities to serve customers in other markets, thus taking advantage of available scale and scope economies. Thus, a portion of the costs may be paid for by revenues generated in other markets, and the full cost should not be attributed to serving just one market. For example, it would be unreasonable to assume that the cost of developing a complete OSS system would have to be recovered within a single granular market. Also, if it is determined that an efficient entrant could efficiently serve both enterprise and mass market customers with the same switch, collocation and transport facilities, then the state's analysis of mass market customers in a particular market should not assume that the entire cost of these facilities is borne by these customers.

[1590] Granite Dec. 16, 2002 *Ex Parte* Letter.

loops, collocations, transport, hot cuts, OSS, signaling, and other services and equipment necessary to access the loop;[1591] the cost of collocation and equipment necessary to serve local exchange customers in a wire center, taking into consideration an entrant's likely market share, the scale economies inherent to serving a wire center, and the line density of the wire center;[1592] the cost of backhauling the local traffic to the competitor's switch;[1593] other costs associated with transferring the customer's service over to the competitor; the impact of churn on the cost of customer acquisitions;[1594] the cost of maintenance, operations, and other administrative activities;[1595] and the competitors' capital costs.[1596] State commissions should pay particular attention to the impact of migration and backhaul costs on competitors' ability to serve the market. We also note that parties to this proceeding have placed evidence in the record that economic impairment may be especially likely in wire centers below a specific line density.[1597] Before finding "no impairment" in a particular market, therefore, state commissions must consider whether entrants are likely to achieve sufficient volume of sales within each wire

[1591] SBC Jan. 14, 2003 Unbundled Switching *Ex Parte* Letter; BellSouth Jan. 30, 2003 *Ex Parte* Letter; AT&T Jan. 17, 2003 *Ex Parte* Letter; WorldCom Jan. 8, 2003 Switching *Ex Parte* Letter; ASCENT Comments at 36; ASCENT Reply at 7; BiznessOnline.Com Feb. 14, 2003 *Ex Parte* Letter at 4.

[1592] New South Reply at 25-26; NewSouth Fury Reply Aff. at para. 4; AT&T Jan. 17, 2003 *Ex Parte* Letter; WorldCom Jan. 8, 2003 Switching *Ex Parte* Letter; BiznessOnline.Com Feb. 14, 2003 *Ex Parte* Letter at 4.

[1593] The state commission should consider whether EELs or digital loop carrier remote terminals are the most effective means for a competitor to backhaul the traffic to its switch.

[1594] WorldCom Nov. 15, 2002 Customer Churn *Ex Parte* Letter; BiznessOnline.Com Feb. 14, 2003 *Ex Parte* Letter at 4.

[1595] *See, e.g.*, BellSouth Jan. 30, 2003 *Ex Parte* Letter at 7; *see also* AT&T Feb. 4, 2003 UNE-L Cost Impairment *Ex Parte* Letter at 10.

[1596] These include the capital carrying costs for the period it takes a competitor to set up operations and achieve profitability. AT&T Feb. 4, 2003 UNE-L Cost Impairment *Ex Parte* Letter at 2, 10. Some of the costs listed here are unlikely to constitute by themselves a barrier to entry, particularly if the incumbent incurs the same costs for the provisioning of its retail service. A state commission should take them into consideration in performing a business case analysis, which requires consideration of all likely revenues and costs.

[1597] SBC and BellSouth have presented studies to show that competitors using their own switches should be able to earn a positive profit in wire centers serving at least 5,000 lines. SBC Jan. 14, 2003 Unbundled Switching *Ex Parte* Letter; BellSouth Jan. 30, 2003 *Ex Parte* Letter. WorldCom and AT&T provided studies to show that a competitor would operate under a significant cost disadvantage, and that this disadvantage is larger in small wire centers. AT&T Jan. 17, 2003 *Ex Parte* Letter; WorldCom Jan. 8, 2003 Switching *Ex Parte* Letter. WorldCom claims that its cost study shows that in central offices with fewer than 25,000 residential lines, the cost of UNE-L will constitute an insurmountable barrier to entry and competition, even if there are significant reductions in incumbent LEC charges. In central offices serving 25,000 or more residential lines, competitive LECs that achieve a reasonable market share (*e.g.*, 7%) can profitably migrate customers served by unbundled loops combined with unbundled local circuit switching to their own switches, provided that state commissions ensure that operational and economic barriers are substantially reduced or removed. WorldCom Jan. 8, 2003 Switching *Ex Parte* Letter at 7.

