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March 1, 2004

HAND DELIVERED

DOCKETED
MAR 02 2004

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P. O. Box 3265
Harrisburg, PA 17105-3265

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

DOCUMENT

Dear Secretary McNulty:

Please be advised that the Office of Small Business Advocate will not be filing a Reply Brief in the above-docketed proceeding. As evidenced by the enclosed certificate of service, a copy has been served on all active parties in this case.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Angela T. Jones

Angela T. Jones
Assistant Small Business Advocate

Enclosures
cc: Hon. Michael C. Schnierle
Administrative Law Judge

Parties of Record

Allen Buckalew

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I certify that I am serving a copy of the foregoing document on behalf of the Office of Small Business Advocate by e-mail and first class mail upon the persons addressed below:

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Date: March 1, 2004

Cavalier TELEPHONE

"Your Local Telephone Company"

March 1, 2004

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MAR 0 2 2004

PA PUBLIC UTILITY COMMISSION SECRETARY'S BUREAU

Mr. James J. McNulty, Secretary
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Commonwealth Keystone Building
400 North Street
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Re: Investigation Into Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements
Docket No. I-00030099

DOCUMENT

Mr. McNulty:

Enclosed for filing in the above proceeding please find the PUBLIC version of the Reply Brief of Cavalier Telephone Mid-Atlantic, LLC.

If you have any questions, please feel free to contact me.

Very Truly Yours,

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

MAR 0 2 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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

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REPLY BRIEF OF CAVALIER TELEPHONE MID-ATLANTIC, LLC

Cavalier Telephone Mid-Atlantic, LLC ("Cavalier") hereby submits its Reply Brief in the above-captioned proceeding. Cavalier supports generally the comments of numerous parties that have expressed skepticism with, criticism of and indignation at Verizon Pennsylvania, Inc.'s attempt to eliminate hundreds of unbundled dedicated transport routes from Pennsylvania.[1] Verizon has failed in its Main Brief to carry its burden to prove that the "self-provisioning" and "competitive wholesale" triggers have been met for dark fiber, DS-3 and, where applicable, DS-1 facilities. As such the Commission should not disturb the unbundled network element (UNE) status of Pennsylvania's dedicated transport routes.

For Cavalier, this is most important with respect to dark fiber, and secondarily DS-3 and DS-1 lit transport facilities, whose end points are located in the **[BEGIN PROPRIETARY] [END PROPRIETARY]**. Based on the following, as well as the evidence at Hearing and the other filings in this case, Verizon has failed to prove satisfaction of the triggers involving dark fiber transport and DS-3 and DS-1 lit transport whose end points are any of these three COs.

A. <u>Verizon Concedes That The "Competitive Wholesale" Trigger For Dark Fiber Transport Has Not Been Met For Routes With</u>

[1]As stated in its Post-Hearing Brief, Cavalier has limited its case to the dedicated transport aspects of Verizon's Petition.

DOCUMENT

<u>An End Point At The</u> [BEGIN PROPRIETARY <u>(PHLAPADE)</u> [END PROPRIETARY]<u>.</u>

In its final pairing report, Verizon does not claim it has satisfied the "competitive wholesale" trigger for dark fiber routes with an end point at the **[BEGIN PROPRIETARY] [END PROPRIETARY]**.[2] As such, if the Commission elsewhere agrees Verizon has failed to prove satisfaction of the "self-provisioning" trigger for dark fiber transport with a **[BEGIN PROPRIETARY] [END PROPRIETARY]** end point, the Commission should rule that all dark fiber routes ending at the **[BEGIN PROPRIETARY] [END PROPRIETARY]** must remain UNEs.

B. <u>In Either a Significant Error or a Misrepresentation, Verizon Claims</u> [BEGIN PROPRIETARY] [END PROPRIETARY] <u>as Satisfying the "Self-Provisioning" and "Competitive Wholesale" Dedicated Transport Triggers, Both as to Dark Fiber and as to Lit Services, For Routes Whose End Points are the</u> [BEGIN PROPRIETARY] [END PROPRIETARY] <u>and Those Routes Whose End Points Are the</u> [BEGIN PROPRIETARY] [END PROPRIETARY]<u>.</u>

In either a mistake by Verizon or in a move which might cast its good faith in this proceeding into question, Verizon has claimed that Cavalier's non-ILEC dark fiber supplier, **[BEGIN PROPRIETARY] [END PROPRIETARY],** satisfies both the "self-provisioning" and "competitive wholesale" triggers for dark fiber and lit transport routes with end points in the **[BEGIN PROPRIETARY] [END PROPRIETARY]** These claims are made without record evidence and in clear contravention of Verizon's position – set forth both in its Rebuttal Testimony and at Hearing -- that, should Cavalier recognize it had made a mistake in its November 14, 2003 answers to the Commission's Appendix A transport questions, Verizon would withdraw these transport trigger claims with respect to the **[BEGIN PROPRIETARY] [END PROPRIETARY]** As Cavalier

[2] *See* Exhibit 2.D to Verizon's Main Brief.

did admit and amend such error and provided additional explanation by Jim Vermeulen, the clear evidence is that **[BEGIN PROPRIETARY] [END PROPRIETARY]** does not supply dark fiber at either of these two COs. Indeed, Cavalier would never need to go through this rigamaroll had **[BEGIN PROPRIETARY] [END PROPRIETARY]** been collocated at either of those two COs. The Commission should thus reject each and every instance in which Verizon has claimed **[BEGIN PROPRIETARY] [END PROPRIETARY]** to be a trigger candidate for dark fiber and lit transport routes whose endpoints are the **[BEGIN PROPRIETARY] [END PROPRIETARY]** and those transport routes whose end points are the **[BEGIN PROPRIETARY] [END PROPRIETARY]**

As Cavalier explained at length in its Post-Hearing Brief, the positions of Cavalier and Verizon at Hearing had apparently been harmonized as to Cavalier's lack of non-Verizon-fed fiber, and consequent need for Verizon UNE dark fiber, in the two above-mentioned COs.[3] Verizon ostensibly had taken the high ground, both in Carlo Michael Peduto III's Rebuttal Testimony and on cross-examination, by stating that it was only based upon Cavalier's mistaken say-so that Verizon had even claimed those transport triggers were met in the first place.[4] Upon Cavalier's introduction at Hearing of its amended transport census data (ALJ Ex. 17A), which showed Cavalier's underlying dark fiber supplier **[BEGIN PROPRIETARY] [END PROPRIETARY]** having no such presence in those COs, Verizon agreed that the pairing reports must be so amended to reflect the removal of those trigger claims.[5]

[3] *See* Cavalier's Post-Hearing Brief, at 5-8, 13-14.
[4] *Id.* at 6.
[5] *Id.*

Yet Verizon has not done so. Verizon continues to claim **[BEGIN PROPRIETARY] [END PROPRIETARY]** to be a trigger candidate on the dark and lit fiber transport routes involving **[BEGIN PROPRIETARY] [END PROPRIETARY]** Cavalier will accept that this was a Verizon oversight and not chicanery if such explanation is forthcoming from Verizon. For the Commission's purposes, the salient point is that, as **[BEGIN PROPRIETARY] [END PROPRIETARY]**

C. Cavalier Agrees With AT&T That The Commission Must Reject Verizon's Contention That AT&T Satisfies Any "Self-Provisioning" or "Competitive Wholesale" Trigger For Dark Fiber, DS-3 or DS-1 Transport.

As AT&T explained, it cannot be considered a transport trigger under the *TRO*. Due to its hub-and-spoke architecture, AT&T's backhaul facilities necessarily eliminate AT&T from the *TRO*'s new "dedicated transport" definition. As such, the Commission should reject each and every instance in which Verizon has claimed AT&T to satisfy any dark or lit transport trigger on any route.

Noting that the FCC in the *TRO* has defined "dedicated transport" as "transmission facilities connecting incumbent LEC switches and wire centers within a LATA",[6] AT&T made clear in its Main Brief that it does not provide, in either retail or wholesale form, dedicated transport between its collocation arrangements at Verizon wire centers.[7] To Verizon's facile claims "that AT&T has physical fiber 'facilities that provide connections between Verizon wire centers' and are 'used to transport traffic'", AT&T ably explained that the only way this physical fiber connection is established is through a switch at an AT&T node. Such transport through a switch is inherently not

[6] *TRO* ¶ 365.

[7] Main Brief of AT&T Communications of Pennsylvania, LLC, at 76.

"dedicated transport".[8] Thus to the extent AT&T provides network interconnection to a CLEC, it is not by means of "dedicated transport" under the *TRO*. CLECs therefore must continue to have unbundled access to dedicated transport between Verizon wire centers.[9]

As a further indicator that AT&T does not have the requisite transports facilities Verizon attributes to it, the Commission need look no further than the substantial sum **[BEGIN PROPRIETARY] [END PROPRIETARY]** AT&T pays Verizon for special access between wire centers in Pennsylvania. Were AT&T operationally ready to provide wire center to wire center dedicated transport, surely AT&T would not need to spend _______ of dollars on special access. This underscores AT&T's plain statement that it neither self-provides nor sells dedicated transport at wholesale in Pennsylvania[10] and, as such, the Commission should not count AT&T as satisfying any dark fiber or lit transport trigger.

D. Telcove Should Not Be Counted Towards The Transport Triggers.

Cavalier joins those parties that contend the Commission should not count Telcove, formerly Adelphia, as a trigger candidate for any transport-related purpose in this investigation. Verizon has failed to provide specific, granular, route-based evidence of Telcove's self-provisioning or wholesale offerings of any form of transport over any given route. As the Pennsylvania Carrier's Coalition stated in its Main Brief, "The testimony does not establish whether Telcove sold transport within the meaning of the TRO between Verizon offices, whether it used Verizon fiber or its own fiber, whether it

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[8] *Id.* at 76-77.
[9] *Id.* n. 341, at 93-94.
[10] Main Brief of AT&T Communications of Pennsylvania, LLC, at 85-86.

self-provisioned optronics and cross-connect equipment, or precisely which routes Telcove served."[11] In addition to this lack of necessary, granular detail, Verizon has made other grossly unsupported conclusions concerning Telcove's data.[12]

Given the high stakes involved, Verizon's burden of persuasion, and the paucity of the record with respect to this carrier, the Commission should not count Telcove toward satisfaction of any transport trigger.

CONCLUSION

For the foregoing reasons and for those reasons set forth in its Post-Hearing Brief, Cavalier respectfully urges the Commission to deny and dismiss Verizon's Petition, to maintain intact for CLECs all available UNE dedicated transport routes, and to order such other just and equitable relief as the Commission shall see fit.

Respectfully submitted,

____
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Dated: March 1, 2004

[11] Main Brief of Pennsylvania Carrier's Coalition, Docket No. I-00030099, at 101.
[12] Main Brief of AT&T Communications of Pennsylvania, at 42.

Sprint.

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March 1, 2004

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Harrisburg, PA 17120

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

Dear Secretary McNulty:

Attached please find an original and nine (9) copies of the Reply Brief of Sprint Communications Company, L.P. (hereinafter "Sprint") in the above-captioned proceeding.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Sue Benedek

Sue Benedek

ZEB/jh
enclosures
cc: The Honorable Susan D. Colwell *(via hand delivery and electronic mail)*
The Honorable Michael C. Schnierele *(via hand delivery and electronic mail)*
Certificate of Service *(via electronic mail and first-class mail)*

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY BRIEF OF SPRINT COMMUNICATIONS COMPANY, L.P.

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Dated: March 1, 2004

TABLE OF CONTENTS

I. SWITCHING

A. GEOGRAPHIC MARKET DEFINITION

PCC in its Main Brief recommends wire centers within MSAs.[1] PCC argues that "economic conditions" vary significantly within the MSA and cites costs of collocation in support.[2] Other parties, such as OCA, suggest geographic areas smaller than the MSA (*i.e.*, density cells within MSAs) for the geographic market definition.[3] OCA contends that that density cells capture differing UNE loop rates between density cells.[4] Verizon requests relief based upon density cells within MSAs.[5]

Sprint has fully addressed the use of MSAs as the appropriate geographic market definition for application of the TRO's competitive triggers.[6] Sprint will simply highlight certain rebuttal points at this juncture.

The geographic market definition is necessary for application of the TRO's competitive triggers. Thus, the Commission must examine the extent to which competitors are using qualifying non-ILEC switching to serve mass market customers throughout the defined geographic area – *i.e.*, MSA – for all customer segments.[7]

Only the MSA is a truly meaningful measure of the scale and scope of economies needed for viable competitive mass market entry. All costs of serving throughout the MSA are given import and meaning. Conversely, because smaller geographic areas do not adequately capture the scale and scope of economies needed for new entrants, smaller geographic areas do not adequately measure whether such entrants (once situated in that small

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[1] PCC M.B. at 28-34.
[2] *Id.* at 30, 31.
[3] OCA M.B. at 15-25 (Density cells within MSAs). Conversely, the CLEC coalition recommends LATAs. *See also*, CLEC M.B. at 16-19.
[4] OCA M.B. at 18.
[5] Verizon M.B. at 10, 12.
[6] Sprint M.B. at 7-12.
[7] *Id.*

geographic area) will expand service to broader areas or will even continue to provide service in that small geographic area.

For example, because ILEC switches are located in wire centers, as PCC notes, the costs of collocation become an overwhelming consideration when the geographic market is defined on a wire center basis. Assuming that the CLEC can economically serve that wire center, there is no assurance of its provisioning of competitive service beyond that wire center. There is no assurance that such a CLEC will continue to provide service even in that one wire center. Similarly, use of density cells within MSAs justified on the basis of variations in UNE loops, as OCA suggests, does not capture or recognize the scale and scope of economies necessary for a competitive entrant to serve outside the larger, denser areas of the MSA.[8]

The Commission should employ the MSA as the geographic market definition to be applied to the triggers case presented by Verizon.

B. VERIZON'S TRIGGER "ANALYSIS"

Verizon continues to press its simplistic, assumption-driven, counting exercise for seeking relief from Verizon's unbundling obligations for circuit switching. Hence, Verizon argues, the Commission must "confine itself" to determinations that are relevant to the self-provisioning trigger for circuit switching.[9] Little to no *evaluation* by the Commission is proposed by Verizon.

This record demonstrates that many issues arise when applying the TRO order and the associated rules to the *prima facie* case presented by Verizon. Testimony has been presented by many parties, including Sprint, demonstrating that Verizon's "counting" exercise is deficient for purposes of applying the TRO triggers because Verizon improperly included

[8] *See generally*, Sprint M.B. at 9-10.
[9] Verizon M.B. at 3-7.

switches and failed to provide evidence that CLECs can economically serve the mass market.[10] Any claim made by Verizon does not automatically become a fact. As Sprint stated in its Main Brief, Verizon's case was, and remains, bloated with assumptions and suppositions from the start.[11]

Genuine and material concerns have been raised in this record to disprove Verizon's switching case and to discredit Verizon's view of the quality of the evaluation required of this Commission under the TRO. However, of all issues arising from Verizon's deficient switching case, Verizon's failure to distinguish between business and residential customers in Verizon's counting exercise demonstrates the gravity of the need for this Commission to evaluate completely the "facts" presented by Verizon.

As set forth in Sprint's Main Brief, customer class is a "market specific variable" required to be examined by this Commission and completely ignored by Verizon.[12] Indeed, in its Main Brief, Verizon asserts (or rather asks the Commission to assume) that "a qualifying CLEC that serves only mass market business customers qualifies as serving the mass market."[13] In other words, per Verizon, no evaluation by the Commission is needed in terms of segments of the mass market served.

If Verizon's application of the TRO in this regard is deemed proper, much of Verizon's *prima facie* switching case stands. However, if this Commission *evaluates* the claim made by Verizon relative to the guidance provided in the TRO, then Verizon's switching case must fail. The enormity of the impact of resolution of this issue highlights the importance of the

[10] Sprint M.B. at 14-23.
[11] *Id.*, at 2-5.
[12] *Id.*, at 16-19.
[13] Verizon M.B. at 10. *See also*, Verizon M.B. at 23 and 17.

Commission's obligation under the TRO to evaluate Verizon's claims, rather than to assume the truth of the assumptions made by Verizon in this case.

The FCC clearly intended that the state commissions actively and carefully undertake the obligation to make a granular analysis under the TRO, including application of the TRO's triggers. Calling the triggers "deliberately objective" does not remove the Commission's duty to undertake a careful and complete evaluation of Verizon's claims under the TRO.[14]

The FCC in the TRO intended for state commissions to do more than simply count any DS0 regardless of customer segment served and assume self-provisioned CLEC switching facilities, as Verizon proposes. State commissions must *evaluate* the claims presented by the petitioning ILEC. If the necessary evaluation by this Commission is minimized – or worse is avoided – due to acceptance of Verizon's rote application of the switching triggers, then the Commission has opened its doors wide for similar relief – much to the detriment of competition in the Commonwealth of Pennsylvania.[15]

II. TRANSPORT/LOOPS

The transport and loop sections of Verizon's Main Brief are replete with Verizon's assertion that other parties have somehow failed to provide facts to rebut Verizon. Meanwhile, Verizon continues to polish its case with additional revisions of claimed qualifying routes. Verizon's case nonetheless fails to shine.

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[14] Verizon M.B. at 11.

[15] This point is underscored by the fact that Sprint's ILEC affiliate can similarly petition the Commission for relief from unbundling obligations under the TRO. As this Commission is aware, Sprint has an ILEC affiliate in Pennsylvania. Sprint's ILEC affiliate, The United Telephone Company of Pennsylvania, currently has approximately 400,000 access lines in Pennsylvania. Sprint St. 1.0 at 3. Notwithstanding the fact that Sprint's CLEC operating entity has less access lines in Pennsylvania than Sprint's ILEC affiliate, Sprint's CLEC operating entity has been actively involved in this TRO proceeding and opposes Verizon's filing.

Specifically, as to Sprint, Verizon claims that Sprint failed to offer any facts as to "their own" transport facilities in rebuttal to Verizon's claims.[16] Verizon asserts that Sprint only offered "hypothetical" reasons why "CLEC facilities might not have unlit fibers in their transport facilities."[17] Similarly, Verizon argues that the CLECs have failed to show that "they are operationally incapable" of establishing dedicated transport.[18]

Sprint denies that it failed to offer any facts concerning Sprint's transport facilities. Sprint presented the testimony of a witness who explained that the "Sprint" transport routes identified by Verizon do not provide competitive local exchange service. These are IXC facilities used for the provision of IXC services. Thus, Sprint is not a "competing carrier" under the TRO.[19] Quite bluntly, Sprint would have every business and economic reason to admit and promote those facilities as operationally ready to provide competitive local exchange services – if indeed those facilities were operationally ready, as Verizon assumes.

Evidence has been presented casting doubt as to the veracity of Verizon's assumptions concerning the existence of unlit fiber in transport routes, as to operational readiness, and as to customer locations for loops. Verizon simply ignores – or refuses to acknowledge – that the broad-sweeping assumptions it elected to inject into this proceeding render those claims ripe for a response demonstrating the myriad ways in which such suppositions fail under the TRO's rigorous transport and loop requirements.

Verizon has merely made a host of generalized claims, providing pieces to a puzzle, rather than developing case that could lead the Commission to render meaningful conclusions. Numerous transport routes have been listed by Verizon. Numerous collocations have been

---

[16] Verizon M.B. at 46.
[17] *Id.*
[18] *Id.* at 60.
[19] Sprint M.B. at 29.

identified by Verizon. Numerous "customer locations" have been declared by Verizon in its loop case. However, Verizon has chosen to string these assertions together by assumptions and generalizations rather than verified facts.

III. CONCLUSION

Sprint Communications Company, L.P. ("Sprint") respectfully requests that the Pennsylvania Public Utility Commission reject in its entirety Verizon's request for relief from unbundling obligations of the Act, as provided under the FCC's Triennial Review Order, and as requested by Verizon Pennsylvania Inc. and Verizon North Inc., for the reasons set forth above and in Sprint's Main Brief.

Respectfully Submitted,

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Dated: March 1, 2004

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of March, 2004, served a true copy, via electronic and first-class mail, of the foregoing Reply Brief, in accordance with the requirements of 52 Pa. Code §1.54:

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SECRETARY'S BUREAU

March 1, 2004

VIA UPS

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor, Room N201
Harrisburg, Pennsylvania 17120

DOCUMENT

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

Reply Brief of the CLEC Coalition

Dear Secretary McNulty:

Enclosed for filing with the Pennsylvania Public Utility Commission, on behalf of ARC Networks, Inc. d/b/a InfoHighway Communications Corp., Broadview Networks, Inc., BullsEye Telecom, Inc., McGraw Communications, Inc. and Metropolitan Telecommunications of PA, Inc. d/b/a MetTel ("CLEC Coalition"), please find an original and nine (9) copies of the CLEC Coalition's Reply Brief in the above captioned docket. Please feel free to contact Ross Buntrock at (202) 887-1248 if you have any questions.

Respectfully submitted,

Ross A Buntrock

Genevieve Morelli (*admitted pro hac vice*)
Ross A. Buntrock (*admitted pro hac vice*)
Heather T. Hendrickson (*admitted pro hac vice*)

Enclosures
cc: Service List (via UPS and electronic mail)
ALJ Michael C. Schnierle and ALJ Susan D. Colwell (version via UPS and electronic mail)

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Network Elements	))))	**Docket No. I-00030099**

DOCKETED
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REPLY BRIEF OF ARC NETWORKS, INC. D/B/A INFOHIGHWAY COMMUNICATIONS CORP., BROADVIEW NETWORKS, INC., BULLSEYE TELECOM, INC., MCGRAW COMMUNICATIONS, INC. AND METROPOLITAN TELECOMMUNICATIONS OF PA, INC. D/B/A METTEL ("CLEC COALITION")

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I. INTRODUCTION

ARC Networks, Inc. d/b/a InfoHighway Communications Corp., Broadview Networks, Inc., BullsEye Telecom, Inc., McGraw Communications, Inc. and Metropolitan Telecommunications of PA, Inc. d/b/a MetTel ("CLEC Coalition") through counsel and pursuant to the *Procedural Orders*[1] in this case hereby submit their Reply Brief in the above captioned proceeding.

The members of the CLEC Coalition submit that the record of this case demonstrates unequivocally that Verizon Pennsylvania Inc. and Verizon North Inc. ("Verizon") have failed to carry the burden assigned to them in the Triennial Review Order ("*TRO*")[2] by the Federal Communications Commission ("FCC") to rebut the national finding "that requesting carriers are impaired without access to unbundled local circuit switching when serving mass market customers."[3] Contrary to Verizon's assertion that the "FCC's mandatory 'trigger' standards" have been met,[4] the record shows precisely the opposite. In its Main Brief Verizon relies upon the same arguments and

1 *Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundled Network Elements,* Dkt. I- 00030099, Procedural Order (Oct. 3, 2003) ("*Procedural Order*"); *Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements,* Dkt. I- 00030099, Second Prehearing Order (Nov. 25, 2003) ("*Second Prehearing Order*").

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

3 *Id.*, ¶ 419.

4 Verizon Main Brief, 2.

"evidence" that were decisively discredited at hearing. Indeed, Verizon is *still trying to explain* the untested, unexamined and inconsistent data it relies upon to demonstrate that the triggers are met in each of the MSAs where Verizon seeks relief. Verizon has provided a further "revised" Attachment 5 with its Main Brief,[5] but even these revised numbers fail to prove that the "triggers" for self provisioned local switching have been satisfied. They have not, and accordingly, the Commission must reject Verizon's Petition on that basis alone.

The Commission should reject Verizon's Petition, and in so doing, refuse Verizon's invitation to take irreversible and anti-competitive actions based on limited and poor quality evidence. Further, in its order rejecting Verizon's Petition, the Commission should clarify that Section 271 of the federal Telecommunications Act of 1996 ("1996 Act") imposes a continuing obligation upon Verizon to provide unbundled loops, switching and transport, regardless of the outcome of this proceeding, and further clarify that this Commission maintains the authority to ensure that Verizon charges cost-based rates for the elements which it is required to provide under Section 271.

II. VERIZON HAS FAILED TO MEET ITS BURDEN OF PROOF IN THIS CASE

A. Verizon Impermissibly Attempts to Shift the Burden of Production and Persuasion to CLECs

The Commission must find, in evaluating the record of this proceeding, that Verizon has failed to meet its burden of proof. The record evidence in this case clearly demonstrates that the self-provisioning trigger has not been met in any of the eight MSAs where

5 *See* Verizon Main Brief, Exhibit 1.

Verizon seeks relief in Pennsylvania. Verizon contends that CLECs have the burden of validating the incredibly sloppy and untested data that Verizon relies upon in attempting to rebut the national finding of impairment for unbundled local switching.[6] Verizon appears to be the only party to this proceeding confused about the "issue" of who has the burden of proof.

Despite the very clear holding to the contrary in the *Procedural Order*, Verizon argues in its Main Brief that CLECs: "have challenged Verizon's evidence as insufficiently specific to prove the case, while withholding from the Commission the very details about their own networks that would conclusively answer the questions presented here. This Commission should not countenance such manipulation of the process." [7]

As an initial matter, the hearings demonstrated decisively that Verizon has failed to put on a prima facie case in this proceeding. In fact, the document upon which Verizon bases its entire case, Attachment 5, which compares the Verizon "Line Count Study"[8] with information provided by carriers themselves through the discovery process in the course of this proceeding, is clearly flawed and can be neither credited nor relied upon by the Commission. On this basis alone the Commission is justified in rejecting Verizon's request for relief.

Carriers to this proceeding, including Verizon, had an equal opportunity to conduct discovery. In addition, the "footnote 14" carriers, many of whom Verizon relies upon as trigger candidates, had an obligation to provide extensive information to the Commission in response to initial data requests propounded by the Commission at the outset of this proceeding. To the extent that a carrier upon whom Verizon relied as a trigger failed to respond to Verizon's

6 Verizon Main Brief, 7-9.

7 *Id.*, at 7 (emphasis added).

8 Verizon St. 1.0 (West/Peduto Dir.) at 21-22.

discovery requests, Verizon could have availed itself of the Commission's processes for compelling the production of information. If the carrier was not a party to this proceeding, Verizon was free to avail itself of the Commission's processes for seeking a subpoena for information, which Verizon in fact sought in the case of Telcove. Therefore, it is patently ridiculous for Verizon to suggest that the reason its case is so weak is because CLECs have withheld critical data.

Verizon has been on notice since this proceeding began that it bears the burden of proof and persuasion to demonstrate that there are: (1) two or more non-affiliated providers that have their own switches in the market and who offer wholesale local switching to customers serving DS0 capacity loops; or (2) three or more non-affiliated competing providers serving mass market end-user customers in the particular market using their own switches.[9] There can be no doubt that the *TRO* places the burden squarely on Verizon to prove non-impairment.[10] As is often the case, Verizon quotes out of context the cite to the *TRO*, which it asserts stands for the proposition that the burden of proof is not on either Verizon or the other parties.[11] The FCC was referring to the application of the burden of proof standard in the FCC's own proceeding, not how this Commission should assign the burden in this proceeding. There is no question that the *TRO* assigns the burden to Verizon.

At the end of the day the Commission must reject Verizon's attempt to lard the record with unexamined, unverified and misrepresentative data. Verizon has clearly failed to provide credible evidence that would allow the Commission to find that the self-provisioning

[9] *Procedural Order*, 14.

[10] *Id.*, 12.

[11] Verizon Main Brief, 8 citing *TRO* ¶ 92.

trigger has been met in any MSA in Pennsylvania. Having failed to provide the verified evidence required by law, the Commission must reject Verizon's case.

B. The Trigger Candidates Relied Upon by Verizon Do Not Satisfy the Self Provisioning Trigger

Verizon contends that the "largely undisputed record compels a finding" of non-impairment. The opposite is true. Verizon has not come close to demonstrating that it has met the six criteria that would demonstrate that the self-provisioning trigger has been satisfied. In order to satisfy the self-provisioning trigger: (1) the trigger candidate's switches must be "mass market," not "enterprise" switches; (2) the trigger candidate must be *actively providing* voice service to mass market customers in the designated market, including residential customers, and must be *likely to continue to do so*; (3) the trigger candidate should provide services exhibiting a ubiquity comparable to UNE-P within the defined market; (4) the trigger candidate should be relying on ILEC analog loops to connect the customer to its switch or, if a claimed "intermodal" alternative, its service must be comparable to the ILEC service in cost, quality, and maturity; (5) the trigger candidate may not be *affiliated* with the ILEC or other self-provisioning trigger candidates; and (6) there must be evidence of sustainable and broad-scale mass market competitive alternatives in the designated market.[12] Only if *each* of these trigger criteria is met does a candidate qualify as one of the three carriers necessary to satisfy the FCC's self-provisioning trigger standard.

The record overwhelmingly demonstrates that applying these criteria to the trigger candidates proposed by Verizon in Pennsylvania, there is no MSA where there are three qualifying mass market trigger candidates who are actively serving mass market customers using

[12] CLEC Coalition St. 1.0, 40-41.

their own switches. Accordingly, there are no "qualifying CLECs in any MSA" and the Commission must reject Verizon's petition for relief.

1. Verizon Counts Enterprise Switches As "Mass Market" Switches

Verizon argues that the "Commission should establish that mass market customers are those customers that are actually being served with one or more voice grade DS0 circuits…."[13] Verizon ignores the plain language of the *TRO* and makes no distinction between switches used by CLECs to serve the enterprise market versus switches used to serve the mass market.

In its attempt to put on a *prima facie* trigger case, Verizon relies upon carriers utilizing self-provided switches to serve the enterprise market rather than the mass market. Numerous parties, in addition to the CLEC Coalition, pointed out that one of Verizon's primary switch trigger candidates, XO, provides service in Pennsylvania using its own switch only to enterprise customers; it does not serve the mass market. The Commission may not rely on enterprise switches to satisfy the self-provisioning trigger.

2. Verizon Relies Upon Trigger Candidates Who Do Not Provide Ubiquitous Service in the Geographic Area Where They Are Proposed as Triggers

Verizon argues that "geographic ubiquity is ***not*** required for a CLEC to count as a self-provider of switching services for the application of the retail trigger analysis."[14] Verizon's position ignores the plain language of the *TRO*. The *TRO* makes it clear that the Commission must consider "how extensively carriers have been able to deploy [such] alternatives, to serve

13 Verizon Main Brief, 19.

14 *Id.*, at 25.

what extent of the market, and how mature and stable that market is."[15] The Commission cannot count mass market trigger candidates with a ubiquity materially less than UNE-P. The record of this proceeding indicates that every trigger candidate proposed by Verizon fails to serve a geographic area comparable to UNE-P, and accordingly, the self-provisioning trigger standard has not been satisfied.

3. Verizon Relies Upon Trigger Candidates That Are Not Likely to Continue to Provide Service

The *TRO* requires the Commission to determine whether the self-provisioning trigger candidates put forth by Verizon are "likely to continue" offering voice POTS services to mass market customers in the future.[16] Verizon argues that in making this determination, the Commission can not look at any other evidence other than whether a carrier has filed a notice to terminate service.[17] Verizon's interpretation is untenable and contrary to the *TRO.* The Commission should reject this interpretation and exercise its judgment and common sense.

At least one of the trigger candidates relied upon by Verizon, Allegiance, is not likely to continue under any interpretation of that requirement. But Verizon interprets the TRO's "likely to continue" standard in a way that leads to absurd results. Under Verizon's tortured interpretation of the *TRO*, if a CLEC on the verge of exiting the mass market has yet to file a service discontinuance notice, that CLEC cannot be disqualified as a trigger candidate. This position is directly contrary to the *TRO* directive to state commissions to examine as the "key

15 *TRO*, ¶ 94.

16 *Id.*, at ¶500.

17 Verizon Main Brief, 27.

consideration...whether the providers are currently offering and able to provide service, and are likely to continue to do so"[18] and the Commission must reject it.

4. The Commission Should Conclude That the "Intermodal" Trigger Candidates Relied Upon By Verizon Do Not Satisfy the Trigger

Verizon relies heavily upon cable telephony providers as trigger candidates, despite the fact that they that do not rely upon ILEC loops to provide service to their end user customers. Specifically, in each of the eight MSAs where it seeks relief, Verizon asks the Commission to count as a triggering carrier at least one cable company providing telephony services. However, in recognition of the fact that intermodal service providers avoid use of the hot-cut process, the FCC found to be a source of impairment on a national basis, the *TRO* cautions state commissions to review carefully whether and how intermodal alternatives like cable telephony satisfy the self-provisioning trigger, and cautions state commissions to give intermodal trigger candidates *less weight* than trigger candidates that rely upon ILEC unbundled analog loops to provide service.[19]

While the *TRO* permits the Commission to consider intermodal alternatives, it advises that: "In deciding whether to include intermodal alternatives for purposes of these triggers, states should consider to what extent services provided over these intermodal alternatives are comparable in cost, quality, and maturity to ILEC services."[20]

18 *TRO*, ¶ 500.

19 *Id.*, ¶¶ 439, 429, 446.

20 *Id.* at ¶ 499, n.1549, emphasis supplied.

Verizon argues that "there can be no serious claim, based on the evidence in the record, that cable telephony is not 'comparable' in quality to traditional telephone service."[21] However, Verizon did not put on any evidence that it in fact conducted such an analysis. Having failed to provide any evidence that the intermodal cable telephony candidates it proffers provide mass market service to business and residential customers that is equal in cost, quality and maturity to the services Verizon offers, these candidates must be rejected.

5. Verizon Improperly Relies Upon ILEC Affiliates As Trigger Candidates

Verizon argues that it may rely on the CLEC affiliates of ILECs as triggers, even when those CLEC affiliates rely upon their ILEC parents' switch. This assertion is contrary to the *TRO* and the Commission should reject it.

The *TRO* requires that self-provisioning trigger candidates may not be affiliated with either Verizon, or another incumbent.[22] However, in each of the MSAs where it seeks relief Verizon relies upon at least one carrier that is affiliated with an incumbent,[23] and in each case the CLEC affiliate relies in whole or in part upon a switch owned by the incumbent to provide analog voice service in the market in which Verizon claims it meets the self-provisioning trigger.

The Commission should exclude these carriers from consideration as switch triggers in this proceeding. Each of these carriers benefits from its affiliation with an ILEC in a

21 Verizon Main Brief, 29.

22 *TRO*, ¶ 499.

23 *See* Verizon St. 1.2, Att. 5. Pt. A: In each MSA Verizon puts forth "affiliated" company triggers: Commonwealth in the Allentown-Bethlehem-Easton MSA; Commonwealth and D&E in the Harrisburg-Carlisle MSA; Commonwealth and D&E in the Lebanon MSA; Commonwealth and D&E in the Lancaster MSA; Commonwealth and D&E in the Philadelphia MSA; Commonwealth and D&E in the Reading MSA; and Commonwealth in the Scranton-Wilkes-Barre-Hazelton MSA.

manner that is unattainable by any other CLEC. As such, their presence as a mass market service provider does nothing to demonstrate that an unaffiliated CLEC is not impaired without access to ILEC-provided switching

III. SECTION 271 REQUIRES THAT VERIZON PROVIDE UNBUNDLED LOCAL SWITCHING EVEN IF THE COMMISSION WERE TO GRANT VERIZON'S FATALLY FLAWED PETITION

Verizon argues that the Commission is powerless to make a determination that section 271 requires Verizon to continue to unbundle section 271 network elements, even if the Commission finds 'no impairment' under the *TRO*'s triggers analysis.[24] Verizon further argues that the Commission has "no role" in the pricing of Section 271, network elements.[25] Verizon's position flies in the face of the plain language of the statute. The Commission should conclude that under Section 271 Verizon has a continuing obligation to provide network elements at the just and reasonable rates administered by this Commission pursuant to its Section 252 authority.

The *TRO* correctly recognized that under the Section 271 competitive checklist, loops, transport and switching are "network elements" that must be unbundled, even if the Commission were to make a finding of 'no impairment' and those elements were no longer required to be made available under Section 251.[26] Contrary to Verizon's unsupported assertions, loops, transport and switching remain subject to the unbundling requirement regardless of this Commission's conclusion regarding Verizon's trigger case, and Verizon's interpretation of the statute is not only contrary to its plain language, but disingenuous. Checklist item 2 of Section 271 requires Verizon to provide "network elements in accordance

24 Verizon Main Brief, 76-78.

25 *Id.*

26 *TRO*, ¶ 654.

with the requirements of sections 251(c)(3) and 252(d)(1).[27] Section 252(d)(1), in turn, grants this Commission the power to determine the rates for network elements required to be provided under Section 271, as well as the network elements Verizon is required to provide pursuant to interconnection agreements with carriers. The plain language of the Section 271 checklist, therefore, requires Verizon to provide unbundled access to loops, transport and switching, and to do so at rates administered by this Commission. Verizon's ludicrous argument that Section 271 somehow loses its effect in the unlikely event that it is found to have satisfied the trigger tests for unbundled local switching must be rejected.

IV. CONCLUSION

Verizon has not satisfied its burden of proof to demonstrate that the fact-based triggers of the *TRO* have been met with respect to unbundled local switching to serve mass

[27] 47 U.S.C. § 271(c)(2)(B)(ii).

market customers. Verizon's claims of non-impairment are simply the result of its own counting exercise, and creative interpretations of the trigger standard contained in the *TRO*. Verizon's petition for relief therefore must be rejected.

Respectfully submitted,

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March 1, 2004

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I, Ross A. Buntrock, hereby certify that I have this 1st day of March, 2004, served a true copy of the "Reply Brief of ARC Networks, Inc., d/b/a InfoHighway Communications Corp., Broadview Networks, Inc., BullsEye Telecom, Inc., McGraw Communications, Inc. and Metropolitan Telecommunications of PA, Inc., d/b/a MetTel ("CLEC Coalition") upon the persons below via electronic and UPS overnight, in accordance with the requirements of 52 Pa. Code §§1.4 and 5.502:

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March 1, 2004

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

Dear Secretary McNulty:

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

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

Sincerely,

Joel H. Cheskis
Assistant Consumer Advocate

Enclosures
cc: All parties of record
*76655

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY BRIEF OF THE
OFFICE OF CONSUMER ADVOCATE

DOCKETED
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Dated: March 1, 2004

INFORMATION ALLEGED TO BE PROPRIETARY HAS BEEN DELETED

TABLE OF CONTENTS

TABLE OF CITATIONS

I. INTRODUCTION

On August 21, 2003, the Federal Communications Commission ("FCC") released the Triennial Review Order.[1] That Order adopts new rules regarding the obligation of incumbent local exchange carriers ("ILECs") to make their unbundled network elements ("UNEs") available to Competitive Local Exchange Carriers ("CLECs"). The TRO establishes new standards for determining impairment under section 251(d)(2) of the federal Telecommunications Act of 1996[2] and sets forth a new list of UNEs that ILECs must make available to CLECs. The TRO requires the Pennsylvania Public Utility Commission (PUC or Commission) to conduct a granular analysis of geographic areas to determine impairment. Under this approach, impairment may vary by geographic location, customer class, and service, including a consideration of the type and capacity of facilities.

The TRO provides three mechanisms through which this Commission must conduct its analysis: 1) a 90-day proceeding to determine CLEC impairment without unbundled switching to serve the enterprise market, i.e., medium- and large-business customers; 2) a nine-month proceeding to determine CLEC impairment without unbundled switching to serve the mass market, i.e., residential and small-business customers; and 3) another nine-month proceeding to establish an efficient loop migration process for effectively transferring large numbers of customers among local phone providers.

[1] Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order (rel. Aug. 21, 2003)(FCC 03-36), as corrected by errata, FCC 03-227 issued on September 17, 2003 ("Triennial Review Order" or "TRO").
[2] Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §§151, et seq. ("TA-96" or "the Act")

The Commission issued a Procedural Order establishing dockets for these three proceedings on October 2, 2003.[3] That Procedural Order provides the standards by which the Commission will adjudicate the Triennial Review Order, and further establishes the procedural rules and schedule by which the Commission will conduct the proceedings.

On October 31, 2003, Verizon Pennsylvania, Inc. (Verizon or the Company) filed its Petition asking the Commission to initiate a proceeding and find that competitors are not impaired without access to unbundled switching to serve certain mass market customers.[4] Here, Verizon seeks to avoid offering competitors access to local service switching in all of Density Cells 1, 2 and 3 in eight[5] Metropolitan Statistical Areas (MSAs).

On October 23, 2003, the OCA filed a Notice of Intervention and Public Statement asserting that it was intervening in this proceeding to address the interests of residential consumers. The OCA also intervened into the other two TRO proceedings at Docket Nos. I-00030100 and M-00031754. On November 13, 2003, the Office of Consumer Advocate (OCA) filed an Answer to Verizon's Petition.

Administrative Law Judges Michael C. Schneirle and Susan D. Colwell were assigned to preside over Verizon's October 31, 2003 Petition, at Docket No. I-00030099. On November 25, 2003, those ALJs conducted a prehearing conference to discuss matters involved in the case and to establish a procedural schedule. The OCA participated in the hearings held in this matter in Harrisburg on January 26, 2004 thru January 29, 2004. The OCA filed its Main

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

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

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

Brief on February 17, 2004, and now files this Reply Brief in support of its position in this matter.

II. ARGUMENT

A. Verizon Failed To Meet Its Burden of Proving That Its Petition Should Be Granted.

In its Main Brief, Verizon inappropriately attempts to shift the burden of proof in this case to the CLECs. Vz. M.B. at 7-9. More specifically, Verizon argues, "once Verizon has presented the detailed evidence in its possession, the burden of coming forward shifted to the CLEC parties to produce evidence demonstrating that the trigger is not satisfied in a particular market…." Id. at 9. Verizon then argues, "if the CLECs have not come forward with the necessary evidence to rebut Verizon's showing, then the Commission must find the trigger to be satisfied." Id. Verizon's arguments are illogical and contrary to law. Verizon cannot avoid the fact that it has not met its burden of proving that its Petition should be granted by arguing that the CLECs have not shown that the Petition should be denied.

In its October 2, 2003 Procedural Order initiating this proceeding, the Commission clearly states, "any ILEC desiring to contest the presumption of impairment must bear the burden of proving non-impairment." October 2nd Order at 12. This determination is consistent with Section 322(a) of the Public Utility Code, which specifically provides that the proponent of a rule or order, such as Verizon, has the burden of proof. 66 Pa.C.S. §322(a).

In its Main Brief, Verizon deflects its responsibility to meet its burden of proof by arguing the CLECs have evaded their burden of coming forward with evidence uniquely within their control. The OCA agrees that, while the burden of proof never shifts from the proponent of a claim, the burden of going forward with evidence, sometimes called the burden of persuasion, can properly shift to an opposing party once the proponent of a claim has presented its primary case. However, in this case, Verizon has failed to present its claim such that the burden of going forward would shift to the intervening parties. The burden of going forward only shifts to the intervening parties when Verizon has presented a *prima facie* case. As discussed throughout the OCA's Main Brief, the record evidence in this proceeding is insufficient to support a finding of non-impairment in any of the geographic markets where Verizon seeks such a finding. Therefore, the burden of going forward never shifts away from Verizon. Verizon's evidence is simply not persuasive on the mass market issues.

Ultimately, Verizon must prove its case by a preponderance of the evidence. However, it has not made such a case here. Instead, Verizon attempts to make this a finger-pointing exercise by claiming that the CLECs have not done their part in helping Verizon to prove its case. The "footnote 14" carriers, and other intervening parties, have appropriately responded to the Commission's data requests contained in the October 2, 2003 Order by revealing information alleged to be highly confidential. Verizon had ready access to various procedural mechanisms in order to acquire additional information from those parties. However, it chose not to take any further steps to acquire relevant information. Rather, Verizon decided to go forward, to its own detriment, based upon its own methods to support its Petition. Verizon's case contains many flaws and does not provide the necessary support to show non-impairment in any of the geographic markets where Verizon seeks such a finding.

The Pennsylvania Supreme Court has clearly stated that the party with the burden of proof has a formidable task before the Commission can adopt its position. Even where a party has established a *prima facie* case, the litigant still must establish that "the elements of that cause of action are proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary." Burleson v. Pa. P.U.C., 461 A.2d 1234, 1236 (1983). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Smalley v. Zoning Hearing Board of Middleton Twp., 834 A.2d 535, 538-539 (Pa. 2003) (citation omitted). On many points, Verizon simply fails to advance sufficient evidence to form a reasonable basis to support its proposed conclusion.

Verizon's argument that the Commission must find the trigger analysis to be satisfied because CLECs have not come forward with the necessary evidence to rebut Verizon's showing is without merit and should be wholly rejected.

B. The Commission Must Not Accept Verizon's Erroneous "Bright Line" Approach

Verizon extols its approach to the FCC's trigger analysis as using "'bright-line' and 'objective' triggers." Vz. M.B. at 5. Nevertheless, Verizon often creates simplistic and nonsensical standards in order to meet its objective approach.

OCA has also used objective standards throughout this litigation. For example, OCA has proposed that a CLEC must serve at least 3% of mass market lines in a market area from its own switch in order to allow such a CLEC to count toward the triggers. Verizon takes a different approach and alleges that a CLEC serving one DS0 line to a single mass market customer would count as a CLEC. Both the OCA and Verizon approaches can be considered as bright line approaches. However, the Verizon approach is incorrect as explained below.

The OCA recognizes that there are virtues in a bright line approach and has proposed such approaches in this proceeding. However, not every bright line approach will work or should be accepted. The PUC must carefully consider the methods proposed and recognize that merely because an objective standard is proposed does not mean that it should be adopted.

C. Hazleton Does Not Belong in the Scranton-Wilkes Barre Market Area Because It Is Not Contiguous Or Even Located Close To Other Cities In That Market Area.

The OCA has indicated in its Main Brief that its position regarding the appropriate geographic market definition to be used for the purposes of applying the TRO trigger analysis is similar to Verizon's proposal. OCA M.B. at 15. That is, the geographic market should be defined in terms of density cells within the MSAs because such a definition is consistent with the FCC's guidelines and will facilitate any impairment analysis that the PUC might undertake. Id. at 14-24. Verizon now appears to have clearly supported this proposal. Verizon M.B. at 12.