center, and in the entire area served by the entrant's switch, to obtain the scale economies needed to compete with the incumbent.[1598]

(c) Baseline Rolling Use of Unbundled Switching for Customer Acquisition Purposes

521. If, after applying the triggers and the flexible analysis of potential deployment described above, a state commission concurs that requesting carriers are impaired in the mass market in any particular market, we conclude that it must next consider the use of "rolling access to unbundled local circuit switching" to address impairment in that market. Specifically, we conclude that, in some cases, impairment in a given market could be mitigated by granting requesting carriers access to unbundled local circuit switching for a temporary period, permitting carriers first to acquire customers using unbundled incumbent LEC local circuit switching and later to migrate these customers to the competitive LECs' own switching facilities.[1599] As set forth below, we conclude that where transitional access to unbundled switching would cure any impairment that would otherwise undermine competition if requesting carriers were denied access to unbundled local circuit switching, the state must implement such "rolling" access rather than perpetuating permanent access to the switching element.[1600]

522. We note at the outset that in at least some cases, "rolling" access to unbundled local circuit switching could adequately address certain barriers to entry associated with the

---

[1598] BiznessOnline.Com Feb. 14, 2003 *Ex Parte* Letter; PACE Dec. 11, 2002 *Ex Parte* Letter at 5-10; AT&T Jan. 17, 2003 *Ex Parte* Letter; WorldCom Jan. 8, 2003 Switching *Ex Parte* Letter; AT&T Oct. 4, 2002 Comparing ILEC and CLEC Local Network Architectures *Ex Parte* Letter.

[1599] We refer to this as "rolling use" because under such a framework, each competitive LEC would obtain limited access to unbundled local circuit switching on a customer-by-customer basis.

[1600] Chairman Powell claims that our impairment test for switching is "unworkable." *Chairman Powell Statement* at 13. To the extent the impairment test for switching is not simple, however, it is because the facts surrounding impairment are not simple. For example, hot cut processes and the charges for them often vary substantially between states. Revenue potential also varies dramatically, as retail rates can vary between states, by the type of customer, and within the state. In order to conduct a granular analysis of the type called for by the D.C. Circuit, it is necessary to take these variations into account. Indeed, in the past, Chairman Powell has argued that such geographic variations and "complicated" factors must be taken into account. *See Commissioner Powell Second NPRM Statement*, 14 FCC Rcd at 8720-21 ("The availability of elements outside the incumbent's network could potentially turn on many factors, such as the existence of vendors and distribution channels, the presence of competing facilities-based LECs and the price of non-incumbent elements relative to the requesting competitor's ability to pay. These factors are likely to vary significantly from one market to the next .... It follows directly, then, that assessments of whether an element is necessary to provide service or whether failing to mandate access to that element would impair a new entrant's ability to provides service will vary significantly among different markets, states, and regions."). While a more simple solution would have been to find impairment or – as Chairman Powell would have found – no impairment nationwide, this approach would not have been responsive to the statute, the court, or the record in this case. Moreover, the enterprise loop analysis delegated to the states is arguably even more complicated as it requires the states to conduct a location-specific review on an individual customer-by-customer basis. *See supra* para. 328. Similarly, the transport analysis requires a route-by-route review. Again, both Chairman Powell and Commissioner Abernathy support these more complicated analyses.

not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services.

580. As explained below, however, we do not require incumbent LECs to "ratchet"[1785] individual facilities. Thus, we do not require incumbent LECs to implement any changes to their billing or other systems necessary to bill a single circuit at multiple rates (*e.g.*, a DS3 circuit at rates based on special access services and UNEs) in order to charge competitive LECs a single, blended rate. Although we do not require ratcheting, we do note that incumbent LECs shall not deny access to a UNE on the ground that the UNE or UNE combination shares part of the incumbent LEC's network with access services or other non-qualifying services.[1786]