However, the OCA's one exception to this similarity with Verizon is that the Hazleton wire center in the Scranton-Wilkes Barre MSA should not be included in that geographic market because it is not contiguous or even located close to the other cities in the MSA. Id. at 15, *see also*, OCA St. 1.0 at 16. The OCA will not reiterate here why it believes this exception is necessary but, rather, responds to Verizon's argument in its Main Brief that the exception is not necessary.

In its Main Brief, Verizon argues that the OCA's position is speculative and unsupported because "the record shows that the same 2 or 3 CLECs are serving Hazleton and the other areas in the MSA, so they must have devised some reasonably efficient way to serve that area from their switches." Verizon M.B. at 15, n.32, *citing*, Verizon St. 1.2, Att. 5 and Tr. 373-374. This position should be rejected. A review of the record evidence that Verizon uses to support its argument reveals that one of the trigger candidates which Verizon claims "must have devised some reasonably efficient way to serve" Hazleton is an ILEC affiliate. *Compare*, Verizon St. 1.2 at Att. 5, p. 11 of 11 and OCA St. 1.0 at 39. The OCA submits that such a CLEC likely interconnects Hazleton and its Wilkes-Barre market through its ILEC affiliated network. Thus, Verizon has not demonstrated that Hazleton is really interconnected with the Scranton-Wilkes Barre geographic market area. Verizon's arguments do not show that a competitor can build a compact and efficient backhaul network for the MSA if Hazleton were included in the Scranton-Wilkes Barre geographic area.

The distinct nature of Hazleton within the MSA was recognized by ALJ Schnierle during Verizon's cross-examination of Dr. Loube on this issue. Tr. 375. The OCA submits that the Commission should recognize that Hazleton is geographically separate from the Scranton-Wilkes Barre geographic market and should not combine these cities in the same geographic area for purposes of conducting the trigger analysis.

Furthermore, the ability of competitors to build a compact and efficient backhaul network for the MSA would compromise a CLEC's ability to compete in Hazleton if Hazleton were included in the Scranton-Wilkes Barre market area. Verizon's argument to the contrary is without merit because the record support used in making that argument is unfounded. Hazleton should not be included in the Scranton-Wilkes Barre geographic market area.

D. Verizon's Petition Allows CLECs To Be Considered In The Trigger Analysis That Provide Service In Too Small Of A Market Area.

In its Main Brief, Verizon argues that there is no requirement that a CLEC serve 100% of the defined geographic market area in order to qualify under the trigger analysis. Vz. M.B. at 25-27. Verizon argues that there is no "requirement that a CLEC currently serve, or be capable of serving, customers throughout the market in order to count toward the triggers." Id. at 26. For example, Verizon claims that where CLECs would offer service in only one wire center within a market area such CLECs would qualify as trigger candidates.

The OCA has previously articulated in its Main Brief that the Commission must exclude CLECs who only provide competitive service in a small portion of the defined geographic market area. OCA M.B. at 46-49. The Commission must ensure that those CLECs it includes in the trigger analysis are actively seeking to serve throughout the market and not in just one particular area. Id. The OCA will not reiterate its arguments on this issue but incorporates them by reference in this reply.

In response to Verizon's arguments in its Main Brief, the OCA submits that it is not necessary for CLECs to provide ubiquitous service, i.e., serve every exchange in the geographic market area, in order to be a trigger candidate. As OCA witness Dr. Loube testified, "if the market covers an area of 20 exchanges, a CLEC serving only 18 of those exchanges could be counted as one of the trigger CLECs. However, if the CLEC is only serving 2 of the exchanges, the state commission may find that the CLEC is not actively serving the market." OCA St. 1.0 at 26-27. As such, the OCA has recognized that service in 100 percent of the service area is not necessary but that a CLEC should not be considered in the trigger analysis if it only provides service in a few exchanges in the geographic market.

The OCA never sought to impose a ubiquitous geographic service requirement upon trigger candidates in this proceeding and it does not seek to impose such a requirement now. However, the OCA submits it is reasonable that CLECs be required to serve in a substantial majority of the geographic market in order to qualify as a trigger candidate. This requirement is consistent with the TRO to ensure that CLECs are not impaired without UNE switching in providing service and that trigger candidates "actively" offer service in the competitive marketplace.

Therefore, the OCA submits that Verizon's argument that there is no requirement that a CLEC serve 100% of the defined market in order to qualify under the trigger analysis does not adequately refute the OCA's position in this case. The OCA never sought to impose a ubiquity requirement on CLEC trigger candidates but only sought to ensure that CLECs can serve a substantial majority of the geographic market to be considered actively serving customers and qualify as a trigger candidate.

E. The PUC Must Reject Verizon's Effort to Define a Mass Market Customer as Any Customer Purchasing a DS0 Service.

Verizon continues to define the mass market customer as any customer, no matter how large, that purchases one DS0 service. Vz. M.B. at 18-20. The OCA has explained at length why this definition does not conform to the TRO and makes no sense concerning any definition of the mass market customer. OCA M.B. at 30-38.

Verizon's short argument on this point in the Main Brief is not persuasive and does not accurately explain the FCC's position on this point. Verizon quotes the TRO on this point as follows: "The FCC recognized that, '[a]t some point, customers taking a sufficient number of multiple DS0 loops could be served in a manner similar to that described above for enterprise customers . . . .'"[6] OCA emphasizes that customers taking a large number of DS0s "could" be served as enterprise customers, i.e. DS1 service. The FCC never suggested that all customers purchasing DS0 services must be mass market customers.

Once again, Verizon refers to its unsupported assumption, i.e. all customers buying DS0 lines are mass market customers, as an "objective test." Vz. M.B. at 19. Verizon's simplistic presumptions are hardly a legitimate test of anything concerning the size of the customer. OCA has explained that the purchase of a DS0 line may simply mean that a large

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[6] Vz. M.B. at 18 citing TRO at ¶ 497.

customer wishes to purchase a fax line or Centrex service. OCA M.B. at 33. DS0 service may also indicate the CLEC is offering DS0 service to work-at-home employees of an enterprise customer. OCA M.B. at 37. The Verizon approach simply fails to track the reasons why enterprise customers would want to use a DS0.

Verizon's arguments fail to get at the heart of the issue. The FCC recognized that it would develop one set of impairment rules for the large enterprise customers and another set for the small mass market customer. OCA M.B. at 31-32. Verizon's mass market definition fails to make any real effort to distinguish between small and large customers. Clearly, selling a DS0 to a customer does not always mean that such a customer is of a very small size.

The appropriate definition to use in this proceeding is that determined by the FCC in the TRO, i.e. a 4 line cut off for the enterprise customer. OCA M.B. at 32, 33, 38. Some form of line number cut off is essential so that the small mass market customers can be distinguished from the enterprise customers.

F. The PUC Must Require Trigger Candidates to Serve Residential Customers

The OCA has explained that any trigger candidate must be serving both the residential and small business customers before it can be considered as a mass market trigger CLEC. OCA M.B. at 38-40. OCA emphasizes that the circumstances of residential and business customers vary greatly. The PUC should not lump the two types of customers together in order to measure mass market trigger candidates.

Verizon also quotes from the TRO in order to demonstrate that the FCC intended to count any service to any mass market customer, residential or small business, as sufficient to meet the trigger requirement. Vz. M.B. at 23-24. OCA will address one of these citations. Verizon quotes at some length Paragraph 499 of the TRO as revised by the Errata released

September 17, 2003. Vz. M.B. at 24. Unfortunately, Verizon has erred in reflecting the Errata revisions. Verizon's quote, allegedly showing the Errata Order changes, is as follows:

> Moreover, the identified competitive switch providers should be actively providing voice service to mass market customers in the market. ~~They must also~~ Identified carriers providing wholesale service should be actively providing voice service used to serve the mass market and be operationally ready and willing to provide service to all customers in the designated market. ~~They should be capable of economically serving the entire market, as that market is defined by the state commission. This prevents counting switch providers that provide services that are desirable only to a particular segment of the market.~~

Id. The corrected quote with the corrections to Verizon's quote shown in bold is as follows:

> Moreover, the identified competitive switch providers should be actively providing voice service to mass market customers in the market. ~~They must also~~ Identified carriers providing *wholesale*[7] service should be actively providing voice service used to serve the mass market and be operationally ready and willing to provide **wholesale** service to all **competitive providers** ~~**customers**~~ in the designated market. ~~They should be capable of economically serving the entire market, as that market is defined by the state commission. This prevents counting switch providers that provide services that are desirable only to a particular segment of the market.~~[8]

Verizon failed to recognize that the FCC had changed the second sentence now exclusively to relate to wholesale service – not retail service. The FCC has changed the paragraph to emphasize the role of wholesale service providers to all competitive providers – not retail customers.

Verizon emphasizes that dropping the phrase related to "a particular segment of the market" means that retail trigger candidates no longer have to serve both the residential and business customers. Vz. M.B. at 24. OCA suggests that the deleted phrases: "the entire market, as that market is defined by the state commission" and "a particular segment of the market" more likely relates to the geographic scope of the market and not a particular type of customer. Thus, it cannot be deduced that the FCC meant to remove any requirement to serve both types of mass

[7] The word "wholesale" was italicized in the original FCC passage, but not italicized in the Verizon quote.
[8] This corrected quote is derived from the TRO Errata Order, September 17, 2003, ¶ 21 (bold emphasis added).

market customers from the Errata Order. Further, as noted above, the FCC has now changed the paragraph to relate to wholesale and not retail providers. Wholesale providers do not offer service to any type of retail customers. Their market simply relates to offering service to CLECs that in turn may offer service of one type or another to their retail customers. In short, Verizon does not accurately cite the TRO passage at issue or properly interpret it.

G. Verizon's Petition Allows CLECs That Serve Too Few Customers To Be Counted In The Trigger Analysis.

In the course of arguing in its Main Brief that there is no requirement that a CLEC serve 100% of the defined market in order to qualify under the trigger analysis, Verizon also argues that the OCA contends that there is a "market share" requirement for the purposes of considering a CLEC in the trigger analysis. Vz. M.B. at 26. More specifically, Verizon explains that the OCA seeks to have the Commission decline to allow a CLEC to be considered a trigger candidate unless three CLECs each were serving 3 percent of the mass market customers in a given market. Id. at n.59. Verizon argues that the FCC did not include such a requirement and this Commission cannot add such a requirement now. Id.

The OCA has articulated its position in its Main Brief that the Commission must not consider in the trigger analysis those CLECs with a *de minimis* presence in the marketplace. OCA M.B. at 44-46. The TRO notes that competitors serving only 3 percent of residential voice lines represent a "small percentage" of the residential voice market. TRO at ¶ 438. Yet, Verizon has included in its trigger analysis five carriers that served only one line per market and nine carriers that served less than 100 lines. This includes markets where Verizon has over 800,000 lines. The OCA has shown how Verizon has included a substantial portion of these carriers in its trigger analysis and the disappropriate impact of including those carriers for purposes of eliminating UNE switching because those carriers serve such a small percentage of the market.

OCA M.B. at 45-46. Verizon would include carriers in the trigger analysis that provide service to a miniscule share of the relevant geographic market. Such an analysis could result in the loss of the main form of competitive entry for CLECs to serve thousands of other customers. This does not pass a common-sense test and should not be applied in this proceeding.

Furthermore, even if the Commission were to apply a **1 percent** market share requirement, and not a **3 percent** market share requirement, many of the trigger candidates Verizon uses to support its petition would still be eliminated. *See*, OCA St. 1.0 at Exhibit RC-1. The record evidence in this case is replete with examples of how Verizon's position that no minimal market share requirement should be imposed provides absurd results in this case. For example, presiding officer ALJ Schnierle noted in his questioning of Verizon witness West that if there were three switches, each with one DS0 that might be serving, for example, the president of the company or a fax machine, Verizon's position is that the Commission should cut off all UNE-P to every residential customer in that market area. Tr. 94; *see also*, OCA M.B. at 33-37. Verizon witness West also indicated on cross-examination that, under Verizon's position, if a CLEC provides DS0 service to one customer through its enterprise switch, that CLEC should count toward the trigger analysis. Tr. 136. Clearly, the FCC did not intend, when it issued the TRO, to allow for the presence of three individual customers, who are served separately by three CLECs, to support the removal of the method of competitive entry for thousands of customers throughout the market area. Again, Verizon is taking a position in this proceeding that fails a common-sense litmus test. A CLEC serving one line in the Philadelphia market is not "actively" providing service in that market.

As such, Verizon's argument that evidence of the provision of only one voice grade line by three CLECs in a given market area supports the removal of UNE switching for an entire geographic market area that serves hundreds of thousands of customers is without merit. This Commission must ensure that those CLECs it considers in the trigger analysis are actively serving customers in a geographic market area, which is evidenced by more than a *de minimis* presence.

H. Verizon's Revised Adelphia Line Count Cannot Be Used

1. Introduction

In Verizon's Main Brief, it now explains how it has revised its CLEC count in its new Exhibit 1. Vz. M.B. at 22. Previously, it had appeared that Verizon counted all of the Adelphia related companies together and counted all Adelphia lines as relating to one trigger candidate. Verizon's new approach to the important question of the CLEC line count seems to be that it has discarded its previous CLEC line count data as last developed in Verizon Statement 1.2, Attachment 5. Now, Verizon presents a new "Verizon Main Brief, Exhibit 1" that is to replace the previous Attachment 5.

In its Main Brief, Verizon explains that it would be appropriate to count Adelphia Cable and PECO Telcove as two separate CLECs and trigger candidates. Vz. M.B. at 33-34. Adelphia Cable is the company that allegedly serves Adelphia cable customers with cable telephony and PECO Telcove is the Adelphia company that Verizon contends serves large enterprise customers such as the Commonwealth of Pennsylvania. Accordingly, OCA will now address the question of whether Adelphia Cable and PECO Telcove should be separately counted as CLEC trigger candidates. OCA submits that it is far too late to revise Verizon's trigger claim through its "CLEC Count" in the new Exhibit 1. Further, there is no real evidence that Adelphia Cable actually offers service to residential customers, and therefore it should not be counted as a separate trigger candidate.

2. Adelphia Cable Should Not Be Considered As A Separate CLEC.

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

***** PROPRIETARY ENDS *****

OCA emphasizes that it is too late in the process for Verizon to be pasting data from an AT&T exhibit in order belatedly to make its case. Further, as explained above, AT&T has never endorsed this data. The new Exhibit 1 represents a belated hodge podge of data from various places in order to attempt to repair the all-important Adelphia line count. Verizon has fundamentally failed to do so.

In short, Verizon continues to fail to meet its burden of proof in the trigger analysis concerning a company that it identifies as "Adelphia Cable." Verizon attempts to portray this company as a CLEC with residential customers. Vz. M.B. at 33. Verizon also attempts to show that the Adelphia-related TelCove companies, pure business services providers, also meet the TRO's trigger requirements.[9] Vz. M.B. at 35. Both of these contentions are in error and do not serve to support Verizon's burden here.

Verizon has not demonstrated that "Adelphia Cable" serves residential customers. Verizon states in its Main Brief that "Adelphia Cable" "...did not respond to the Commission's discovery requests or otherwise participate in this proceeding." Vz. M.B. at 34. That is undoubtedly true because the CLEC "Adelphia Cable" **does not exist**. There is no dispute that Aldephia Communications provides cable services throughout the Commonwealth. There is, however, a difference between cable service providers and regulated local telephone service providers. In terms of the Commission's regulations, a provider of local exchange telephone service must file tariffs, and otherwise comply with the registration requirements of the Commission. Here, Verizon neither shows a tariff for "Adelphia Cable" to indicate that such an entity provides local exchange telephone service, nor does it show any evidence that such an entity exists as a CLEC. The record simply does not contain evidence to show that "Adelphia Cable" offers local residential telephone service at all. This conspicuous lack of evidence shows that "Adelphia Cable" is not a CLEC within the Commonwealth; it does not operate as a provider of local residential local telephone service. It is therefore not a trigger candidate.

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[9] In Attachment 4 to Verizon St. No. 1.0, Verizon provides that Adelphia (TelCove) has tariffs for residential service at PUC Tariff # 1, Section 6. Section 12 of the tariff referenced by Verizon, the rates and charges section, contains no pricing information regarding message rate residence line services and otherwise has the appearance of a place-holder should this company decide to offer such service in the future. At any rate, this tariff does not provide for such service now. PUC Tariff # 1, Section 12.

PROPRIETARY ENDS *** ALJ Exhibit No. 1, Affidavit of Jeffery J. Heins at 2. This glaring lack of evidence directly undermines Verizon's claim that lines attributable to "Adelphia Cable" represent standalone voice grade UNE loops. VZ M.B. at 33. The evidence from ALJ Exhibit No. 1, highlighted above, directly contradicts Verizon's claim on this point.

Next, Verizon attempts to support its claim by stating, without more, that it has attributed residential E911 listings to "Adelphia Cable." VZ M.B. at 34. Therefore, Verizon assumes that the company must have residential customers. Verizon provides no credible record support for this assumption. Regardless, a residential E911 listing without more provides no evidence of the existence of a residential account. The OCA will not fully repeat its explanation from the OCA Main Brief as to why the E911 database is inappropriate for that use. OCA M.B. at 40. For example, service to a large nursing home may result in many residential E911 listings even though the telephone service is to a large enterprise customer, <u>i.e.</u>, the nursing home. OCA M.B. at 42. That alone is enough to illustrate the shortcomings of Verizon's assumption that all such E911 subscribers are residential mass market customers.

The OCA would point out; however, that TelCove's ALJ Exhibit No. 1 expressly contradicts Verizon on this point. ALJ Exhibit No. 1 provides that the TelCove operating companies within Pennsylvania are *** **PROPRIETARY BEGINS** ***

*** **PROPRIETARY ENDS** ***." ALJ Exhibit No. 1, Affidavit Of Jeffery J. Heins at 2. This direct evidence also contradicts Verizon's circumstantial and unproven assumptions that the residential E911 database provides a gold-standard record of residential customer accounts.

Verizon's Main Brief also argues that because "Adelphia Cable" failed to make an appearance here Verizon's evidence parsed from the E911 database stands without contradiction. Vz. M.B. at 35. This negative inference is not only in error, but as the OCA explains above, it is also impermissible under Pennsylvania law.

Further, Verizon attempts to use its flawed line count study as evidence that PECO TelCove uses voice grade UNE Loops to serve mass market business customers and that perhaps *these* customers count toward the trigger requirements. VZ M.B. at 35. *** **PROPRIETARY BEGINS** ***

*** **PROPRIETARY ENDS** ***." ALJ Exhibit No. 1, Affidavit of Jeffery J. Heins at 2. The fact that TelCove provides lines exclusively to *** **PROPRIETARY BEGINS** *** *** **PROPRIETARY ENDS** *** does not support Verizon's conclusions regarding its flawed line count.

3. Verizon Has Not Demonstrated That Its Line Count Study Excludes All Lines Used Under The Commonwealth Contract.

Verizon has taken two steps in its Main Brief in an attempt to prove that the lines attributed to "Adelphia" in Verizon's testimony, and now "PECO TelCove" in Verizon's Main Brief, are lines not used to serve the Commonwealth of Pennsylvania. The first step was to remove from the CLEC Count column all Adelphia related lines. The second step is Verizon's claim that its own line count study only looked for lines leased to PECO TelCove. VZ M.B. at 33.

OCA submits that Verizon's premise that its line count study focused only on the one TelCove entity, which provides mass market service (as identified in ALJ Exhibit No. 1) is contradicted by Verizon's testimony and replies to discovery. Thus, Verizon has not demonstrated that the line counts attributed by Verizon to Adelphia, now PECO TelCove, are free of lines leased to serve the Commonwealth.

Before receipt of the TelCove cover letter and affidavit (ALJ Exhibit 1) and the hearings, Verizon reviewed the TelCove replies to the PUC's discovery questions. Verizon knew in preparing both its supplemental direct and rebuttal testimony that the TelCove replies were not limited to data for PECO Hyperion, now PECO TelCove.[10] See Vz St. 1.1 at 5, Vz. St. 1.2 at 22, n.5. In the supplemental direct, Verizon did not match the Verizon count for Adelphia with the information provided by "Adelphia Business Solutions (now known as TelCove)" only because Verizon had trouble matching the CLEC data to wire centers. Vz. St. 1.1 at 5. Implicitly, Verizon accepted that the information received for "Adelphia Business Solutions (now known as TelCove)" should be matched to "Adelphia" in the Verizon Count. Indeed, in rebuttal, Verizon witnesses West and Peduto categorically stated "Adelphia Business Solutions, d/b/a Telcove also qualifies as a triggering CLEC as a provider of UNE-L based service to the mass market." Vz. St. 1.2 at 22, n. 5. Verizon's theory in the Main Brief that all references to "Adelphia" in Verizon's testimony and discovery was shorthand for just two entities, PECO TelCove and Adelphia Cable, cannot withstand scrutiny. Verizon witnesses West's and Peduto's testimony does not support Verizon's briefing position.

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[10] As TelCove's November 13, 2003 cover letter to the PUC makes clear, TelCove offered one combined set of discovery replies in response to the PUC's direction that Adelphia Business Solutions of Pennsylvania, Inc. and PECO Hyperion, Inc. should answer the PUC's discovery questions. ALJ Exh. 1, TelCove Exh. 2. Throughout this case, Verizon has argued that, even if the PUC named just one CLEC in its discovery requests, all affiliated CLECs should have replied as well. See Vz. St. 1.2 at 4; Tr. 167.

Nor does Verizon's explanation of its line count study support Verizon's briefing position. The record is clear that "Verizon counted affiliated carriers as a single carrier to avoid double-counting affiliates within a particular wire center" in conducting its line count study. Verizon St. 1.0 at 22. In discovery, Verizon summarized the steps taken to produce the September 2003 line count study. *** **BEGIN PPROPRIETARY** ***

*** **END PROPRIETARY** *** AT&T Cross Exam Exh. No. 2, AT&T-III-3, Verizon Line Count Study. Thus, Verizon witnesses West and Peduto recognized the FCC requirement "that affiliates be counted together." Vz. St. 1.2 at 26, n.6. In cross-examination, Verizon witness West confirmed that there were "more than one Adelphia floating around" but that Verizon treated "Adelphia as one entity, whether it is Adelphia Business Solutions or Adelphia, the cable company." Tr. 120-121. OCA submits that Verizon cannot credibly now argue that its line count study focused exclusively on lines leased to just one Adelphia affiliate, PECO Hyperion or now PECO TelCove.

The conclusion that Verizon's own line count data for Adelphia may include DS0s to provision service to the Commonwealth is inescapable. There is no testimony or evidence that Verizon knowingly took steps to restrict its line count study to count only DS0s leased to PECO TelCove. Indeed, Verizon's testimony repeatedly associates the short form "Adelphia" with "Adelphia Business Solutions," strengthening this conclusion.

I. Verizon Must Continue To Unbundle Network Elements Pursuant To Other Legal Obligations.

In its Main Brief, Verizon addresses the impact that its unbundling obligations under Section 271 of TA-96 and various state authorities have on this proceeding. Verizon argues that this Commission has no authority to require unbundling under Section 271 of TA-96. Vz. M.B. at 76-78. Verizon further argues that this Commission cannot rely on the Global Order, In re: Nextlink Pennsylvania, Inc., 196 PUR 4th 172 (Pa. PUC Sept. 30, 1999)("Global Order"), to attempt to require unbundling. Verizon alleges that the FCC's trigger analysis has been satisfied because federal law would preempt other unbundling requirements. Id. at 79-83. Verizon alleges this Commission has no statutory authority to create such a requirement. Id. The OCA has articulated in its Main Brief the numerous reasons why Verizon must continue to unbundle certain elements pursuant to these, and other, existing obligations, OCA M.B. at 67-72, and incorporates by reference those arguments here. The OCA now specifically responds to Verizon's arguments in its Main Brief to assert why those obligations remain in effect.

Verizon's claims that Section 271 is a federal statute that vests authority only in the FCC and "clearly does not provide ***this Commission*** with a legal basis to require Verizon to continue to unbundle parts of its network in the face of a 'no impairment' finding." Id. at 76 (emph. in original). This argument is without merit and should be rejected. Certainly, Section 271 is a federal statute and Verizon must act consistently with its obligations under it. As the OCA asserted in its Main Brief, the FCC granted Verizon permission to provide long distance services in Pennsylvania under Section 271 after a showing that it had taken the statutorily-prescribed steps to open its local exchange markets to competition. OCA M.B. at 69, *citing*, Application of Verizon Pennsylvania, Inc. for Authorization to Provide In-Region InterLATA Services in Pennsylvania, CC Docket No. 01-138, Memorandum Opinion and Order, FCC 01-

269, at ¶¶ 76 and 78. Verizon must act consistently with that statute and this Commission cannot provide Verizon with obligations that are contrary to the FCC's determination in the Verizon Pennsylvania 271 proceeding. Therefore, Verizon's unbundling obligations present pursuant to it receiving authority to provide long-distance service remain in effect.

The Commission should also reject Verizon's arguments that the Commission cannot rely on the Global Order to require unbundling where the FCC's trigger analysis has been satisfied because federal law preempts the Commission's ability to do so. Verizon M.B. at 79-80. Verizon argues, "any attempt to order unbundling of elements where there is 'no impairment' under the TRO's mandatory trigger standards would directly conflict with and be preempted by federal law." Id. at 79.

The TRO specifically discusses the interplay between federal and state unbundling requirements. In particular, the TRO provides "we do not agree with the incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act." TRO at ¶ 192.

The United States Supreme Court has affirmatively declared that preemption occurs when Congress, in enacting a federal statute,

> expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively thus occupying an entire field of regulation and leaving no room for the States to supplement federal law or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Public Service Comm., et al. v. Federal Communications Commission, 476 U.S. 355, 368-369, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369, 381-382 (1986).

The Supreme Court further declared, "the critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." Id. 476 U.S. at 369, 106 S.Ct. at 1899, 90 L.Ed.2d. at 382; *see also*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d. 248 (1963), *reh'g denied*, 374 U.S. 858, 83 S.Ct. 1861, 10 L.Ed.2d 1082 (1963). The FCC may preempt state regulation of an intrastate matter, such as local telephone competition, only when the matter has interstate aspects as well and when it is not possible to separate the interstate and the intrastate components of the asserted FCC regulation. Louisiana PSC, 476 U.S. at 376.

Verizon's arguments in this proceeding cannot satisfy the requirements of preemption. TA-96 does not provide a clear expression of intent to preempt state law in this area. In fact, Section 251(d)(3) preserves states' rights in this area. Nor is there an outright or actual conflict between federal and state law. Instead, both Congress and the Pennsylvania General Assembly have clearly expressed their desire to make the provision of local telecommunications services a competitive market. Furthermore, it is not physically impossible to comply with both federal and state law and there is no barrier to state regulation implicit in the federal law. Finally, Congress has not legislated so comprehensively that the entire field of regulation is occupied leaving no room for states to supplement federal law nor does the state law stand as an obstacle to the accomplishment and execution of the full objectives of Congress.

Verizon's arguments that any state obligation to require unbundling is preempted by TA-96 must fail because the intent of those state obligations, as expressed in the now expired Chapter 30, are consistent with the goals and objectives of the federal act, namely, to further the competitive provision of local exchange telecommunications services. Verizon's state unbundling obligations are not preempted by TA-96 because they are consistent with TA-96 and do not substantially prevent its implementation. Verizon's arguments to the contrary must be rejected.

III. CONCLUSION

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

Respectfully submitted,

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Dated: March 1, 2004

78229

CERTIFICATE OF SERVICE

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

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

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

DOCUMENT

Dear Mr. McNulty:

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

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

Very truly yours,

Robert C. Barber

Robert C. Barber

Enclosures

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

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY BRIEF OF
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INTRODUCTION

Plainly unable to satisfy the requirements of the *Triennial Review Order* and present a case that proves the triggers have been met for unbundled local switching, dedicated transport, and high capacity loops, Verizon attempts instead to put a set of blinders on the Commission and have it simply pull the triggers on competition. To that end, Verizon would have the Commission ignore the plain language, purpose and intent of the *TRO* concerning how the triggers are to be applied. It would have the Commission ignore the record – and especially Verizon's own fatally flawed evidentiary submissions. It also would have the Commission ignore its own prior determinations concerning Verizon's burden in this case and its unbundling obligations under state law. And, most tellingly, Verizon would have the Commission ignore the adverse competitive consequences of its misapplication of the *TRO*, especially the profound effect its irrational interpretation of the triggers would have on the hundreds of thousands of customers – most of them residential consumers -- that currently rely on the unbundled network elements platform ("UNE-P") for a meaningful choice in local exchange service.

The only thing the Commission should ignore is Verizon. As AT&T showed in its Main Brief, the *TRO* not only does not support Verizon's simplistic "count to 3 and pull the trigger" approach to this case, it effectively repudiates it. Indeed, the *TRO*'s fundamental requirement that the Commission's unbundling decision be "economically rational" necessitates a thorough and coherent application of the triggers, not Verizon's mindless counting exercise.

ARGUMENT

I. THE COMMISSION SHOULD DISREGARD VERIZON'S EFFORTS TO OBSCURE THE ADVERSE CONSEQUENCES THAT ITS TRIGGERS APPROACH POSES FOR CONSUMERS.

Verizon obviously has not come to this proceeding to praise UNE-P, but to bury it. In pursuit of that goal, Verizon actually contends that this Commission not only should not, but may not, pay any attention to the likely competitive consequences that a misapplication of the triggers would have for Pennsylvania's consumers and competitors.[1] According to Verizon, any such considerations are irrelevant.

That is arrant nonsense, and the TRO rejects such an approach.[2]. As much as Verizon would like to ignore it, the effect of its attack on unbundled switching is not an academic exercise, but one that has the potential to adversely affect hundreds of thousands of Pennsylvania consumers. In fact, Pennsylvania CLECs are serving over **[BEGIN PROPRIETARY]**

[END PROPRIETARY] are serving residential customers.[3] If Verizon has its way, the CLECs' ability to use the platform as a means of providing competitive alternatives to these residential and small business customers in Pennsylvania will be lost altogether. It is thus critical for the Commission to understand the extent to which that competition will be affected by Verizon's proposed application of the *TRO* triggers.[4]

As AT&T noted in its Main Brief, the Commission once before soundly repudiated Verizon's efforts to constrain the availability of unbundled network switching and the UNE platform in the 1999 Global Order the Commission, declaring that the "importance of a CLEC's ability to obtain UNEs as a 'platform' cannot be overemphasized."[5] In directing Verizon to make UNE-P immediately available in all parts of the Commonwealth, the Commission expressly determined that "UNE-P is the only effective way for CLECs to begin immediately

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1 See VZ Main Brief at 5-7.

2 See *TRO* n.1332 (unbundling reviews should adhere to the "'clear and measurable benefit to consumers' standard").

3 AT&T Stmt. 1.0 at 59.

4 See, e.g., AT&T Stmt. 2.0 at 49 (describing the economic affect of eliminating local circuit switching as an unbundled element).

offering competitive local exchange services to a broad range of customers, particularly residential and small business customers."[6]

Fortunately for Pennsylvania's consumers, the Commission has not shown any sign of departing from those pronouncements. To the contrary, in its recent decision in Docket. No. I-00030100 the Commission found that the Global Order's requirement that Verizon make the platform available continues to exist, even in the context of service to what would generally be considered "enterprise" level customers.[7]

Significantly, Verizon's effort to sweep UNE-P "under the rug" is directly at odds with its prior reliance on the availability of the platform in obtaining approval to enter Pennsylvania's long distance market. For example, Verizon's presentation to this Commission seeking support for its Section 271 application specifically relied on the fact that competitors were providing service over 174,000 UNE-P lines as support for its claim that the Pennsylvania local exchange market was open.[8] And the FCC subsequently approved Verizon's 271 application on September 19, 2001, in part based on a finding that "[a]t the time of its application, Verizon had provisioned over 220,000 UNE platform combinations. . . "[9] As AT&T witnesses Kirchberger and Nurse testified, it is the "height of hypocrisy" for Verizon to contend that, now that it has

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

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

7 *Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market*, Docket No. I-00030100, Order, Dec. 18, 2003, at 15.

8 *In the Matter of Application of Verizon Pennsylvania, Inc for Authorization under Section 271*, CC Docket No. 01-138, Consultative Report of the Pennsylvania Public Utility Commission, June 25, 2001, at 20.

9 *In the Matter of Application of Verizon Pennsylvania, Inc for Authorization under Section 271*, CC Docket No. 01-138, Memorandum Opinion and Order, Sept. 19, 2001, ¶74.

achieved long distance entry, a key factual underpinning for that entry should be eliminated altogether.[10]

But this is not the only instance of Verizon's hypocrisy with regard to the platform. Verizon has been able to quickly penetrate the long distance market due to the availability of the "long distance" equivalent of UNE-P -- willing wholesale providers that offer end-to-end transmission and long distance switching at competitively driven cost-based rates. Using this method of entry, Verizon is rapidly acquiring significant market share in the long-distance market. Verizon now claims to be the third largest long distance provider nationally, and reports a market share of about 40% in its existing customer base, and as high as 50% in some states.[11] Thus, in just a few years Verizon has garnered a share of the long distance market substantially greater than MCI and Sprint *together* took more than *two decades* to achieve. This clearly makes any arguments about the impropriety of UNE-P and CLEC investment "disincentives" ring hollow.

These developments also have special significance for the issues facing the Commission in this proceeding. In an environment where customers clearly desire bundled packages of services offered by one provider, preferably on one bill, Verizon's overwhelming local service market power in Pennsylvania provides it with enormous opportunities to leverage into related services such as long distance. The potential harm to emerging competition in long distance was clearly contemplated at the time of the Bell System divestiture, and was part of the rationale for requiring AT&T to divest the Bell companies and for barring the Bell companies from offering long distance services. Now that Verizon has been permitted to offer long distance services, it has an incentive to harm long distance competition as well.

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10 AT&T Stmt. 1.0 at 61.

11 AT&T Stmt. 1.0 at 62 (citing Doreen Toben, Verizon CFO, 3Q03 Analyst Call (October 28, 2003)).

Thus, Verizon's ability to re-monopolize all telecommunications markets is not mere speculation, but rather extrapolation – *unless* competition can be fostered and sustained in the local market. So far, UNE-P competition is the only way CLECs have been able to serve both residential and business customers throughout the mass market. If it were eliminated, the major barrier to Verizon's ability to remonopolize the mass market would be breached and average consumers would be subjected to Verizon's monopoly power over both local and long distance services.

The implication for the Commission is, quite simply, that it must be extremely cautious in applying the *TRO* triggers. Pulling the trigger in the manner advocated by Verizon would imperil the Commission's progress to date in bringing competitive choice to consumers –and especially residential customers.[12] As the Consumer Federation of America concluded in a recent report, "The tremendous gains that competition and consumers have made recently will be short-lived if the incumbent carriers succeed in undermining UNE-based competition, and forcing weakened competitive carriers to build redundant telecommunications networks. If this happens, it will spell the end of local phone competition, and the real savings being enjoyed by consumers across the country will disappear."[13]

II. THE COMMISSION SHOULD REJECT VERIZON'S EFFORT TO SHIFT THE BURDEN OF PROOF TO ITS COMPETITORS.

Rather than confronting the remarkable evidentiary deficiencies in its case – most notably, its attempt to pass of a CLEC's servicing of the State government telecommunications

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12 As AT&T described in its Main Brief, the record shows that there are ***no*** instances where at least three CLECs are using their own switches to serve residential subscribers within a wire center. Thus, those residential customers who today are being served by CLECs using UNE-P would be out of luck if UNE-P were no longer available – they would lose service from their existing carrier with inadequate alternatives available.

13 AT&T Stmt. 1.0 at 63-64 (citing Consumer Federation of America Press Release, "Study Shows Incumbents' Arguments for Higher Wholesale Prices, Reduced Access to UNEs Don't Stand Up to Scrutiny," Oct. 7, 2003).

contract as service provided to "mass market" customers -- Verizon tries to evade them. In fact, Verizon's answer to the undeniable problems with its data is to argue (1) that it does not bear the burden of proof,[14] and (2) even if it does, any problems with its data are attributable to the CLECs.[15] Both claims are baseless.

The Commission's Procedural Order puts to rest Verizon's claim that it does not bear the burden of proof. In that Order, the Commission, relying on the national finding of impairment in the *TRO*, tentatively concluded "there is impairment in Pennsylvania" for unbundled switching, dedicated transport, and high capacity loops.[16] Therefore, it held that "any ILEC desiring to contest the presumption of impairment must bear the burden of proving non-impairment."[17] There were no qualifications or exceptions to this determination. Thus, Verizon unequivocally bears the burden of proving that the triggers have been met for each of the elements in this case for which it seeks a finding of non-impairment.

This is entirely appropriate. It is Verizon, after all, that is legally obligated to make unbundled elements available to competitors in Pennsylvania at TELRIC rates. And it is Verizon that is trying to overturn that obligation, and in so doing eliminate UNE-P and other elements that make competitive choice possible for hundreds of thousands of Pennsylvania consumers. It thus must be Verizon's burden to come forward with compelling and reliable evidence demonstrating that CLECs are not impaired in the absence of those unbundled elements.

Having failed to satisfy that duty, Verizon attempts to shirk it. According to Verizon, the deficiencies in its evidentiary presentation are not its fault, but instead lie with unnamed CLECs,

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14 VZ Main Brief at 8.

15 VZ Main Brief at 7-9.

16 Procedural Order, Docket Nos. I-00030099 et al., Oct. 3, 2003, at 12.

17 Id.

who are "manipulat[ing] the process" by withholding "the evidence in their own unique possession and control."[18] These accusations are more than a little ironic, since it was Verizon that only divulged the identities of its original trigger candidates as a result of an order from the Presiding ALJs,[19] and that was compelled by the ALJs to provide the same breakout of residential and business unbundled loops that had been asked for by the Commission request[20] – and that then responded to that directive by attempting to foist that responsibility on the CLECs.[21]

Irony aside, Verizon's claims have no basis in the record. Certainly Verizon can point to no motions to compel that it filed against any particular CLEC for failure to comply with proper discovery. In fact, Verizon does not identify any particular CLEC that allegedly engaged withheld data from Verizon or the Commission.

Moreover, no CLEC forced Verizon to submit faulty and misleading data concerning Adelphia/Telcove, and portray that information as evidence of mass-market lines. Nor can the CLECs be held responsible for Verizon's decision to include Comcast as a trigger candidate in the Philadelphia MSA, and RCN as a trigger candidate Reading and Scranton/Wilkes-Barre MSAs, in the face of evidence demonstrating that *neither* entity had *any* loops in *any* of those markets.[22] Likewise, Verizon alone decided to include XO as a trigger candidate in several

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18 VZ Main Brief at 7, 8.

19 Order Directing Verizon to Provide Complete Proprietary Version of Its Filing to the Other Parties, Docket No. I-00030099, Nov. 26, 2003.

20 Order Granting AT&T Communications of Pennsylvania, LLC.'s Motion to Compel the Verizon Companies to Answer Certain Interrogatories, Docket No. I-00030099, Dec. 16, 2003.

21 See AT&T Stmt. 1.0 at 52.

22 VZ Main Brief, Exhibit 1; See AT&T's Main Brief at 58-60.

MSAs, despite evidence indicating that the bulk – if not entirety – of that company's services involved DS1s, not DS0, loops.[23]

Even its Main Brief, with its "new" exhibit that includes trigger candidates and associated line count information that either cannot be verified in the record (such as assertions concerning the extent of PECO TelCove's presence in the Harrisburg and Scranton MSAs), or that is improbable on its face (such as its assertions concerning Adelphia Cable's alleged telephony services) evinces Verizon's willingness to rely on unreliable and discredited data. The CLECs certainly cannot be faulted for this propensity. More importantly, the Commission should not accept Verizon's casual approach to the evidence.

III. CONTRARY TO VERIZON'S CLAIMS, THE *TRO* EXPRESSLY REQUIRES THIS COMMISSION TO CONDUCT A REASONABLE REVIEW OF THE CLECS THAT VERIZON CLAIMS SATISFY THE TRIGGER.

As AT&T described in its Main Brief, a properly conducted trigger analysis is not a simple matter of "counting to 3" and then pulling the trigger. The *TRO* specifically states that the FCC "believe[s] that any reasonable application of the impairment standard and unbundling requirements should be economically rational."[24] Before the Commission can reasonably be assured that there are no substantial entry barriers for non-UNE-P competitors in the eight geographically-dispersed MSAs Verizon has put at issue here, it must carefully examine market data regarding each CLEC that Verizon has identified to ensure itself that their entry is of a sufficient magnitude and scope to demonstrate that they (and other CLECs) are not impaired.

Verizon, of course, wants none of this. Instead, consistent with Verizon witness West's contention that application of the triggers is a "straightforward counting exercise,"[25] Verizon

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23 VZ Main Brief, Exhibit 1; See AT&T's Main Brief at 46-47.

24 *TRO*, ¶ 78.

25 Tr. 93.

asserts that these "exceptions" -- and the Commission's concomitant analysis of the candidate CLECs – actually are barred by the *TRO*.[26] This assertion is baseless.

AT&T's Main Brief details the many provisions of the *TRO* that require state commissions to exercise its expertise to determine which carriers should be counted toward the triggers. Any remaining question on this point is put to rest by the fact that the *TRO* explicitly directs the Commission's attention to Part V of the *TRO* in undertaking that analysis.[27] Part V of the *TRO*, entitled "Principles of Unbundling," includes the following guidance:

- any application of the impairment standard, including through the FCC's trigger tests, must be economically rational;[28]
- CLECs are "impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic;"[29]
- in evaluating evidence of actual CLEC self-provisioning of mass market switching, a state commission must consider factors such as "how extensively carriers have been able to deploy such alternatives, to serve what extent of the market, and how mature and stable that market is;"[30]
- evidence that some CLECs may have deployed alternative facilities is "not necessarily dispositive of a lack of impairment," because it may not show that a retail market is truly "contestable" by multiple CLECs using non-ILEC switching.[31]

26 VZ Main Brief at 3.

27 *TRO* nn. 1547 & 1549.

28 *TRO*, ¶¶ 55-56, 69, 78.

29 *TRO* ¶ 84.

30 *TRO* ¶ 94.

31 *TRO*, ¶ 94.

- less weight may be given to intermodal competition, including "traditional or new cable plant,"[32] which does "not provide evidence that self-deployment of such access is possible to other entrants;"[33] and
- the mass market "consists of residential customers and very small business customers.[34]

Thus, all of these points must be taken into account in applying the FCC's impairment standard, including an assessment of whether impairment exists under the trigger tests. Just as important, the application of all of these standards necessarily implicates a Commission that is not simply a mindless calculator, but rather one that is exercising its sound judgment to evaluate whether each trigger candidate evinces proof that the barriers to entry in each MSA have been effectively dismantled.

The *TRO* and Rules, when read together as they must be, provide the Commission with the analytical framework necessary to determine whether or not CLECs remain impaired in Pennsylvania without access to unbundled switching, high-capacity loops and dedicated transport. Verizon wants the Commission to ignore the *TRO* because the *TRO* rejects a simple counting of CLECs, loops or dedicated transport facilities. Indeed, undertaking the triggers test in the blind-folded manner proposed by Verizon would violate the FCC's command that decisions regarding unbundling must be economically rational.[35] Accordingly, before the Commission starts counting, it must exercise its reasonable judgment to determine which – if any – trigger candidates are pertinent to the analysis. The *TRO* requires this, and its mandates cannot, despite Verizon's protestations, be ignored.

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32 *TRO* fn. 325.

33 *TRO* ¶ 98.

34 *TRO* ¶ 127

35 *TRO*, ¶ 78.

IV. VERIZON'S "REVISED" LINE COUNT UNDERSCORES THE UNRELIABILITY OF ITS DATA, AND FURTHER SUPPORTS THE DISMISSAL OF ITS CASE CONCERNING UNBUNDLED LOCAL SWITCHING.

As AT&T's Main Brief showed, Verizon's alleged "evidence" concerning the extent to which CLECs are actively providing service to mass market customers in the denominated MSAs is so riddled with inaccuracies and obvious errors as to render it completely unreliable as a basis for any judgment, much less for taking the extreme step of eliminating UNE-P competition. Although not the only example, the poster child for the problems with Verizon's "proof" was its effort to attribute the tens of thousand of "lines" that plainly were tied to Adelphia's telecommunications contract with the State government as "mass market" business lines counting toward satisfaction of the trigger. The purposeful inclusion of enterprise switching data such as this thoroughly and irreparably infected Verizon's case, and warranted the outright dismissal of Verizon's petition for a finding of non-impairment for unbundled local switching.

Verizon's response to this problem, like so many others in its case, is to pretend it never existed. Instead, without moving to withdraw any of its prior submission or testimony concerning Adelphia from the record, Verizon has submitted a new exhibit to its Main Brief that purports to recapitulate the evidence concerning CLECs lines counts, but this time without the Adelphia State contract data.[36] Notably, however, Verizon's new submission not only maintains Adelphia as a trigger CLEC, it magically turns it into *two* trigger CLECs – PECO TelCove and Adelphia.[37]

As an initial matter, Verizon's latest rendition of the evidence only reinforces the need to dismiss this case. The new "Exhibit 1" to its Main Brief is at least Verizon's third attempt at

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[36] VZ Main Brief at 22-23 and Exhibit 1.

portraying the data concerning self-provided CLEC switching in each of the MSAs it cites. The stakes for the Commission, CLECs, and Pennsylvania's consumers are simply too high to permit decisions of this magnitude to be based on such shoddy, constantly-changing and patently unreliable data. This is plainly not a case where "the third time's the charm." Rather, it should be one in which Verizon has had its three strikes, and must be called out.