581. We conclude that the Act does not prohibit the commingling of UNEs and wholesale services and that section 251(c)(3) of the Act grants authority for the Commission to adopt rules to permit the commingling of UNEs and combinations of UNEs with wholesale services, including interstate access services. An incumbent LEC's wholesale services constitute one technically feasible method to provide nondiscriminatory access to UNEs and UNE combinations.[1787] We agree with the Illinois Commission, the New York Department, and others that the commingling restriction puts competitive LECs at an unreasonable competitive disadvantage by forcing them either to operate two functionally equivalent networks – one network dedicated to local services and one dedicated to long distance and other services – or to choose between using UNEs and using more expensive special access services to serve their customers.[1788] Thus, we find that a restriction on commingling would constitute an "unjust and

[1785] Ratcheting is a pricing mechanism that involves billing a single circuit at multiple rates to develop a single, blended rate.

[1786] More specifically, our approach to ratcheting does not mean that an incumbent LEC can refuse to commingle a UNE with a special access service because the incumbent LEC multiplexes traffic for multiple customers onto one facility within its own network. For example, an incumbent LEC shall not refuse to provide a UNE DS1 transport (where such UNEs are available) on the grounds that the UNE shares a transmission facility with tariffed access services or other wholesale services.

[1787] *See* NewSouth Comments at 42-43 (describing connections and work processes); Qwest Dec. 17, 2002 *Ex Parte* Letter at 15-16 (proposing and describing EEL arrangements); Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 4-6 (filed Dec. 18, 2002) (Qwest Dec. 18, 2002 EELs *Ex Parte* Letter) (describing Qwest's commingling proposal); Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3 (filed Feb. 6, 2003) (Qwest Feb. 6, 2003 EELs *Ex Parte* Letter) (describing Qwest's commingling proposal); AT&T Apr. 5, 2001 Comments at 22. In addition, we find that commingling is a technically feasible practice. *See, e.g.*, AT&T Apr. 30, 2001 Reply, CC Docket No. 96-98, Decl. of Anthony Fea and William J. Taggart III (AT&T Apr. 30, 2001 Fea/Taggart Reply Decl.) at para. 40 (asserting that linking loops or loop-transport combinations with high-capacity special access services is technically feasible). In light of the determinations we make herein, we grant WorldCom's request to clarify that requesting carriers may commingle UNEs with other types of services. MCI WorldCom Feb. 17, 2000 Petition for Clarification at 21-23.

[1788] In the *Local Competition Order*, the Commission concluded that those "terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete." 11 FCC Rcd at 15660, para. 315; *see UNE Remand*, 15 FCC Rcd at 3913-14, paras. 490-91. A number of parties persuade us that a commingling restriction, combined with the reduced (continued....)

unreasonable practice" under 201 of the Act, as well as an "undue and unreasonable prejudice or advantage" under section 202 of the Act.[1789] Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirement in section 251(c)(3).[1790] Incumbent LECs place no such restrictions on themselves for providing service to any customers by requiring, for example, two circuits to accommodate telecommunications traffic from a single customer or intermediate connections to network equipment in a collocation space.[1791] For these

(Continued from previous page)

unbundling obligations, would raise the costs of competitive LECs. AT&T Comments at 106-107; ALTS *et al.* Comments at 106; CompTel Comments at 97; Illinois Commission Comments at 5; Sprint Comments at 55-57; WorldCom Comments at 55; AT&T Reply at 293 (citing AT&T Lesher Reply Decl. at paras. 34-36); NewSouth Reply at 37; Sprint Reply at 46; NuVox *et al.* Reply at 52; XO Reply at 17; Letter from Ruth Milkman, Counsel for WorldCom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 13 (filed Oct. 7, 2002) (WorldCom Oct. 7, 2002 EELs *Ex Parte* Letter) (asserting that commingling "forces needless inefficiencies on competitors"); Letter from Michael H. Pryor, Counsel for NewSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98 (filed Oct. 18, 2002) (NewSouth Oct. 18, 2002 Loops and Commingling *Ex Parte* Letter); ALTS/CompTel Oct. 28, 2002 *Ex Parte* Letter at 5; Cbeyond Nov. 22, 2002 *Ex Parte* Letter; Letter from Jonathan Askin, General Counsel, ALTS, to William F. Maher, Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 5 (filed Nov. 14, 2002) (ALTS Nov. 14, 2002 Use and Commingling Restrictions *Ex Parte* Letter); WorldCom Nov. 22, 2002 *Ex Parte* Letter at 13-14; AT&T Dec. 23, 2002 *Ex Parte* Letter at 8 (arguing that commingling restrictions force competitive LECs into inefficient network architectures); Letter from Ruth Milkman, Counsel for WorldCom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3 (filed Feb. 13, 2003) (WorldCom Feb. 13, 2003 EELs *Ex Parte* Letter); Letter from Patrick Donovan, Counsel for Cbeyond, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338 at 4 (filed Feb. 13, 2003) (Cbeyond Feb. 13, 2003 EELs and Commingling *Ex Parte* Letter). *See* Cbeyond *et al.* Apr. 5, 2001 Comments at 14 (requesting clarification that competitive LECs can purchase access to a DS1 EEL that is "riding on a DS3 circuit with other types of ancillary traffic"); CompTel Apr. 5, 2001 Comments at 33; AT&T Apr. 30, 2001 Fea/Taggart Reply Decl. at paras. 41-42. We therefore disagree with Qwest and the other incumbent LECs who argue that the commingling restriction does not impede competitive LECs from deploying efficient network configurations. *See* SBC Comments at 108 (noting that commingling restriction precludes competitive LECs from obtaining UNEs and access services that share the same facility); BellSouth Reply at 40 (stating that competitive LECs can connect UNEs and access services at collocation arrangements); Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98 at 3 (filed Oct. 28, 2002) (Qwest Oct. 28, 2002 Transport and Commingling *Ex Parte* Letter).

[1789] ALTS *et al.* Comments at 105; ALTS/CompTel Oct. 28, 2002 *Ex Parte* Letter at 5; WorldCom Nov. 18, 2002 *Ex Parte* Letter at 15; Cbeyond Nov. 22, 2002 *Ex Parte* Letter at 13-14.

[1790] AT&T Comments at 107; Illinois Commission Comments at 5; WorldCom Reply at 32; ALTS/CompTel Oct. 28, 2002 *Ex Parte* Letter at 5; AT&T Nov. 23, 2002 *Ex Parte* Letter at 8 (arguing that commingling restriction is discriminatory).

[1791] AT&T Comments at 107 (arguing that "the co-mingling ban deprives CLECs of obtaining the same network efficiencies as the ILEC enjoys because the ILEC can place any traffic on any facility to maximize efficiency"); NewSouth Comments at 42-46; Sprint Reply at 46-48; WorldCom Apr. 30, 2001 Reply at 14; CompTel Apr. 5, 2001 Comments at 33; AT&T Apr. 30, 2001 Fea/Taggart Reply Decl. at paras. 41-42); *see* 47 C.F.R. § 51.315(b) (requiring incumbent LECs to provide access to UNEs on terms and conditions no less favorable to those under which the incumbent LEC provides such UNEs to itself). *But see* SBC Comments at 108 (noting requirement for competitive LECs to collocate in certain circumstances); Verizon Comments at 141 (acknowledging that it combines all telecommunications traffic on the same facilities); BellSouth Reply at 40 (acknowledging collocation requirement); *see* 47 C.F.R. § 51.315(b) (requiring incumbent LECs to provide access to UNEs on terms and conditions no less favorable to those under which the incumbent LECs provides such UNEs to itself).

reasons, we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations.[1792]

582. We decline, however, to require "ratcheting," which is a pricing mechanism that involves billing a single circuit at multiple rates to develop a single, blended rate.[1793] The Commission's pricing rules for UNEs already ensure that competitive LECs are paying appropriate rates for UNEs and UNE combinations, and that incumbent LECs are adequately compensated for the use of their networks. To permit ratcheting would be to create an additional series of discounts for situations in which all parties' interests are already protected.[1794] Thus, our rules permit incumbent LECs to assess the rates for UNEs (or UNE combinations) commingled with tariffed access services on an element-by-element and a service-by-service basis.[1795] This ensures that competitive LECs do not obtain an unfair discount off the prices for

[1792] We note that sections 202 and 203 of the Act provide specific penalties for noncompliance. *See* 47 U.S.C. §§ 202(c), 203(e). These amounts have been adjusted to $7,600 for each offense and $330 for each day of the continuance of the offense. 47 C.F.R. § 1.80(b)(4). Thus, any incumbent LEC policy or practice that has the effect of prohibiting commingling could subject the incumbent LEC to enforcement action for imposing an "undue or unreasonable prejudice or disadvantage" upon competitive LECs. In addition, the Commission's rules establish a five-year statute of limitations for violations of sections 202 and 203. *Id.* at § 1.80(c)(2).