In this regard, Verizon's suggestion that its prior inclusion of Adelphia's State government contract data was a mere mistake cannot be credited.[38] It is simply incredible that Verizon would not know the identity of the company to whom it lost that State contract. And even if Verizon somehow forgot that detail in its preparation of its prior submission, it did have a way of finding out. As Mr. West acknowledged, Verizon was granted a subpoena to conduct a deposition of Adelphia.[39] Had it pursued that process, the obvious anomalies in the TelCove data could have been explored, and the inclusion of improper data averted. Verizon decided not to pursue that deposition, however, content to attempt to pass off the extraordinary number of lines that suddenly appeared in places such as Camp Hill and Harrisburg as evidence of mass market competition. If this was not intentional, it verged on the reckless.

Verizon's latest recapitulation of the data fares no better. In this iteration, Verizon purports to have excluded the lines attributable to the state government contract. In fact, Verizon has eliminated the entity identified in its prior submissions as "Adelphia" altogether. In its stead Verizon has now identified an Adelphia affiliate known as PECO TelCove, and claims that the "lines attributable to PECO TelCove are standalone voice grade UNE loops" which the company

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[37] VZ Main Brief at 33-35.

[38] See VZ Main Brief at 34-35.

[39] Tr. 351.

is using "to serve mass market business customers" in four MSAs, including Harrisburg and Scranton.[40]

The problem with this representation is that it is contradicted by Adelphia/TelCove's own data. For example, under the "Verizon Counts" column Verizon's latest Exhibit ascribes

[BEGIN PROPRIETARY]

[END PROPRIETARY] This would be consistent with TelCove's representation that PECO TelCove serves customers in the Philadelphia and Allentown areas,[43] mentioning nothing about Harrisburg or Scranton. Amazingly, Verizon quoted that statement in its brief,[44] yet it failed to assess the legitimacy of its own data in light of it.

Even if this submission did not raise new questions about the reliability of Verizon's data, the fact that PECO TelCove serves only business customers would disqualify it from counting toward satisfaction of the trigger. But the fact is that these new questions cannot be ignored, especially in light of the problems in Verizon's prior representations.

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40 VZ Main Brief at 33, 35 and Exhibit 1.

41 ALJ Exhibit 1, at 20-21 (Attachment C, showing PTR data for the Camp Hill and Harrisburg wire centers).

42 ALJ Exhibit 1 at 22 (Attachment C, showing no designation for PTR in the Scranton wire center).

43 ALJ Exhibit 1 at 1.

Nor is Verizon helped by its assertions concerning its newest candidate, Adelphia Cable. Verizon purported to separately identify lines for that company, which it claims shows that it is providing mass market telephony services in four different MSAs.[45] However, even if Adelphia were not properly excluded from an proper trigger count because of its status as a cable telephony provider – which, as discussed in AT&T's Main Brief and below, should be the case – the paltry numbers Verizon ascribes to it in the various MSAs are laughable.

For example, Verizon claims that Adelphia is serving just **[BEGIN PROPRIETARY]** 1

[END PROPRIETARY]

Adelphia Cable thus fails as a trigger candidate on the *de minimis* test alone. Moreover, these extraordinarily small numbers may very well represent database errors, and raise a substantial question as to whether Adelphia is operating as a cable telephony provider at all – a question that is underscored by the absence of any apparent Adelphia cable telecommunications tariff.[46] It plainly strains belief to suggest that a cable company would invest in a switch and all of the necessary system upgrades necessary to make telephony possible over a cable system in order to provide service to just **[BEGIN PROPRIETARY]**

[END PROPRIETARY] This is yet another

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44 VZ Main Brief at 35.

45 VZ Main Brief at 33-34 and Exhibit 1.

46 See http://puc.paonline.com/tariffs/Telephone_Tariffs.htm.

example of the utter lack of reliability in Verizon's evidence, and yet another reason that this evidence – and the relief Verizon asserts it is entitled to on the basis of it – should be dismissed.

V. THE ERRATA DOES NOT SUPPORT VERIZON'S CLAIM THAT 'BUSINESS-ONLY" CLECS AND CLECS PROVIDING "DE MINIMIS" SERVICE COUNT TOWARDS THE TRIGGER.

Typical of Verizon's selective reading of the *TRO* is its effort to overplay the importance of the FCC's Errata. Indeed, no single provision in the original 500 pages of *TRO* appears to receive as much prominent attention in Verizon's Main Brief as the edits that were made to Paragraph 499 after the Order was published.[47] In particular, Verizon relies on these edits to argue that the *TRO* does not require that trigger candidates serve the entire mass market – including residential customers – in order to count toward application of the switching trigger.[48]

Verizon's reliance on the FCC's Errata is completely misplaced. Paragraph 21 of the Errata eliminated potentially misleading language stating that to be counted toward the triggers a CLEC had to be "capable of economically serving the entire market." The FCC did so following outcries from ILECs – particularly Verizon -- complaining that this original language could have been misinterpreted to require that *each* unaffiliated self-provider counted for a trigger be capable of serving *each and every* customer in the market, and thus be large enough to serve as a "carrier of last resort."[49] The Errata addressed that hyperbolic concern, but it did not – and could not --turn the entire order on its head.[50] To the contrary, the Errata simply makes clear what

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47 VZ Main Brief at 6, 16, 24 and 26.

48 VZ Main Brief at 24.

49 It would be economically irrational to expect each trigger CLEC to have facilities in place to serve 100 percent of the existing market. That would contemplate no less than four carriers of last resort, with a total of 400 percent of the capacity currently serving customers in that market. The pre-Errata language of Paragraph 499 plainly did not require or contemplate such a result.

50 Verizon itself has argued to the FCC that the errata procedure itself, which made unexplained ministerial textual changes in an already issued order, cannot, under FCC rules, be relied upon to make substantive changes. AT&T Stmt. 1.0 at 26 (citing Ex Parte Letter from Joseph Mulieri, Verizon, to Marlene Dortch, FCC (filed CC Docket 94-157, July 21, 2003)).

should have been obvious previously: a CLEC need not be large enough to serve every customer in the market in order to be counted toward the triggers.

That clarification, however, cannot possibly be interpreted as undermining the FCC's fundamental definition of the mass market as consisting of both residential ***and*** small business customers that are served using DS0 level loops.[51] Nothing in the Errata to Paragraph 499 mentions residential customers, much less indicates that they are to be excluded from the trigger analysis. This is just common sense, since the requirement that a proper candidate serve residential customers is fundamental to the purposes of the *TRO* and the trigger analysis

Indeed, permitting Verizon to prove non-impairment for unbundled local switching through candidates that serve only business customers would make a mockery of the purposes of the *TRO* and its trigger test. As AT&T described in its Main Brief, the trigger test is a surrogate for the results that would be obtained in a full review of operational and economic barriers faced by carriers serving the "mass market," which includes **both** residential and small business customers.[52] However, a trigger analysis like Verizon's that relies primarily on evidence of competing switch providers that serve only business lines – and not even small business lines at that[53] -- does not provide an economically rational view of the impact of a determination that the trigger is met for the mass market as a whole. This is particularly true in Verizon's local

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

52 See *Id.*

53 The evidence in fact shows that the majority of unbundled loops Verizon claims to be providing to CLECs are being provided not just to business customers, but sizable businesses. See AT&T Stmt. 1.0 at 50-51 and Exhibit 23 (showing that **[BEGIN PROPRIETARY]**

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

exchange market in Pennsylvania, which – as the evidence shows, and as even Verizon admits[54] -- is dominated by residential customers.

Thus, without convincing proof that three viable competitors are using their own switches today to serve residential customers (and the entire mass market) generally, the Commission should not find that the trigger has been met. In fact, the "clear and measurable benefit to consumers" unbundling standard[55] cannot be met if *either* residential *or* small business customers as a class are disregarded when applying the triggers. Nothing in the Errata changes that.

Nor does the Errata support Verizon's suggestion that carriers that it identified as supposedly having a just a few lines in the relevant geographic market – or even one line, such as RCN or Verizon's "new" candidate, Adelphia Cable[56] -- nevertheless are rational trigger CLECs.[57] While the Errata eliminated language indicating that a carrier must be willing to provide service to each and every customer in the market, the *TRO* did not define how much less would qualify a particular CLEC as a trigger firm. On the other hand, the Errata affirmatively did not establish a rule that service to one single customer would suffice to satisfy a trigger case. In particular, the Errata did not modify the FCC's finding that the RBOCs' evidence that about three percent of residential lines were served by alternative switches was insufficient to show that CLECs were not impaired.[58] Thus, the Errata does nothing to affect the state commissions'

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54 Tr. 129, 262.

55 See *TRO* n.1332.

56 See VZ Main Brief, Exh. 1.

57 See VZ Main Brief at 16 and 26.

58 TRO, ¶438.

authority and responsibility to apply the "actively serve" requirement intelligently and in an economically rational manner.[59]

It plainly irrational to apply the trigger to deprive consumers of choice through UNE-P on the basis of carriers that are serving substantially less than the relevant market. Under Verizon's proposed methodology, the consumer welfare mandates of the *TRO* would be totally subverted because there could be no reasonable expectation, based on actual experience (the only information relevant to a trigger test), that all customers within the defined area will have the benefit of multiple, alternative sources of facilities-based competition.[60] Thus, the mere fact that a CLEC need not be as large as Verizon to be counted towards the trigger in no way means that a CLEC that serves a trivially small portion of the market (either in numbers of geographic scope) may be counted. In fact, when it issued its Errata, the FCC retained in the *TRO* explicit findings that the small levels of mass market penetration by CLECs using their own switches and unbundled ILEC loops was compelling and conclusive evidence that CLECs remain impaired without unbundled switching.[61] Nor did the Errata modify the requirements of Paragraph 94 of the TRO, which states that regulators must "consider how extensively carriers have been able to deploy such alternatives, to serve what extent of the market, and how mature and stable that market is." Because the record confirms that CLEC non-UNE-P entry in Pennsylvania is minimal, Verizon's petition for a finding of non-impairment must be rejected.

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59 See *TRO*, ¶499.

60 As AT&T witness Dr. Mayo testified, "If CLECs are currently operating in only a geographically-localized subset of areas (*e.g.*, a few wire centers), it is reasonable to investigate whether they may be able economically to expand to serve customers throughout the market area; that investigation, however, would require the more complete assessment of barriers to entry and expansion facing new entrants that constitutes the FCC's "potential deployment" test. If any presumption is to be made at the stage of applying the trigger test, without further analysis, the natural presumption is that there are economic barriers to further expansion." AT&T Stmt. 2.0 at 28.

61 *See TRO*, ¶¶ 438-440, 475, and footnotes 1365, 1371.

VI. THE COMMISSION SHOULD REJECT VERIZON'S ATTEMPT TO "COUNT" CABLE TELEPHONY PROVIDERS WITHOUT COMPLYING WITH THE ANALYTICAL REQUIREMENTS OF THE *TRO*.

Verizon also argues that all three cable CLECs it has identified in this case – the third now being Verizon's "new" candidate, Adelphia -- must be counted toward the self-provisioning trigger.[62] To sustain this claim, however, Verizon has the burden under the *TRO* of proving that: (i) the experience of each of these cable providers demonstrates the viability of a similar market entry path for CLECs attempting to enter the relevant geographic market through self-provided switching; and (2) each of these cable providers offers service that is comparable in "cost, quality and maturity" to Verizon's services.[63] Verizon has failed on each count.

Indeed, Verizon provides no analysis of these factors concerning any of the three alleged cable telephony providers it has included in its trigger analysis. For example, Verizon offers no evidence at all about Adelphia's or RCN's cable telephony pricing or quality, much less an analysis comparing those factors to Verizon's local exchange offerings.[64] Such an analysis would likely prove particularly difficult in the case of Adelphia, since that entity –if it even provides cable telephony services – does not appear to even have a tariff filed with the Commission.[65] And the only "evidence" Verizon offers about Comcast is an website marketing assertion dating back to when AT&T owned the Comcast cable properties in Pittsburgh.[66] There is no analysis of what Comcast itself is currently doing in that market, or how it compares to

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62 VZ Main Brief at 28-31.

63 *TRO*, ¶ 98 & fn. 1549. The FCC expressly defines cable telephony as being an "intermodal" service to which these requirements apply. *TRO* ¶ 6 & fn. 325.

64 Tr. 103-105; 268.

65 See http://puc.paonline.com/tariffs/Telephone_Tariffs.htm.

66 See VZ Main Brief at 30.

Verizon – and absolutely no showing for the alleged Comcast telephony services in Philadelphia, where Comcast denies it even provides such services.[67]

Instead of evidence, Verizon offers only the observation that, because the cable providers appear to have customers in markets in Pennsylvania, their services must be comparable to wireline local exchange offerings.[68] But that rhetoric cannot substitute for the analysis required by the *TRO*. Furthermore, Verizon has provided no evidence that any of the three cable companies it has identified as trigger firms have been able to expand the scope of their telephony offerings outside the narrow footprint of their cable television systems. Because these cable companies remain within their own footprint, they do not provide evidence of the feasibility of "multiple, competitive" CLEC entry in the denominated MSAs; nor do they offer the prospect of providing competition anywhere else in Pennsylvania.

VII. AT&T NEITHER SELF-PROVIDES NOR WHOLESALES DEDICATED TRANSPORT AND THEREFORE CANNOT BE COUNTED AS A TRIGGER CANDIDATE FOR EITHER PRONG OF THE TRIGGER TEST.

Verizon most certainly has not made a triggers case for dedicated transport. Verizon's simplistic theory of the case is that so long as a CLEC has "on-net" collocations at two or more Verizon wire centers, then it "must be" operationally ready to provide "dedicated transport" between all such points, whether on not the CLEC actually does offer any service between those points.[69] But as AT&T explained in its Main Brief, AT&T's collocation arrangements and transport facilities are principally engineered to carry switched traffic between AT&T's switches

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67 See ALJ Exhibit 12 (response to PUC Preliminary Data Request 1).

68 VZ Main Brief at 30-31. See Tr. 268.

69 An "on-net" collocation arrangement is one at which AT&T-owned fiber connects the arrangement to the AT&T network. An "off-net" collocation arrangement is one at which AT&T has *not* provisioned AT&T-owned fiber to connect the arrangement to the AT&T network, but rather purchases special access from Verizon. By definition, an off-net collocation cannot be the end point of a dedicated transport "route" as defined by the FCC, nor do we understand Verizon to be making such a claim.

and those collocation arrangements, and not between collocation arrangements at any pair of Verizon wire centers. AT&T neither self-provides nor wholesales "dedicated transport" (as defined by the FCC in the *TRO*) between any of its collocation arrangements at Verizon wire centers. Nor is it operationally ready to do so. Accordingly, AT&T is not a trigger candidate for either of the two prongs of the FCC's trigger tests.

A. Verizon has failed to carry its burden of proof.

As shown in AT&T's Main Brief, Verizon's case, rather than being granular, is predicated upon one broad assumption piled upon another. Based upon these multiplied general assumptions, Verizon claims it has come forward with "evidence" and now seeks to shift the burden onto the trigger CLECs to prove that they do *not* either self-provide or offer at wholesale capacity on a specific route at the specific capacities that the FCC found relevant to an impairment analysis.

But this case is one for Verizon to win or lose, as the FCC made plain. The FCC found, based on extensive proceedings and a mountain of evidence, that CLECs are impaired without access to dedicated transport, and this case is about disproving that finding.[70] The Commission only needs to make an impairment determination for routes for which Verizon has presented "relevant evidence" that competing carriers would not be impaired if access to UNE dedicated transport were eliminated.[71] The FCC's impairment findings for dedicated transport are controlling unless *Verizon* has introduced sufficient evidence to overcome the affirmative findings of impairment by the FCC and enable the Commission to make an affirmative finding of non-impairment.

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70 *TRO* ¶ 359.

71 *TRO* ¶ 417.

Verizon has not done so. In particular, Verizon has not come forward with relevant evidence at the level of granularity that the FCC's trigger tests require. Verizon cannot simply assume critical facts on a broad-brush basis and then demand that CLECs prove the negative on a specific basis. This attempt to shift the burden of proof is impermissible and contrary to the *TRO* decision and the Commission's Procedural Order.

B. "Switched dedicated transport" is an irrational concept that does not exist.

Verizon struggles mightily to create a whole new category of transport, "switched dedicated transport," as contrasted to a "dedicated circuit."[72] To do so is a fool's errand, as Verizon's own witness conceded. Mr. Peduto, on cross-examination on this point, called the concept of a switched OC-48 dedicated transport route (commonly used for network provisioning) "laughable."[73] It is beyond dispute that a "dedicated transport" route from collocation A to collocation Z cannot be stitched together by routing links between collocation A and AT&T switch X, and between collocation Z and AT&T switch X through the switch. A switched route does not – and cannot -- fit within the definition of "dedicated" transport, certainly not as the FCC defined it, nor as it is commonly understood in the industry, or for that matter, by Verizon itself. Why Verizon has persisted in making this nonsensical argument is beyond understanding.

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72 VZ Main Brief at 56-59.

73 Tr. 535 (Paduto) (Q. The last question, Mr. Peduto. There was some discussion yesterday about whether AT&T would or could run an OC-48 directly into a switch. Do you recall that? A. I do. Q. Do you have a response? A. Yes. I think that, you know, to use a testimony word, it was a red herring. It was a fog. To be honest with you, Verizon doesn't believe and never believed that AT&T would take an OC-48 into Class 4 or 5 circuit switch. That's a laughable assumption. JUDGE SCHNIERLE: So you agree they wouldn't do that? THE WITNESS: Yes, Your Honor, I agree they wouldn't..

Verizon argues that the FCC rule, read literally, says that the a route "may pass through one or more intermediate wire centers *or switches*."[74] It also argues that the FCC meant to include "transport routed through switching facilities" in defining "dedicated transport."[75] However, the FCC's dedicated transport deliberations in the *TRO* were about transport that is dedicated in the traditional sense, and the FCC's Rules provide that dedicated transport is "*dedicated to a particular customer or carrier*."[76]. There is no evidence that the FCC was attempting to create a new variant of dedicated transport heretofore unknown to the industry, as Verizon's contorted interpretation would require. Thus, Verizon's interpretation is inconsistent with the FCC's intention to narrow the scope of the availability of the transport UNE.[77]

The FCC rule cannot be divorced from the FCC's discussion of this issue in the *TRO*, where the FCC stated clearly that "[e]ven if, on the incumbent LEC's network, a transport circuit from 'A' to 'Z' passes through an intermediate wire center 'X,' the competitive providers must offer service connecting wire centers 'A' and 'Z,' but do not have to mirror the network path of the incumbent LEC through wire center 'X.'"[78] It is evident that the FCC was discussing switch *locations*, rather than intermediate switches themselves, when it was discussing intermediate points on "dedicated transport" routes. Read in context, the rule makes sense. Any other result would be irrational.[79] Indeed, any circuit routed through a switch is, by definition, not dedicated

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74 VZ Main Brief at 56 (emphasis in original).

75 VZ Main Brief at 58.

76 FCC Rules 51.319(e)(1) and (2) (emphasis added).

77 *TRO* ¶¶ 365-366.

78 *TRO* ¶ 401.

79 *See* Tr. 466-467 (Nurse). No carrier would utilize a local or tandem circuit switch to permanently connect OC-48s to one another. Such "nailed up" 24-hour-a-day connections would quickly exhaust the switch's call completion capacity and lead to massive call blocking, because one OC-48 contains 32,256 voice grade equivalents, (672 x 28) and the dozens of OC48s at issue here would surpass the capacity of the largest Class 5 switch by an order of magnitude. Indeed, The economic irrationality of creating a switched path for dedicated transport is demonstrated by a simple

to a single customer, because the switch's entire purpose it to allow for the establishment of routes between multiple different customers on an as-needed basis.

C. Verizon also has failed to show that AT&T's network is operationally ready to provide "dedicated transport."

Verizon claims that "the only specific content the FCC gave to the 'operationally ready' requirement was that a carrier have transport facilities and fully provisioned collocation arrangements in place."[80] That, however, is not the case. The trigger analysis established by the FCC is dependent to a large degree upon what CLECs are actually providing at retail (that is, self-provisioning) and wholesale. While the test may be "operational readiness," the FCC found that the best proof of operational readiness for purposes of the triggers tests is what services the CLECs actually provide between Verizon wire centers. As the FCC determined, the self-provider "must *offer service* connecting wire centers 'A' and 'Z'...."[81] Further, a carrier must be "immediately capable and willing to provide" and a wholesaler must be "[a]ble immediately to provision service."[82] The FCC described the requirement as being "readily available," and only requiring the installation of a cross-connect jumper cable.[83]

Verizon claims that AT&T has failed to make its case because AT&T has digital cross connect facilities at its switching locations and has stated that it is "technically feasible" to connect one ring to another.[84] But technical feasibility is not the test that the FCC prescribed. Almost anything is technically feasible in a modern network, given sufficient labor and

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example. Providing a single DS3 "dedicated" path through a switch would consume 672 DS0 lines worth of the switch's ports and infrastructure, 24 hours a day, 7 days a week. And 12 DS3s (the maximum amount of transport that may be purchased on a route) would consume 8,064 ports on the switch all day every day.

80 VZ Main Brief at 62.

81 *TRO* ¶ 401 (emphasis supplied).

82 *TRO* ¶ 400 and ¶ 414, respectively.

83 *See TRO* ¶ 414 fn. 1279.

investment. According to the FCC's trigger test, the best proof that a CLEC is offering service is when the service is *actually* being provided, not if the service could *potentially* be provided. Potential provisioning is *not* a part of a triggers analysis, as Verizon well knows, and it is the trigger analysis that Verizon relies upon exclusively in this proceeding.

Verizon seeks to reverse the burden of proof by claiming that AT&T has offered no evidence that any investment is needed at any AT&T switch location or collocation arrangement in order for AT&T to connect A-X and X-Z links at a switch node to create a dedicated transport route between A and Z.[85] But it is not up to AT&T to prove the negative, rather it is up to Verizon to prove the positive in a granular, route-by-route and capacity-by-capacity basis. This it has not done.

Verizon is in error in any event. In fact, AT&T has testified that to become operationally ready to provide dedicated transport between any of the collocation pairs identified by Verizon could require investment in engineering and associated equipment augmentation. The extent of these activities and investments cannot be established at this point because it would depend upon the vendor make and model and utilization of the equipment already on site, the availability of spare capacity and capability on the existing facilities, such as a digital cross connect facilities, and the demands placed upon the existing facilities if AT&T were required to self-provide dedicated transport between Verizon wire centers.[86] AT&T has not conducted such a pointless exercise because there is no economic benefit from providing dedicated transport between Verizon wire centers, as discussed in our Main Brief.

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84 VZ Main Brief at 60.

85 VZ Main Brief at 61.

86 AT&T Stmt. 1.0 at 114.

Verizon also assumes that it "is a straightforward process to peel off one of these DS3 or DS1 facilities on one side of the switch and connect it to a DS3 or DS1 facility that has been peeled off on the other side of the switch through a digital cross connect."[87] As indicated above, that is not necessarily the case, because systems, equipment and collocation augmentations may be required. Providing a service is not simply a matter of parts — if it were, Lucent would be America's largest LEC. Moreover, AT&T does not offer an dedicated transport in Pennsylvania now, for the technical and economic reasons already documented in our Main Brief.[88]

The facts also impeach Verizon's assumptions in this regard. It would make little sense for AT&T to buy high-priced special access from Verizon if it were easily able to self-provision the requisite transport between Verizon wire centers. Yet AT&T incurs considerable charges from Verizon for special access between the Verizon wire centers where Verizon alleges that AT&T either self-provides or wholesales "dedicated transport." When there is demand for a high-capacity service that requires AT&T to carry traffic between Verizon wire centers, AT&T typically purchases such transport from Verizon as special access, despite the cost of such access. Indeed, Verizon currently bills AT&T **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** for special access between the Verizon wire center pairs in Pennsylvania on which Verizon claims that AT&T is either a self-provider or a wholesaler of dedicated transport.[89] If it were as trivial to provide such services

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87 VZ Main Brief at 61.

88 Verizon's reference to the "routine network modifications" that the FCC requires of *ILECs* in the provision of high capacity unbundled *loops* is inapposite to the requirements that the FCC laid down for this non-impairment inquiry on *CLEC* dedicated transport. Section 251 of the Act pointedly places greater obligations on ILECs and RBOCs than on CLECs.

89 Tr. 550-552. AT&T Hearing Exhibits 3 and 4 show the routes identified by Verizon where AT&T is a purported self-provider or wholesaler, on which AT&T purchases special access from Verizon in order to satisfy AT&T customer demand.

over AT&T's fiber as Verizon suggests, there would be no reason for AT&T to incur these substantial special access costs. At hearing, Verizon could only offer speculation on this point.[90]

Verizon also claims that AT&T and other CLECs are arguing that backhaul facilities do not "count" under the FCC's trigger analysis."[91] But that is not AT&T's position. AT&T recognizes that a "route" as defined by the FCC may consist of two (or more) links that are electrically connected at a location other than the end points of the route. We have already testified that, as a technical matter, a "route" may be indirect in the sense of connecting at an AT&T node location that also houses an AT&T switch.[92] Rather, our point is that the AT&T network is principally configured for backhaul, and simply is not used to provide (or offer) dedicated transport between Verizon wire centers, and therefore AT&T is not operationally ready to provide dedicated transport, as discussed in our Main Brief and at the hearing. If such backhaul facilities were automatically "operationally ready" to provide dedicated transport between Verizon wire centers, as Verizon assumes, then there would have been no point for the FCC to ask the states to conduct a granular trigger analysis, given that the FCC has already found that such facilities are no longer UNEs. The FCC could simply have counted "on-net" collocations – as Verizon wants to do -- and be done with it.

D. Verizon has failed to show that AT&T is ready to provide "dedicated transport" on a wholesale basis.

The FCC's wholesale trigger test requires that the carrier must be operationally ready and willing to sell the particular capacity of transport wholesale along the route in question. The critical points here are: (1) if the transport facility is not already established and thus "immediately" available, it does not count for purposes of a wholesale trigger analysis; and (2) if

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90 Tr. 293.

91 VZ Main Brief at 53-56.

92 AT&T Stmt. 1.0 at 102.

the carrier does not generally offer access to other carriers on a "widely available" basis, it does not count for purposes of the trigger.[93]

AT&T does not provide wholesale dedicated transport services between Verizon wire centers. Verizon cannot point to a single statement in AT&T's presentation in this case or in AT&T's promotional materials that would support its allegation that AT&T provides services between the identified Verizon wire centers. Indeed, Verizon's witness conceded as much.[94] Verizon has simply ignored AT&T's (and other carriers') testimony that they do not provide wholesale services between Verizon wire centers. Since wholesaling is, by definition, an intentional act, Verizon cannot reasonably be heard to contradict such statements. Nevertheless, Verizon seems intent on picking and choosing only that data that supports its theory of the case, and ignoring the overwhelming evidence to the contrary. Verizon's failure to give any credit to CLECs' information responses when they do not square with Verizon's theory of the case is disingenuous.

In rejecting the unfavorable responses, Verizon artfully obfuscates the term "transport" in the generic sense from the term "dedicated transport" as defined by the FCC in the *TRO*. For purposes of this impairment proceeding under the FCC's *TRO* guidelines, "dedicated transport" is defined narrowly as "transmission facilities connecting incumbent LEC switches and wire

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93 *TRO* ¶ 414. The FCC emphasized that the operational readiness test for wholesalers "safeguards against counting alternative fiber providers that may offer service, but do not yet have their facilities *terminated or collocated* in the incumbent LEC central office, or are otherwise unable to *immediately* provision service along the route." *Id.* (emphasis added).

94 Tr. 543-544 (Peduto) (Q. I think I only have two more questions for you. Going back to page 114 and the change that were made by AT&T. A. Yes. Q. Is there anything in that change that indicates that AT&T in fact at the moment is providing transport between any two of the central offices that were identified on Verizon's list? A. Let me make sure I understand your question. You're saying is there anything in the language presented on page 114 as it now stands after the changes that makes me believe that AT&T is actually providing? Q. Is there anything in the language that says that AT&T is now providing? A. No. There is nothing in the language that says they're actually providing. It says to me that they're operationally ready to provide. Q. Okay.

centers within a LATA" *TRO* ¶ 365 (footnote omitted). Thus, only a small subset of the universe of transport (in the generic sense) is in issue in this proceeding.

A carrier may well advertise on its national web site or otherwise that it is prepared to provision some types of "transport" for another carrier. But that is not evidence that the carrier is prepared (and operationally ready) to provision "dedicated transport" between Verizon wire centers, as newly defined by the FCC in the *TRO*. A CLEC may have transport facilities and collocation arrangements that it is willing to use to provide some types of transport services to other carriers, and may say so, but be entirely unable (and/or unwilling) to use those facilities and arrangements to provide service between specific pairs of Verizon wire centers.

Finally, Verizon's supposition that AT&T wholesales dedicated transport between Verizon wire centers badly misreads AT&T's tariffs. AT&T offers retail dedicated interoffice channels at DS1, DS3 and other speeds, but these are available only between two *AT&T* Central Offices or points of connection or combinations thereof, on AT&T's fiber network.[95] Notably, these tariffs do not offer such channels between Verizon wire centers, since such wire centers are by definition *not* AT&T Central Offices. Thus, AT&T does not hold itself out in these tariffs to provide dedicated transport between ILEC wire centers, and Verizon's assumption that AT&T holds itself out as a wholesaler on such routes is predicated upon a gross misreading of AT&T's Network Interconnect Services tariff.[96]

Is there anything in the language that says that AT&T is providing it at wholesale to other carriers? A. I see nothing in that language that speaks to that.).

95 See AT&T Stmt. 1.0 at 120 and n.161 (citing, for example, AT&T Communications of Pennsylvania, LLC, Pa. PUC No. 19, § 8.2.1 (ACCUNET T45 Interoffice Channel). For another retail example, see *Id.*, § 11.1.1, offering AT&T Private Line Interoffice Channel SONET Services at various speeds, "configured by combining service components at designated AT&T Central Offices."

96 Verizon cites to AT&T PUC No. 17, § 10 for the proposition that "AT&T offers private line services at all speeds up to OC192, including DS3." VZ Stmt. 1.0 at 50. However, that citation also fails to support Verizon's claim that AT&T provides dedicated transport between *Verizon* wire centers at wholesale at any speed. What AT&T actually offers under the cited tariff is Network

VIII. VERIZON FAILED TO ESTABLISH THAT AT&T OR OTHER CLECS ARE COMPETITIVE WHOLESALE TRIGGERS FOR DS3 OR DS1 HIGH CAPACITY LOOPS AT THE VERIZON-IDENTIFIED SPECIFIC LOCATIONS.

Verizon persists in identifying AT&T as a competitive wholesale trigger[97] candidate for DS3 loops for 35 of the 66 building locations in Pennsylvania,[98] despite AT&T's showing that it does not provide wholesale DS3 loops at any of the identified locations. Persistence, however, is not evidence. The problem in this regard is that Verizon does not have the latter, relying instead on a series of assumptions and generalities – not the hard evidence that the *TRO* and this Commission requires.

For example, Verizon concluded that because AT&T "admitted" in its 10K report to the federal Securities and Exchange Commission that it sells "high volume transmission capacity," it must therefore wholesale DS3 loops at each and every location where it provides high capacity loops to its customers.[99] Similarly, Verizon asserted that AT&T "offer[s] DS1s and DS3s through tariffs contained on the Commission's web page."[100] Armed with these generalizations and its assertion that AT&T and the other carriers did not provide any "particularized, location-

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Interconnection Services that "is available only in connection with the termination of Local Traffic to End Users to whom [AT&T] is able to terminate calls using Access Services as provided elsewhere in this tariff." AT&T Communications of Pennsylvania, LLC, Pa. PUC No. 17, § 10.1. The service interconnects a CLEC's network to AT&T's network; it does not transport traffic between two wire centers on Verizon's network. The Points of Interconnection ("POI") for the provision of the Network Interconnection Services must be "at [AT&T's] End Office, and at any other reasonable point on [AT&T's] network." *Id.*, § 10.2.2. AT&T Stmt. 1.0 at 120.

97 The competitive wholesale triggers applicable to DS3 and DS1 loops are met where the Commission "determines that two or more unaffiliated alternative providers . . . have access to the entire multiunit customer premises, and offer the specific type of high-capacity loop over their own facilities on a widely available wholesale basis to other carriers desiring to serve customers at that location." *TRO* ¶ 337.

98 VZ Stmt. 1.1, Exhibit 3. Verizon does not assert that AT&T is a competitive wholesale trigger candidate for any DS1 loop location. *Id.*

99 VZ Main Br. at 71.

100 *Id.* (citing VZ St. 1.2 at 103 & VZ Cr. Ex. 15).

specific evidence" rebuttal, Verizon concludes that AT&T is a DS3 competitive wholesale loop candidate at 35 Pennsylvania locations.[101]

But Verizon's assumption-laden approach does not provide evidence to define AT&T as a trigger firm that may be used to eliminate high capacity loops to any of the building locations it identified. Verizon did not and could not produce any location-specific evidence that AT&T provides DS3 loops on a wholesale basis to other carriers. Verizon's series of interrelated assumptions cannot turn AT&T into something that it is not, i.e., a high capacity loop wholesaler. Indeed, there is not a scintilla of evidence that supports Verizon's bald conclusions. At no time in this proceeding did AT&T indicate or imply that it was a wholesale high capacity loop provider. And beyond its assumptions drawn from vague generalities, Verizon did not provide any independent evidence to support its contention regarding any customer location.

Verizon's failure to develop wholesale loop trigger evidence also extends to trigger candidates other than AT&T. For example, Verizon simply relied on generalities from websites and general tariffs – again, not actual evidence regarding specific locations – to conclude that MCI, XO, RCN and Penn Telecom were wholesale loop trigger candidates.[102] In only one single instance, involving just one building location, did Verizon cite to any facts supporting the idea that one carrier actually provided a high capacity loop on a wholesale basis.[103] But that instance is just that – one occurrence applicable to just one carrier at just one location. Verizon's effort to extrapolate from that lone example to a presumption regarding AT&T and the other CLECs simply is utterly deficient. Indeed, rather than being proof of widespread wholesale provisioning of high capacity loops, this case provides yet another example of Verizon's willingness to rely on

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101 VZ Main Br. at 72.

102 *Id.* at 71.

assumptions and conjecture. It plainly does not support its contention that the wholesale trigger has been met at any of the locations Verizon identified.

IX. VERIZON FAILED TO ESTABLISH THAT AT&T OR OTHER CLECS ARE SELF-PROVISIONING DARK FIBER OR DS3 HIGH CAPACITY LOOP TRIGGERS AT THE VERIZON-IDENTIFIED SPECIFIC LOCATIONS.

Verizon also identified AT&T as a self-provider of DS3 and dark fiber loops at over 50 locations in Pennsylvania.[104] Yet, as with the competitive wholesale loop triggers, Verizon relies almost strictly on assumptions. Rather than putting forward a case supported with concrete, location-by-location, evidence as the FCC envisioned in the *TRO*, Verizon again elected to rely strictly on generalities. For example, Verizon attempted to support its dark fiber case by arguing "standard industry network practice" as the basis for finding spare dark fibers at specific building locations.[105] Verizon also argued that the Commission should *assume* carriers have maintained dark fiber at each location to which it has deployed fiber loop facilities.[106] Such a vague, imprecise claim does not satisfy the rigorous, location-specific review described throughout the *TRO*.

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103 *Id.* at 70. Specifically, Verizon contended that **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** at one of the locations identified as satisfying the triggers." *Id.*

104 VZ Stmt. 1.1, Exhibit 3. To meet the self-provisioning loop trigger applicable to DS3 and dark fiber loops, the providers must be unaffiliated and own the loop facilities; the loop capacity must be specifically identified; a location-specific review must be conducted; and the providers must be serving customers via the specified facilities. *TRO* ¶¶ 332-33.

105 VZ Main Br. at 68. Verizon also conjectures that "vast majority of self-provisioned fiber loop facilities will have spare dark fibers." *Id.*

106 *Id.* at 69 (citation omitted). Verizon, in this case, tried to shift the burden in the case by suggesting that AT&T did not provide adequate discovery responses. Of course, if Verizon truly concluded that the AT&T discovery response was inadequate, Verizon had the right to file a motion to compel with the Commission. Verizon elected not to take such action in the instant case.

Moreover, Verizon provided no actual evidence of competitive "facilities in place *serving* customers at that location *over the relevant loop capacity level*."[107] In the case of a self-provisioning trigger candidate for DS3 loops, the carrier must be providing service at the DS3 level, *but limited to only one or two DS3s of demand*, which is the only amount of capacity that may be purchased as a UNE.[108] The record, however, lacks any showing that would allow the Commission to determine affirmatively just how many DS3s each trigger candidate has deployed at each of the trigger locations. Verizon's presumption-based approach simply ignores this *TRO* requirement and the Commission should reject it.

X. THE COMMISSION SHOULD REJECT VERIZON'S EFFORT TO EVADE ITS UNBUNDLING OBLIGATIONS UNDER ITS CHAPTER 30 PLAN AND THE GLOBAL ORDER.

The Commission does not need to reach back into state law to find that Verizon has a continuing obligation to provide unbundled local switching and UNE-P. The record, interpreted under the requirements of the *TRO*, emphatically demonstrates that CLECs continue to be impaired without unbundled local switching, and that Verizon thus is obligated to provide that element under federal law. Nevertheless, Verizon makes certain arguments concerning the

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107 *TRO* ¶ 332 (emphasis added). *See also id.* ¶ 329 (trigger satisfied only by "facilities at the relevant loop capacity level").

108 The FCC found that carriers that need at least 3 DS3s (the equivalent of over 2,000 DS0 circuits) of demand can generally afford to construct their own facilities to individual locations (assuming there are no significant operational barriers to such construction). The fact that carriers with such significant demand may be able to provide their own loops says nothing at all about whether carriers that need substantially less demand (only one or two DS3s) would be impaired if they were forced to do the same in order to avoid the need to purchase ILEC special access services. Thus, self-provisioning trigger candidates for DS3 loops must be able to show that carriers that need only a modest amount of demand (only 1 or 2 DS3s) could afford to construct their own facilities.

extinction of pre-existing state law unbundling requirements that are without merit,[109] and thus require brief rebuttal.

First, Verizon argues that because "***the Chapter 30 statute has expired***" the Commission cannot rely upon it to require unbundling.[110] It is, of course, true, that Chapter 30 has been allowed to sunset. That is not to say, however, that its unbundling requirement do not continue in effect. To the contrary, in making this argument Verizon conveniently ignored the terms of its existing Chapter 30 Plan. For example, the Competitive Services Deregulation Plan in Verizon Pennsylvania's Chapter 30 Plan expressly "incorporates the statutory protections contained in Chapter 30."[111] Leading the list of those protections in that Plan are the unbundling requirements of Section 3005(E)(1).[112]

The sunset of Chapter 30 did not alter the effectiveness of the requirements of the Plan. The Commission confirmed this just over a month ago, concluding that its prior orders concerning ILEC Chapter 30 Plans, "and the Chapter 30 plans approved by those final order, *remain in effect* and are fully enforceable in all respects upon the ILECs after the sunset date of December 31, 2003."[113] Verizon undoubtedly is relying on that determination as a basis for avoiding an examination of its rates. It must also adhere that determination for purposes of complying with the competitive safeguards that its plan incorporated. Thus, Verizon's Chapter 30 Plan continues as an independent source for Verizon's unbundling obligations.

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109 VZ Main Brief at 81-83. AT&T does not concede the validity of Verizon's arguments concerning the scope and effect of Section 271 or federal pre-emption, but reserves the right to address them at an appropriate time.

110 VZ Main Brief at 82 (emphasis in original).

111 Bell Atlantic-Pennsylvania, Inc.'s Alternative Regulation Plan, Docket No. P-00930715, July 27, 1994, at 16.

112 Id.

113 *Sunset of Chapter 30, Title 66 of the Public Utility Code,* Statement of Policy, Jan. 16, 2004, at 2-3 (emphasis added).

Verizon's argument that its evidentiary submissions in this case suffice to eliminate the Global Order's requirement that it provide UNE-P also is without merit.[114] Under the terms of that Order, Verizon must continue to offer UNE-P "except where [it] can demonstrate to the Commission, by a preponderance of the evidence, that collocation space is available, that it can be provisioned in a timely manner, and that considerations of the number of customers and revenues from the customers served by the CLEC from a collocation in that central office represents a valid reasonable economic alternative to the provision of UNE-P. . . to that CLEC."[115]

Needless to say, Verizon's minimalist "count to 3" approach to this case does not come close to meeting this evidentiary standard. Verizon certainly has provided no evidence in this case concerning the availability of collocation space, or its ability to provision available space in a timely manner. More important, Verizon has avoided -- like the plague -- any evidence that would bear on the competitive considerations embodied in the Global Order's "valid reasonable economic alternative" requirement. Indeed, under Verizon's (invalid) view of the triggers, "the number of customers" a CLEC is serving in the market area is not even a valid consideration.

The Global Order says otherwise. And the fact it does is fully in accord with the provisions of the *TRO* requiring the Commission to undertake the same type of qualitative and quantitative analysis in applying the trigger. Properly applying those requirements shows that Verizon's unbundling obligation not only clearly continue under the Global Order, but federal law as well.

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114 See VZ Main Brief at 82-83.

115 Global Order at 90.

CONCLUSION

For the reasons set forth above and in AT&T's Main Brief, Verizon's petition for a finding that CLECs are not impaired in the absence of unbundled local switching, unbundled dedicated transport, and unbundled high capacity loops should be denied and dismissed.

Respectfully submitted,

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Certificate of Service
Docket No. I-00030099

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ORIGINAL DOCUMENT

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

Your Honors:

Enclosed please find the original and nine (9) copies of Pennsylvania Carriers' Coalition's Reply Brief in the above-referenced matter. As evidenced by the attached Certificate of Service, all parties of record have been served.

Thank you for your attention to this matter.

Respectfully submitted,

Alan Kohler

Alan Kohler
For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

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Enclosure
cc: Attached Cert. of Service w/enc.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY BRIEF OF THE PENNSYLVANIA CARRIERS' COALITION

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I. INTRODUCTION

In a classic example of "this is our story and we're stickin' to it," Verizon Pennsylvania, Inc. ("Verizon PA") and Verizon North, Inc. ("Verizon North") (jointly "Verizon") have submitted a brief which attempts to dress up its recycled arguments that the Commission should act, in robotic fashion, to eliminate the Unbundled Network Element Platform ("UNE-P") and numerous dedicated transport routes for most of its service territory. While Verizon has added a few wrinkles to its claims, little has changed from its Petition and witness testimony.

The Pennsylvania Carriers' Coalition ("PCC") has already addressed most of Verizon's arguments in its Main Brief and will not repeat those arguments here. Accordingly, the PCC will restrict the scope of its reply brief to Verizon's newly fabricated arguments that have not been raised previously.

Despite the Federal Communications Commission's ("FCC") decision in its *Triennial Review Order* ("*TRO*"),[1] Verizon continues to argue that the Commission can do nothing more in this case than count to three and grant Verizon its requested relief. In making its demands, Verizon asks the Commission to ignore its burden of proof (and in fact now argues that it does not have a burden of proof), and the lack of credibility of its evidence – apparently believing that both of these issues are somehow outside of the Commission's scope of review and that the Commission should march in step to eliminate Verizon's unbundling obligations.

Adopting Verizon's approach to the *TRO* under which the Commission just counts to three, the Commission would run the risk of eliminating the over 200,000 residential customers currently served by UNE-P in Density Cells 1, 2 and 3 which are spread out over every one of

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1 *Review of Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 01-338 (August 21, 2003).

the Density Cell 1, 2 and 3 wire centers in Verizon PA's service territories. This is despite the fact that, even by Verizon's own data, there is either 0 or de minimus (less than 10) residential customers being served by switch-based providers in 82 of the 140 wire centers in Verizon's three densest cells. Another 11 wire centers have less than 50 residential customers being served by CLEC switches. Furthermore, there are 0 wire centers with more than 50 residential customers served through a UNE-L arrangement, since over 95% of the residential customers served by CLEC switches are served by cable companies.

At the same time, Verizon attempts to eliminate the dedicated transport routes upon which many of the remaining switch-based providers depend. Overall, all of its arguments are devised with one common goal – to eliminate its competitors and the competitive benefits they provide to hundreds of thousands of Pennsylvania customers once and for all.

Fortunately, the weaknesses in Verizon's case make it a relatively easy job for the Commission to maintain Verizon's unbundling obligations and protect Pennsylvania's public interest in a competitive local telecommunications market. As fully explained in the PCC's Main Brief, review of the record reveals that Verizon has not met its burden of proof of demonstrating that the FCC's triggers have been met with anything resembling credible evidence and its request for relief in this proceeding should be outright denied.

II. ARGUMENT

As explained above, the PCC has already addressed the majority of Verizon's arguments in its Main Brief and will not repeat those arguments here. The PCC will respond to each of Verizon's remaining arguments below.

A. <u>Verizon Has The Burden of Proof In This Proceeding And Has Failed To Meet Its Burden.</u>

Faced with the weaknesses of its case before the Commission, Verizon is now attempting to avoid its obligation to prove its case altogether. On pages 7-9 of its Main Brief, Verizon argues that because this is not a "traditional state law case," Verizon does not have the burden of proof, and that it is somehow this Commission and competitive local exchange carriers ("CLECs") which have the burden of proof. In the alternative, Verizon argues that even if it does have the burden of proof, it has met its *prima facie* case and has shifted the burden to the Interveners.

Verizon's late arriving arguments pertaining to burden of proof turn federal and state process on its head. First, as to federal requirements, the FCC has established a national finding of impairment for mass market switching, dedicated transport and loops which essentially creates a rebuttable presumption for evidentiary purposes. To then turn around and claim, as Verizon does, that it does not have to rebut the presumption is nonsense. Since CLECs have no interest or obligation to rebut the presumption, if Verizon does not meet its evidentiary burden under federal law, the FCC's national impairment findings must be affirmed.