[1793] CompTel Comments at 97-98 (citing *BellSouth Telecommunications, Inc. Part 69(g)(1) Public Interest Petition to Establish New Rate Elements for Switched Access Versions of BellSouth's SMARTGate Service and BellSouth SPA Managed Shared Network*, Memorandum Opinion and Order, 14 FCC Rcd 1838, 1839, para. 2, n.2 (CCB 1998) (*BellSouth Ratcheting Order*); Sprint Comments at 56, n.48; Sprint Reply at 47. As explained in the *BellSouth Ratcheting Order*, ratcheting allows special access charges to be reduced by 1/24th for each switched access voice-grade circuit on a special access DS1 or 1/672nd for each switched access voice-grade circuit on a special access DS3. *BellSouth Ratcheting Order*, 14 FCC Rcd at 1839 n.2. We note that some parties contend that any Commission rule requiring ratcheting would necessitate substantial modifications to incumbent LEC billing systems and operational procedures. *See* Letter from Glenn T. Reynolds, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Feb. 6, 2003) (BellSouth Feb. 6, 2003 Ratcheting *Ex Parte* Letter). Because we do not require ratcheting, however, we find no need to address these arguments.

[1794] Our decision not to require ratcheting does not affect a competitive LEC's ability to obtain UNEs, UNE combinations, and wholesale services. Thus, an incumbent LEC may not deny access to a UNE or UNE combination on the grounds that such UNE or UNE combination shares part of the incumbent LEC's network with access or other non-UNE services. Some competitive LECs have contended, for example, that incumbent LECs deny access to UNE combinations on the grounds that a UNE and access service share certain multiplexing equipment. *See* Letter from Brad E. Mutschelknaus *et al.*, Counsel for ALTS *et al.*, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, CC Docket No. 96-98 (filed Aug. 1, 2001) (ALTS Aug. 1, 2001 EELs *Ex Parte* Letter), *in* Letter from Steven A. Augustino, Counsel for ALTS *et al.*, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 (filed Aug. 1, 2001). By eliminating the commingling restriction, we will ensure that competitive LECs will be able to obtain all available UNEs, UNE combinations, and wholesale services, albeit at the rates established pursuant to tariffs, interconnection agreements or other contracts.

[1795] *See infra* Part VII.B.

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2003, a copy of the foregoing document was serviced on the parties of record, via US mail:

Guy Hicks
BellSouth Telecommunications, Inc.
333 Commerce St., Suite 2101
Nashville, TN 37201

Charles B. Welch, Esquire
Farris, Mathews, et. Al
618 Church St., #300
Nashville, TN 37219

Timothy Phillips, Esquire
Office of Tennessee Attorney General
P. O. Box 20207
Nashville, Tennessee 37202

H. LaDon Baltimore, Esquire
Farrar & Bates
211 Seventh Ave., N. #320
Nashville, TN 37219-1823

James Wright, Esquire
United Telephone – Southeast
14111 Capital Blvd.
Wake Forest, NC 27587

Martha M. Ross-Bain, Esq.
AT&T Communications of the
South Central States, LLC
1200 Peachtree Street, Suite 8100
Atlanta, GA 30309

Ms. Carol Kuhnow
Qwest Communications, Inc.
4250 N. Fairfax Dr.
Arlington, VA 33303

Jon E. Hastings, Esq.
Boult, Cummings, et al.
P. O. Box 198062
Nashville, TN 37219-8062

Dale Grimes, Esq.
Bass, Berry & Sims
315 Deaderick St., #2700
Nashville, TN 37238-3001

Mark, W. Smith, Esq.
Strang, Fletcher, et al.
One Union Square, #400
Chattanooga, TN 37402

Nanette S. Edwards, Esq.
ITC^DeltaCom
4092 South Memorial Parkway
Huntsville, AL 35802

Henry Walker