As to state law, regardless of whether this is a "traditional state law case," the Commission is not empowered to conduct proceedings which do not meet the requirements of the agency's enabling statutes and other statutory procedural requirements. Further, whether or not the FCC applied a burden of proof approach in its review is inconsequential.[2] Under Section

2 Verizon's sole support for its contention is that the FCC indicated in the *TRO* that it was not following a burden of proof approach in its underlying analysis (which resulted in the national impairment finding). Verizon M.B. at 8. However, nothing in the FCC's discussion addresses whether the state commissions should assign a burden of proof in their granular analyses. Further, unlike the FCC, this Commission must conduct trial type proceedings to meet the requirements of the Administrative Agency Law, 2 Pa.C.S.

332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), it is the proponent of a rule or order which bears the burden of proof.[3] Here, Verizon submitted a Petition to Initiate Proceedings seeking a ruling of non-impairment for various UNEs in the face of a national finding of impairment. Clearly, as the proponent of the rule or order, the Public Utility Code assigns the burden of proof to Verizon.

Furthermore, in the October 3, 2003 *Procedural Order* governing this proceeding, the Commission conclusively determined that Verizon had the burden of proof to rebut the FCC's impairment findings. As the Commission determined:

> Given the national findings of impairment, we tentatively conclude there is impairment in Pennsylvania. Therefore, any ILEC desiring to contest the presumption of impairment must bear the burden of proving non-impairment.

Procedural Order at 12.

Verizon did not contest this Commission ruling and, in fact, it did not even raise the issue of the burden of proof in its Petition or at the November 25, 2003 Prehearing Conference before Administrative Law Judges ("ALJs") Schnierle and Colwell. Furthermore, Verizon accepted a schedule under which it submitted testimony first and last – a position reserved for the party with the evidentiary burden. Verizon had ample opportunity to conduct discovery and cannot be permitted to avoid the evidentiary burden by claiming it did not have some of the information to prove its case in its posession. Under these circumstances, for Verizon to now claim at this late

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§§ 504, 505, under which it cannot resolve disputed material facts without an oral hearing.

3 Under Section 332(a), this is true except as otherwise provided in Section 315. Section 315 provides further support for the assignment of the burden of proof on Verizon here by requiring that in any proceeding upon the motion of the Commission involving the services or facilities of any public utility, the burden of proof is on the public utility whose service and facilities are at issue.

date that it does not have the burden of proof should be viewed as nothing more than a sign of desperation which should be summarily rejected.

Nor did Verizon meet its burden in a manner which shifted the evidentiary burden to Intervenors. Verizon is correct that <u>if and when</u> a party with the burden of proof meets its evidentiary burden, the burden of going forward shifts to the opposing party(s).[4] However, what Verizon fails to understand is that before the evidentiary burden shifts, the party with the burden of proof must meet its evidentiary burden in its entirety. As the Pennsylvania Supreme Court described this evidentiary scenario:

> Thus, where a party, with the burden of proof, is the only party to present evidence and does not prevail, that party has either failed to meet her burden of production or her burden of persuasion. Because a defendant has no burden of production or persuasion, at least until the plaintiff has sufficiently met both of her burdens, the burden of persuasion may not shift to the defendant to produce sufficient credible evidence or lose, before plaintiff has satisfied both those burdens.[5]

As explained fully on pages 21 through 25 of the PCC's Main Brief, Verizon has fallen far short of meeting its *prima facie* evidentiary burden in a number of ways and those arguments will not be repeated here. Indeed, Verizon's mechanical count to three approach does not meet its *prima facie* case of proving that trigger candidates are serving analog lines which are not provided to enterprise customers – the most fundamental of evidentiary requirements in this case. Accordingly, Verizon has the burden of proof in this proceeding and its failure to meet that burden requires the Commission to affirm the FCC's national impairment findings.

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4 Verizon M.B. at 8-9.

5 *Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board,* 571 Pa. 189, 215, 478 A.2d 478, 494 (Pa. 200).

B. Mass Market Switching.

1. Verizon Mischaracterizes the PCC's Position on the Relevant Geographic Market.

On pages 16-17 of its Main Brief, Verizon mischaracterizes the PCC's position pertaining to the Commission's establishment of the relevant geographic market for purposes of application of the Commission's trigger analysis.[6] As fully explained in the PCC's Main Brief and contrary to Verizon's characterization, the PCC has followed Verizon's approach of utilizing a combination of geographic designations in establishing the relevant geographic market. Also, like Verizon, the PCC proposes that the general market be established as Metropolitan Statistical Areas ("MSAs"). Where the PCC departs from Verizon's approach is that it proposes to utilize wire centers as the submarket, rather then Density Cells, as proposed by Verizon.[7]

As fully explained in the PCC's Main Brief and underlying testimony, wire centers are more appropriate than Density Cells for use in combination with MSAs in defining the geographic market, because only wire centers capture all of a switch-based CLEC's revenue opportunities and underlying costs. Accordingly, each wire center presents a different economic picture and therefore each wire center is frequently viewed as a distinct submarket by a switch-based CLEC.[8] Together, MSAs and wire centers are the only geographic designations that meet the FCC's criteria in the TRO which require the market to be defined in the eyes of a CLEC.[9]

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6 Verizon characterizes the PCC position as follows, "Other intervenors, notably MCI and the Pennsylvania Carriers' Coalition ("PCC") take the opposite position and contend that the market should be defined very narrowly at the wire center level."

7 PCC M.B. at 28-34.

8 PCC M.B. at 31-34; PCC St. 1.0 at 29-30.

9 *See*, *TRO* at ¶ 459 identifying three geographic market definition criteria. PCC M.B. at 10.

2. Verizon's Cutover Proposal Is No Cutover At All And Its Criticisms Of The PCC Proposal Are Unsupportable.

In its Main Brief at pages 18-20, Verizon supports a cutover between mass market customers and enterprise customers under which mass market customers would be defined as any customer, regardless of size, which is being served by multiple DS0s. As fully explained in the PCC's testimony, Verizon's proposal is no cutover at all and is completely non-compliant with the *TRO*'s requirements.[10]

At the same time, Verizon criticizes the PCC's proposal under which the cutover would be established based on the customer's local and intraLATA Total Billed Revenue ("TBR") as "unworkable from a practical perspective."[11] To suggest that a TBR based cutover is unworkable completely ignores the Commission-established system of regulation applicable to Verizon over the last five years originating in 1999 with the Commission's *Global Order*.[12] As both Verizon and the Commission are fully aware, the cutover which determines whether Verizon's retail services are subject to rate regulation is based on customer TBR (cutover of $10,000 TBR). So is the cutover which determines whether Verizon must offer UNE-P and EELs to CLECs (cutover of $80,000 TBR).

The fact of the matter is that the Commission has routinely used a TBR-based cutover for a number of purposes in regulating Verizon and, to the best of the PCC's knowledge, TBR-based cutovers have not presented any practical implementation problems and have been quite

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10 PCC St. 1.0 at 37-38.

11 Verizon M.B. at 19.

12 *Joint Petition of Nextlink Pennsylvania Inc., et al.*, P-00991648, P-00991649 (September 30, 1999).

workable. Accordingly, Verizon's criticism of the PCC's cutover proposal has been fabricated by Verizon, has no factual basis and should be rejected.

3. Verizon's Line Count Study Neither Proves Mass Market Trigger Compliance Nor Is It Credible.

On pages 20-23 of its Main Brief, Verizon asserts its claim that its Line Count Study demonstrates that it has met the mass market switching triggers in DCs 1, 2, and 3 of eight MSAs. However, even putting aside the *TRO's* criteria applicable to Verizon's trigger candidates, which will be addressed in Subsection 4 below, as fully explained on pages 21-26 of PCC's Main Brief, Verizon's Line Count Study has numerous flaws, including that it counts analog lines which serve enterprise customers and is generally not credible. The PCC incorporates those arguments in its Main Brief by reference and will not repeat them here.

4. Verizon's Response to the PCC's Proposed Trigger Criteria Lacks Merit and the Trigger Criteria Should Be Adopted.

In the PCC's testimony and Main Brief, it identifies and supports eight criteria which were established by the FCC in the *TRO* and which must be met before a proposed trigger candidate can be considered a trigger carrier in the Commission's trigger analysis.[13] In Verizon's Main Brief at pages 23-35, Verizon addresses (and responds in advance) to five of the criteria. Verizon also makes a separate argument regarding the qualifications of Adelphia as a trigger candidate. Without repeating its arguments in its Main Brief, the PCC will respond to Verizon's claims.

First, Verizon attempts to discredit the trigger candidate criterion which requires that a trigger candidate serve both the residential <u>and</u> small business segments of the mass market in

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13 PCC M.B. at 37-54.

order to qualify as a trigger carrier.[14] Verizon's arguments regarding this criterion are predictable and Verizon only addresses one assertion that PCC has not previously addressed in its Main Brief.[15] That assertion relies on footnote 1546 of the *TRO* which Verizon claims clarifies that the residential/small business criterion is not applicable. However, review of footnote 1546 reveals that it does not stand for the proposition for which it is being cited by Verizon. In fact, in footnote 1546, the FCC does nothing more than make an obvious observation – that being that as you raise the mass market/enterprise cutover under the FCC's analysis (e.g. from four lines to 24 lines), the chances that a given switch-based provider will be serving mass market customers in a given geographic market will naturally increase as the base of mass market customers increases in size. Footnote 1546 says nothing about whether a trigger candidate must be serving the residential segment and simply does not support Verizon's claim in this regard.[16]

As fully explained in the PCC's Main Brief, in addition to the requirements of the *TRO*, the nature of the evidentiary record in this case requires that a trigger candidate serve the residential segment in order to qualify as a trigger carrier. This is because the record is clear that the data pertaining to small business analog lines is littered with analog lines serving enterprise customers. Accordingly, data pertaining to residential customers is the only reliable evidence that a given trigger candidate is actually serving the mass market.[17]

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14 Verizon M.B. at 32-35.

15 PCC M.B. at 38-43. The PCC has already addressed the effect of the FCC's *TRO* Errata on this criterion and will not repeat those arguments here.

16 On pages 24-25 of its Main Brief, Verizon also cites to a preliminary decision by the Ohio Public Utilities Commission which, as a preliminary matter, decided not to conduct a separate residential and small business trigger analysis. Obviously, a preliminary decision by the Ohio Commission is not binding on this Commission and, in fact, does not necessarily even reflect the final decision of the Ohio Commission.

17 PCC M.B. at 21-25, 41-42.

Second, Verizon attacks the ubiquity criterion, largely by misstating and mischaracterizing the application of the criterion to the Commission's trigger analysis. In the PCC testimony and Main Brief, the PCC identifies and provides support for application of the FCCs ubiquity criterion, application of which would require that a trigger candidate for a given MSA be providing some level (more than *de minimus*) of mass market service in each of (or at least most of) the wire centers in that MSA.[18]

Verizon responds to the ubiquity criterion by characterizing it as requiring that "a CLEC serve 100% of the Defined Market," in carrier of last resort fashion, a standard which PCC has never advocated and, in fact, confirmed in its Main Brief that such a standard was never intended by the FCC.[19] Accordingly, Verizon's response to the ubiquity criterion defends against a position that was never advocated by the PCC and does not respond at all to arguments pertaining to the FCC's actual ubiquity criterion.

Third, in paragraph 500 of the *TRO*, the FCC charged state commissions with examining whether trigger candidates "are currently offering and able to provide service, and are likely to continue to do so."[20] At pages 27-28 of its Main Brief, Verizon argues that the Commission must find that a trigger candidate is likely to continue to provide mass market service unless the carrier has "affirmatively indicated that it is exiting the market."

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18 PCC M.B. at 43-46; PCC St. 1.0 at 43-44.

19 PCC M.B. at 41, fn. 111. In support of its mischaracterization of the ubiquity criterion, Verizon cites to a passage from the FCC's recent D.C. Circuit brief which stands for nothing more than the fact that the FCC never intended that a trigger candidate be ready and willing to serve <u>all</u> retail customers in a market in carrier of last resort fashion – but provides no indication that the FCC did not intend application of a ubiquity criterion as advocated by the PCC.

20 Accordingly, in order for a trigger candidate to qualify as a trigger, the Commission must affirmatively find that any mass market service is sustainable. PCC M.B. at 46-49.

This claim by Verizon is simply not supportable. Verizon bases its entire argument on footnote 1556 of the *TRO* which follows the FCC's directive that a state commission must assure that a trigger candidate will continue to provide mass market service. Footnote 1556 provides, "For instance, states should review whether the competitive switching provider has filed a notice to terminate service in that market" (emphasis added). While the FCC provides an example of what would definitely constitute unsustainable service, nowhere in the footnote does the FCC restrict or attempt to define what evidence a state commission should look to in determining whether a trigger candidate's service is sustainable. While the FCC has made it clear that a carrier should not be disqualified merely because it is in bankruptcy, the FCC has provided ample discretion to state commissions to determine what constitutes sustainable service under that state commission's granular analysis.

Fourth, Verizon argues that the FCC is requiring state commissions to include cable TV companies as trigger carriers based on a biased and partial analysis of the *TRO*. While it is true that cable telephony providers are not automatically excluded from a state commission trigger analysis, as pointed out by the FCC in footnote 1560 of the *TRO* and as cited by Verizon on page 28 of its Main Brief, it is equally clear that a cable telephony candidate does not qualify as a trigger carrier unless the state commission affirmatively finds that cable telephony alternatives are comparable in cost, quality and maturity to incumbent LEC services[21] – a requirement which Verizon conveniently omits from its Main Brief. As explained and supported in the PCC's testimony and Main Brief, while whether cable telephony services are comparable in cost and

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[21] As the FCC clearly and unambiguously stated in paragraph 455, fn. 1549 of the *TRO*:

> In deciding whether to include intermodal alternatives for purposes of these triggers, states should consider to what extent services provided over these intermodal alternatives are comparable in cost, quality and maturity to incumbent LEC services.

quality is debatable, it is beyond reasonable dispute that these recently introduced services have nowhere near the maturity of Verizon's services.[22]

Fifth, Verizon argues that the Commission should include independent, incumbent LEC affiliates as trigger carriers.[23] This is despite the fact that while the FCC did not outright preclude inclusion of these carriers in state commission trigger analyses, it clearly frowned on such inclusion unless the state commission found such inclusion to be appropriate given the specific record in that granular analysis.[24] Suffice it to say the obvious – independent ILEC affiliates which can lease ports from their ILEC affiliate switches and have access to other means of ILEC contribution provide absolutely no evidence of whether a CLEC with no access to ILEC affiliate contribution can overcome impairment or compete successfully for mass market customers in a given geographic market.[25]

Finally, after being aggressively challenged at the hearings in this case regarding its inclusion of Adelphia's analog lines associated with the Commonwealth's state contract in its trigger analysis, Verizon resorts to off-the-record information in a desperate attempt not only to maintain Adelphia as a trigger carrier, but to magically turn Adelphia into two trigger carriers.[26] Before addressing Verizon's arguments, here are the facts which are on the record of this proceeding regarding Adelphia:

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22 PCC M.B. at 51; PCC St. 1.0 at 50.

23 Verizon M.B. at 31-33.

24 *See, TRO* at 440 including fn. 1352. The PCC has comprehensively addressed the FCC's standard for this criterion in its Main Brief and will not repeat that argument here. PCC M.B. at 52-55.

25 PCC St. 1.0 at 52.

26 Verizon M.B. at 33-35 and Exhibit 1.

> 1) In its proposed trigger analysis attached to its testimony, introduced as Exhibit 5 to Verizon St. No. 1.2, Verizon included all analog lines either identified in its Line Count Study, its 911E data review or as reported by Telcove (the Adelphia parent Company) as qualifying Adelphia as a trigger carrier in various MSAs.[27]
>
> 2) The Verizon witness sponsoring its proposed trigger analysis did not know that Adelphia provided service, including analog service, to the Commonwealth under the state contract.[28]
>
> 3) Verizon has no way of knowing how many of the lines included in its proposed trigger analysis fall under the state contract.[29]

Now turning to Verizon's attempt at resurrecting Adelphia as a trigger carrier – fact No. 1 cited by Verizon:

> ***First***, as Verizon's witness Mr. West explained, the "Adelphia" in Rebuttal Attachment 5 for whom Verizon identified lines in the "Verizon Counts" column refers to two different entities. The first is the cable company, Adelphia Communications, hereinafter referred to as "Adelphia Cable." The lines attributable to Adelphia Cable were obtained from the residential E911 database and represent residential customers only.[30] (footnote omitted)

There are a number of problems with this alleged fact, most prominently that the information is not part of the record. Verizon cites to "VZ St. 1.2 (West/Peduto Reb.) at 22, n.5." for this supposition. However, review of that citation reveals that the Verizon witnesses were unclear regarding whether there were two separate unaffiliated Adelphia entities.[31] If

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27 Tr. at 107-110.

28 Tr. at 109.

29 Tr. at 119.

30 Verizon M.B. at 33.

31 As the relevant portion of the footnote indicates, "In addition, it has come to our attention that Adelphia Communications Company (the cable company) may no longer be affiliated with Adelphia Business Solutions d/b/a Telcove pursuant to *TRO* ¶ 499, fn.

Verizon ever confirmed anything about the purported Adelphia entities, it is not on the record of this proceeding. Furthermore, Verizon's claim that the so-called "Adelphia Cable" is providing residential service is impeached by a sworn affidavit from Telcove itself which confirms that no Adelphia company provides any voice grade residential service.[32]

Next, Verizon pieces together a series of claims on page 34 of its Main Brief, many of which are not on the record, and miraculously concludes that not only does its Line Count Study include legitimate mass market service for Adelphia, but that Adelphia Cable should be treated as a second Adelphia CLEC under its proposed trigger analysis. Most importantly, Verizon alleges that all of the analog lines identified for Adelphia in its Line Count Study are PECO Telcove lines, not Adelphia Operations lines, and accordingly, have nothing to do with the state contract. Not only are these distinctions completely missing from the record, but they are inconsistent with the statements of its sponsoring witness who confirmed that Verizon had no way of identifying which of Adelphia's lines were associated with the state contract.[33] Overall, Verizon's desperate attempt to resurrect Adelphia as a trigger carrier (much less two Adelphias) is not consistent with the record and should be rejected.

C. <u>Dedicated Transport</u>

As it did with switching, Verizon once again mounts its tired horse for a Don Quixote-like tilt at the windmill of impaired transport. And again, Verizon's lance shatters far short of the mark. Brushing aside its burden of proof (an especially bold stance in light of the FCC's national

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1550 . . . To be conservative, however, until Verizon confirms this information, we will continue to count the two as a single carrier for the purposes of the trigger" *See also* Tr. at 120.

[32] Tr. at 119-120; ALJ Exhibit 1-Exhibit 1.

[33] Tr. at 109.

impairment findings),[34] Verizon continues to rely on its misplaced hearing room arguments about CLECs failing to deny unsubstantiated Verizon allegations; so-called "admissions" contained in dated and puffed CLEC websites; misread tariffs; unproven operational assumptions concerning CLEC networks and capabilities; and other inferences built on presumptions, then packaged as "proof" of ultimate facts. Unlike certain leftovers, which actually taste better the second time around, Verizon's case has not improved with age since the conclusion of the hearing.

1. Verizon's Case Generally

As was the case with its initial filings and again at the hearing, Verizon in its brief is unable generally or specifically to prove the existence of either a self-provider or a wholesale provider of dedicated transport services along a single route for DS1, DS3 or dark fiber transmission capacities in Pennsylvania. Verizon mistakenly cites as "conceded facts"[35] the results of its physical inspections of collocations; purported CLEC "admissions;" and "reasonable conclusions," which it then attempts to bootstrap into generalized proof of non-impairment. However, the divide between the Verizon fantasy view of the state of dedicated transport competition in Pennsylvania, and the harsh reality as seen under the exacting proof demanded by the *TRO*, is a chasm too wide to bridge on the record before this Commission.

Starting with its "physical inspections" of collocation arrangements in Verizon offices, which apparently show powered collocations with non-Verizon fiber running from them and out of the building, Verizon offers the following as "proof" of competitive transport between Verizon wire centers and switches:

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[34] Verizon M. B. at 37.

[35] *Id.*

(1) Some CLECs have "robust" fiber networks in the state;

(2) CLECs with OCn capacity automatically can channelize it to lower transmission capacities, including DS1 and DS3, and have excess dark fiber;

(3) CLECs with OCn capacity and connection from their own switches to two or more Verizon offices are operationally ready to self-provide and to wholesale DS1, DS3 and dark fiber between and among Verizon offices; and

(4) CLECs admit to providing transport in their websites and tariffs.[36]

There is one very interesting twist to Verizon's case – if this rank speculation was even close to being accurate, the FCC likely would have issued a national finding of *non*-impairment as to these capacities, just as it did with respect to entrance/backhaul facilities. Instead, the FCC upon an extensive record and after careful review and documentation issued a finding of *impairment* as to DS1, DS3 and dark fiber.[37] It has been written that an argument can prove too much; on the contrary, Verizon's argument assumes too much, proves too little, and fails to advance the cogent, granular review of transport required by the *TRO*.

2. Backhaul Facilities

Verizon believes that a central tenet of its case is the treatment that this Commission will accord to backhaul facilities. Objectively, this is untrue, because the Commission for the sake of argument could accept the Verizon litigation construct of the transport "route" definition and still quite easily determine that competing carriers are not operationally ready to provide dedicated

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[36] Verizon Brief at 37-40. These are the same arguments Verizon made in its direct and rebuttal testimony, and the same arguments the PCC predicted and rebutted in its Main Brief. *See* PCC M. B. at 91 *et seq.*

[37] *TRO* at ¶ 359.

transport.[38] But Verizon's treatment of "backhaul" facilities runs contrary to the *TRO*'s plain (and repeated) definition, is actually the very "mockery" that it decries,[39] and deserves to be exposed.

The *TRO* specifically removes backhaul/entrance facilities from the definition of transport. It does not eliminate a couple or a few backhaul facilities; it does not eliminate some or even many facilities; it does not eliminate certain classes or capacities of facilities; it removes *all* backhaul facilities from the definition of transport, and does so clearly and repeatedly.[40]

The reasons for the reformulated definition ought to be patent by now to everybody, even to Verizon: because CLECs have configured and built their networks primarily to serve large business customers directly and to haul vast volumes of traffic over their own OCn facilities back and forth to ILEC offices, these backhaul/entrance facilities no longer can be considered impaired.[41] However, even carriers the size of AT&T and MCI configure their networks primarily to backhaul traffic to their own switches and on to end-user customers; they do not configure and build their networks to carry traffic between and among ILEC offices.[42] For these ILEC inter-office facilities, even the mightiest of CLECs (including those with substantial

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38 *See* discussion of operational readiness in PCC M. B. at 81-84, . Even if backhaul facilities could provide the legs for a transport "route," there is no evidence of record to prove that any CLEC has in place and functioning on specific routes the requisite equipment, engineering expertise, systems and support required to self-provide or wholesale transport services at the affected capacities.

39 Verizon M. B. at 53.

40 *TRO* at ¶¶ 365-373; *see* PCC M. B. at 84-88 for a discussion of the *TRO* transport definitions.

41 *See TRO* at ¶¶ 365-367.

42 *TRO* at ¶¶ 365-381; Tr. at 455-462; *see* PCC M. B. at 74-77.

interexchange networks) are impaired without access to ILEC transport. It is the truth. It is a national finding.[43]

Verizon would stand this national finding on its head. And in order to do so, Verizon attempts to stand the definition of dedicated transport on *its* head. It cannot attempt the former without first attempting the latter. Both efforts must collapse. Dedicated transport is a permanent, always-on, unswitched connection between two points.[44] The FCC specifically recognized the difference between dedicated and non-dedicated (switched, common or shared) transport, and contrary to Verizon's assertion, treats the two concepts differently and in separate parts of the *TRO*.[45] Nowhere does the FCC attempt to redefine the essential nature of switched vs. unswitched transmission. Only Verizon attempts this Houdini-like shift, arguing that the FCC actually intended to *equate* switched and unswitched transport.[46] But Verizon's principal argument contains its own undoing.

In formulating its "route A to Z" argument to include CLEC switches, Verizon states: "It is irrelevant that a CLEC, *for reasons of economic efficiency*, may choose to route all of its fiber facilities through centralized switching facilities."[47] (emphasis added). This assertion is absurd. No CLEC would tie up a precious switching resource by running dedicated trunks through the switch. That configuration would prove totally *uneconomic*, and for Verizon brazenly to suggest

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[43] *TRO* at ¶ 359.

[44] AT&T St. 1.0 at 113-116.

[45] *TRO* at ¶ 361 and fn. 1100.

[46] Verizon Brief at 57, 58.

[47] Verizon Brief at 58.

that a CLEC would do so voluntarily as a matter of efficiency is ludicrous.[48] Verizon's argument crumbles of its own weight, and drags down with it the assertion that CLEC backhaul is really part of the Verizon network for purposes of defining or providing dedicated transport.

The reality of the situation before this Commission compels a view more reasonable in light of how CLECs actually configure and operate their networks (and as recognized by the FCC *and proven* in this case). Competitive carriers first lease then build their networks from the ILEC switches back to their own switches, and eventually use fiber rings to connect their customers. As CLEC traffic increases between the ILEC networks and their own, the CLECs build out and replace ILEC-leased facilities with their own facilities. This has been a defining characteristic in the growth of the CLEC industry.[49]

Likewise, as CLEC traffic increases over time through the ILEC transport networks, CLECs eventually will have the economic incentive to exit their current ILEC transport lease arrangements. They will extend their own facilities deeper into the ILEC networks, either directly to connect certain ILEC offices, or to connect certain ILEC offices indirectly through other ILEC offices where the CLECs locate facilities. There will come a time when the CLECs build these facilities either to self-provide or to wholesale (or both) transport services between and among ILEC offices – in other words, begin to provide "dedicated transport" (exclusive of backhaul) within the meaning of the *TRO's* definition.

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48 *See* Tr. at 465-468; 494-500. Also, Verizon in its Main Brief (at 58) claims that AT&T witness Nurse characterized the FCC's definition of transport as "senseless." (citing Tr. at 496). Actually, witness Nurse characterized the Verizon *understanding* of the FCC transport definition as "senseless," since Verizon would allow for CLEC switches to have their capacity exhausted by dedicated circuits running to and from Verizon offices, which is foreign to the industry and never intended by the FCC.

49 *See, e.g.*, PCC St. 1.0 at 59-60; Allegiance St. 1.0 at 2-5; *TRO* at ¶s 370-414.

Consistent with the FCC's national impairment findings, the record before this Commission demonstrates that this time is not yet at hand in Pennsylvania, and that Verizon deserves no transport relief. The Commission therefore must reject Verizon's current petition, and upon future petitions, carefully sift the evidence to determine whether, where and to what extent competitive networks extend into incumbent transport facilities.

3. A More Granular Look at Transport

a. Wholesale Transport

Under Verizon's misreading of the *TRO*, it is not necessary for a carrier actually to have wholesale arrangements presently in place to count as a wholesale transport provider; it is sufficient if the carrier is "ready and willing" to provide wholesale service.[50] This interesting and novel interpretation leads inexorably to this result: under the Verizon analysis, a carrier can be ready, willing and *unable* to offer wholesale services, yet would still count toward the trigger. Although it matters not to Verizon that a competitive carrier has an actual ability in place to serve demand at the specified capacities, the trigger candidate's present ability to serve ought to matter very much to this Commission. It certainly mattered to the FCC, which unlike Verizon, found that a wholesale trigger candidate, *inter alia*, must be "immediately capable" of providing service.[51] Whether a single competitive carrier or many, absent a present ability to provision circuits and service (with the requisite equipment, engineering expertise, systems support and the like), measured by actual, documented proof of service, there can be no sustainable finding that any potential carrier counts toward the trigger for wholesale service on any specified route.

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50 Verizon M. B. at 48.

51 *TRO* at ¶ 400. Additionally, wholesale facilities must be CLEC owned, non-affiliated with the ILEC, and widely available to other carriers for the entire route in question. *Id.*

b. Self-Provisioned Transport

Verizon continues to argue that this Commission must follow a lock-step counting procedure as to DS3 and dark fiber self-provisioned transport.[52] As with wholesale transport, however, Verizon does not complete the analysis. In addition to determining non-affiliation and facilities ownership, the Commission must do much more than merely assume operational readiness from a Verizon count of powered collocations and the speculation of a witness as to CLEC capabilities. It must hold Verizon to its burden of proving the existence and functional ability of the necessary equipment, engineering expertise and systems in place to support transmission service at the required capacities.[53]

This Commission's granular analysis, on the basis of the record before it, need not proceed to analyzing specific route pairs. A review of Verizon's trigger candidates demonstrates that Verizon's presumptions concerning competitive carrier capabilities and the nature of "transport" services offered is so deficient that further analysis is neither warranted nor appropriate. At the proper time, upon a proper petition and with adequate proof of CLEC services and capabilities, a route-specific review may be in order. At this time, the Commission should totally disregard Verizon's purported review, including the attempted evidentiary amendments attached to its brief, and deny the Verizon petition.

The carrier-specific review concerning routes where the PCC currently serves customers reveals Verizon's willingness to obfuscate the facts and attempt to pry advantage from the slimmest and most confusing of sources. It proves nothing favorable to Verizon:

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52 Verizon M. B. at 41.

53 PCC M. B. at 82-83.

Allegiance – Verizon offers Allegiance as both a self-provider of DS3 transport and a wholesaler of DS1 and DS3 transport on selected routes. Allegiance allegedly self-provides transport because it leases fiber from AboveNet and lights it with its own optronics. Allegiance is allegedly a wholesaler for three reasons: (1) it advertises transport services on its website; (2) it filed a tariff offering transport services; and (3) it states in its 10-K that it selectively offers wholesale services to other carriers.[54]

Verizon ignores the facts adduced in the pre-filed testimony and at the hearing. Allegiance "transport" services are classic backhaul/entrance facilities – it leases and lights fiber to transmit traffic between the Allegiance switch and the Verizon network. It has no transmission facilities joining offices *within* Verizon's network. Even under Verizon's tortured definition of a "route," Allegiance lacks the add-drop multiplexers and other equipment necessary to offer dedicated transport.[55] Allegiance's website, tariff and 10-K obviously refer to backhaul/entrance facilities, which until the FCC's recent re-definition were commonly known to the industry as transport. It is neither a self-provider or a wholesaler of dedicated transport, and must be disregarded as a trigger candidate for any route.

AT&T – Verizon's claims here are almost identical to those it advances for Allegiance. Verizon claims that AT&T self-provisions DS3 transport and dark fiber, and wholesales DS1, DS3 and dark fiber. Verizon also points to the AT&T website, tariff and 10-K as "proof." Verizon's arguments fail for the same reasons they failed with Allegiance. Although AT&T has an extensive fiber network, it was provisioned to backhaul traffic to its own switches and through

54 Verizon M. B. at 42, 48-49.

55 Allegiance St. 1.0 at 5-8 (which also notes that Verizon included Allegiance as a trigger carrier on some routes where Allegiance purchases transport UNEs from Verizon); ALJ Exh. 5.

rings to its customers. AT&T does not provide transport, either to itself or to other carriers, between and among Verizon's network offices. And again, even under Verizon's litigation construct of a transport "route," there is no competent record evidence demonstrating that AT&T has in place the required equipment, systems and processes in order immediately to provide transport service either to itself or widely to other carriers. Finally, there is no evidence demonstrating that AT&T has for itself or offers for wholesale any dark fiber available to connect Verizon offices.[56]

Cavalier – Verizon lists Cavalier as a self-provider of DS3 and dark fiber, and a wholesale provider of DS1 and DS3 transport on selected routes. Its case here suffers the same fatal infirmities. There is no competent record evidence that Cavalier transmission facilities directly join Verizon offices, or that Cavalier either self-provides or offers to others transport within the meaning of the *TRO*. To the extent Cavalier self-supplies and offers services generally, there is no clear delineation as to where these are merely classic entrance/backhaul, or whether and where there may be a route that falls within the FCC definition.[57] The confusing evidence here needs to be clarified on a route-specific basis before this Commission considers taking action that would injure existing local competition in Pennsylvania.

City Signal – Verizon lists City Signal on several routes as a self-provider of DS3 and dark fiber transport, as well as a wholesaler of DS1, DS3 and dark fiber. It does so on scant evidence, as City Signal has not participated as a party or a discovery respondent in this proceeding. Cavalier claims to purchase some dark fiber from City Signal, and SNiP LiNK

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56 AT&T St. 1.0 at 89-121; ALJ Exh. 4.

57 Cavalier St. 1.0 at 65-84.

believes that City Signal resells facilities of other carriers, including Verizon.[58] There is insufficient evidence for this Commission to draw any conclusions here, and it ought to reject City Signal as a trigger candidate for self-provisioned and wholesale services.

Level 3 – this carrier apparently has some OCn facilities in the Locust-Market wire centers. There is no evidence that it self-provides or supplies to others any dedicated transport, and has specifically denied wholesaling any such services.[59] The Commission should eliminate Level 3 as a trigger candidate.

Lightwave – this carrier occupies much the same position as Level 3. It may be a niche player of some sort in the Locust-Market wire center, but there has been no competent evidence adduced either before or at the hearing to determine whether Lightwave is a self-provider or wholesaler of transport at any capacity.[60] The Commission should disregard this carrier as a trigger candidate.

Qwest – this is yet another example of a carrier that may play a niche role in the Locust-Market wire center, but no party can be certain based on the state of the record. There is no direct evidence or additional hearing room evidence to support that Qwest self-provides or wholesales any capacity of transport, and therefore must be eliminated as a trigger candidate.

Sprint – although Verizon claims Sprint as a provider of the full suite of retail and wholesale services on several routes, it is clear that Sprint does not qualify as a trigger candidate for either category on any route. As was made clear at the hearing, Sprint long distance may

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58 Cavalier St. 1.0 at 721-742; SNiP LiNK Direct at 24.

59 PCC Exh. 6 at 1.

60 PCC Exh. 6 at 1.

have some collocations and fiber, but uses none of it to supply any local services or transport in Pennsylvania.[61]

Telcove – Verizon lists Telcove (the former Adelphia) as an almost ubiquitous self-provider of DS3 and dark fiber, and wholesale provider of DS1 and DS3 transmission. As with its other trigger candidates, however, Verizon fails to prove that Telcove offers any transport services within the meaning of the *TRO* to any retail or wholesale customers on any route in Pennsylvania. The record evidence fails to establish whether Telcove sells transmission between or among Verizon offices, whether and to what extent it uses its own fiber, and whether it has the necessary equipment and support mechanisms in place to offer the relevant service capacities.[62] Absent sufficient record evidence, this Commission cannot establish Telcove either as a retailer or wholesaler of transport services, and cannot designate Telcove as a trigger carrier.

Worldcom (MCI) – much like AT&T, Verizon alleges that Worldcom is an almost ubiquitous self-provider of transport for DS3 and dark fiber transmission, and also is a wholesaler of DS1 and DS3 transport facilities. And as with AT&T, Verizon's case falls flat. Verizon cites "evidence" (websites, tariffs, the usual) that Worldcom offers "dedicated private lines" and "dedicated Internet access" at high capacities.[63] As with AT&T and other carriers, this proves nothing at issue in this case. Much like all CLECs, MCI's network is constructed to carry high capacity transmission to and from MCI switches to the Verizon network in order to serve

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61 Tr. at 602; PCC Hearing Exh. 1.

62 Telcove admits to providing some transport services, but there is nothing to prove that these are more than just backhaul/entrance facilities. SNiP LiNK believes that Telcove provides some DS3 transport (of unknown origin) on its own facilities, but leased Verizon fiber and resold Verizon special access on other routes. ALJ Ex. 1; SNiP LiNK Direct at 23-24.

63 Verizon M. B. at 44.

MCI's end user customers – these are backhaul/entry facilities. MCI transmission facilities do not connect Verizon offices together, and MCI does not wholesale or self-provision any DS1, DS3 or dark fiber dedicated transport capacity.[64]

XO – XO also appears to have a network configured to serve end-user customers, with backhaul/entrance facilities at OCn capacity joining its network to Verizon offices. XO does not link Verizon offices directly, and offers no wholesale services to other carriers.[65]

MFS (AboveNet) – this carrier has not participated in the proceedings, yet Verizon continues to insist that it provides wholesale transport on several routes. The only evidence here is that MFS provides a few routes where carriers lease backhaul/entrance facilities, and do not use any MFS transmission to connect Verizon offices.[66]

Verizon's transport case collapses for three basic reasons: the facts do not support it; reasonable inferences from those facts do not support it; and the law does not support it. And it ought to continue to fail for the foreseeable future for a fourth basic reason – the public policy of Pennsylvania favoring customer choice of competitive local carriers does not support it.

The purpose of the *TRO*, and of this Commission's review, is to ensure that actual, sustainable transport competition exists in a manner and to an extent that removal of Verizon's dedicated transmission facilities will not affect end user choice of carriers. The *TRO* and attendant state proceedings are not intended to be primitive counting exercises conducted for the purpose of enabling Verizon to choke competition under color of federal and state law. Based on

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64 Tr. at 407-408.

65 XO St. 1.0 at 2.

66 Allegiance St. 1.0 at 5-8.

the record before it, this Commission must act to protect competition and consumers in Pennsylvania, and reject Verizon's premature and inadequate petition.

D. Section 271 And State Law Issues

The PCC has submitted its arguments pertaining to the application of Section 271 and state law issues in its Main Brief and will not repeat those arguments here.[67] Essentially, the PCC's argument boils down to a claim that if the Commission in applying its trigger analysis finds non-impairment for any UNE in any geographic area of the Commonwealth, the Commission should follow its precedent in the *Enterprise Switching Order*[68] and require that Verizon continue to provide the UNE, in combinations, and at existing Tariff 216 rates, at least until such time as Verizon seeks unbundling relief under state law.

In its Main Brief, Verizon has attempted to anticipate the PCC's arguments in advance and, predictably, argues that the Commission is without authority to preserve unbundling under either 47 U.S.C. § 271 or state law. Of course, as the Commission has already determined in its *Enterprise Switching Order*, Verizon's excruciatingly narrow view of the Commission's authority is not supportable. While the PCC will not repeat its arguments in its Main Brief, it will briefly respond to some of the specifics of Verizon's argument.

1. State Law

Verizon argues that the Commission is preempted from requiring unbundling under state law, is without authority to reach a different result than the trigger analysis yields under federal law and that, therefore, the Commissions' *Global Order* requirements can no longer be

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67 PCC M.B. at 103-109.

68 *Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market*, L-00030100 (December 18, 2003).

applicable.[69] Of course, the Commission has already rejected this same Verizon argument in its *Enterprise Switching Order*. Furthermore, as pointed out in the PCC's Main Brief, the FCC's recent brief to the D.C. Circuit Court of Appeals confirms that the Commission is correct in its approach to this issue.[70] In fact, Verizon seems to agree with the Commission's determination in the *Enterprise Switching Order* in other contexts.[71]

In its Main Brief, Verizon has added a new wrinkle to its state law preemption argument, claiming that the *Global Order's* requirements are no longer valid because of the sunset of Chapter 30. However, its new wrinkle adds nothing to the merits of its claims for a variety of reasons.

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69 Verizon M.B. at 81-83.

70 PCC M.B. at 105-107. In the Circuit Court, the FCC agreed that the preemption issue was not ripe for judicial review because "... the [*TRO*] Order did not preempt states from adding to the unbundling requirements that the FCC adopted. In the Order [*TRO*], the Commission [FCC] simply observed that section 251(d)(3) 'preserves states authority to impose ... unbundling obligations ... only if such obligations are consistent with the Act' and do 'not substantially prevent the implementation of the federal regime. Brief for Respondent, *USTA v. FCC*, No. 00-1012 (D.C. Cir., filed December 31, 2003). Of course, the Commonwealth Court has already found that the Global Order's unbundling requirements are consistent with the Telecommunications Act and the federal regime. *Bell Atlantic Pennsylvania Inc., et al. v. Pennsylvania Public Utility Commission*, 763 A.2d 440 (Pa. Cmwlth. 2000).

71 In fact, in the federal appellate courts, Verizon sings a much different tune regarding the scope of state unbundling authority provided the state commission under the *TRO*. For example, in pleadings in support of a Petition for Mandamus filed in federal court, Verizon, along with other ILECs, describes the *TRO* as "delegating the ultimate determinations [concerning unbundling requirements] entirely to the states, guided only by a laundry list of open-ended factors ...." *United States Telecom Association v. FCC*, Nos. 00-1012, 00-1015 et al., Reply Brief in Support of Petitions for a Writ of Mandamus to Enforce the Mandate of This Court (D.C. Cir. Oct. 16, 2003), at 6. Verizon also described the "competitive triggers" as leaving the states "to their own judgment in deciding the central issue of market definition." Id. at 9. And specifically with respect to the switching trigger, Verizon noted that the TRO "unquestionably" required that a state commission's determination to overturn the FCC's presumption of impairment must be based on a determination that "a market is already fully competitive before providing relief ...". Id. at 11.

First, the Commission did not rely on Chapter 30 (or even mention it) as an underlying basis for its *Enterprise Switching Order*. Accordingly, Verizon's claim that the *Global Order's* requirements are vacated by the sunset of Chapter 30 is not supportable and the *Global Order* remains in effect under the Commission's general powers in the Public Utility Code.

Indeed, this viewpoint is confirmed by the Commission's recent Policy Statement in which it determined that its prior orders, including the *Global Order*, which were issued during the period when Chapter 30 was effective, remain effective and enforceable under the Commission's general powers.[72] Accordingly, Verizon's apparent claim that it has evaded the *Global Order* as a result of Chapter 30's sunset is wrong.

Finally, even if Verizon's view had some validity, the provisions of Chapter 30 (primarily 66 Pa. C.S. § 3005) upon which the *Global Order* relies have been maintained as components of Verizon's Alternative Regulation Plan. Accordingly, trying as it may to avoid the *Global Order*, the Commission's landmark decision continues to govern Verizon's wholesale business activities.

2. Section 271.

Verizon's arguments regarding its belief that the Commission completely lacks authority under Section 271 is equally unconvincing. In fact, as the PCC indicated in its Main Brief, Verizon's position is at odds with the FCC's advocacy to the D.C. Circuit.[73]

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72 *Sunset of Chapter 30, Title 66 of the Public Utility Code*, M-00041786 (January 16, 2004).

73 PCC M.B. at 106-107. As the FCC stated in its D.C. Circuit Brief, while the federal agency believed that Congress intended to give it "primary authority" to establish obligations under 47 U.S.C. § 271, the FCC did not intend to be "usurping state authority" in the Section 271 area. Brief at 90.

Verizon's reference to the Commission's consultative report to the FCC in its Section 271 in-region, interLATA entry proceeding does not help its cause. No one, including the Commission, disputes that it is the FCC, in consultation with the state commission, which was assigned statutory responsibility to make the final determination of whether a BOC had met the requirements of the competitive checklist necessary for initial approval to commence in-region, interLATA service. However, this specific and discrete assignment of statutory responsibility in the initial approval process cannot be reasonably expanded to an overriding assignment of exclusive jurisdiction over all aspects of Section 271 implementation and compliance (particularly since as this Commission will remember well, state commissions served the primary fact finding role even in the initial approval process),[74] and a far-reaching preemption of all residual state authority over Verizon's post interLATA entry activity, as Verizon apparently believes.

This Commission and the FCC have made it abundantly clear that Verizon's unbundling obligations remain intact under Section 271 – even if those unbundling obligations are eliminated under Section 251 and/or state law.[75] However, Verizon cites to a footnote in the *TRO* to advance its claim that it cannot be required to offer combinations of network elements

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74 And as Verizon will vividly remember, a significant portion of the Commission's review of Verizon's Section 271 Application pertained to whether Verizon was complying with its obligations under the same *Global Order* (e.g., Commission Code of Conduct) that Verizon is now claiming should be ignored.

75 *Enterprise Switching Order* at 16; *TRO* at ¶ 653. Verizon does cite to a decision by the Massachusetts Commission who apparently believes that it does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271. However, the scope of the Massachusetts Commission's jurisdiction has no bearing on this Commission, because given the differences in enabling statutes, the scope of this Commission's jurisdiction is unique. For example, as the Commission is well aware, the Virginia Corporation Commission has determined that it has far more restrictive jurisdiction in these areas than most other state commissions – and far more restrictive jurisdiction than that provided by the General Assembly to this Commission.

under Section 271. While it may be true that the FCC, in a new position for the agency, currently holds the view that it will not require combinations of network elements under Section 271, it cannot be reasonably suggested that through a footnote in the *TRO* the FCC has assigned exclusive jurisdiction over the combinations issue to itself or outright preempted state action on this issue. In any case, the FCC has no such intent since as it told the D.C. Circuit it was not usurping state authority in the Section 271 area.

Moving on to ratemaking issues, in the *Enterprise Switching Order*, the Commission required Verizon to continue to charge its Tariff 216 rates for network elements to CLECs to serve enterprise customers. Verizon challenges the legality of that decision here. However, Verizon lacks the legal authority to support its legal advocacy."

It is true, and as the Commission is fully aware, under the *TRO,* use of the TELRIC rate methodology is only mandated by federal law for UNEs under 47 U.S.C. §§ 251 and 252. In addressing this issue, the Commission recognized that as to Section 271 pricing, the rates must meet a "just and reasonable" standard under both state and federal law,[76] that the FCC recognized that the state and federal standards were analogous, and that since the Tariff 216 rates had already been adjudicated "just and reasonable" under Section 1301 of the Public Utility Code, it was reasonable to expect that they would also meet the "just and reasonable" rate standard under federal law.[77] While the Commission's logic is completely sound and reasonable, its outcome was merely to maintain the status quo by recognizing the maintenance of Verizon's Tariff 216 rates at least until any enterprise switching disputes under the *Global Order* were fully

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[76] 47 U.S.C. § 201; 66 Pa. C.S. § 1301.

[77] *Enterprise Switching Order* at 16-17. In this discussion, the Commission also states what it understands to be Verizon's position on its issue – that being that Verizon sets rates under Section 271, subject only to review by the FCC.

resolved and not necessarily involving Section 271 pricing issues at all. This approach is completely consistent with all applicable law and the *TRO* and is equally applicable here.

The PCC agrees that the *TRO* indicates that TELRIC pricing is not mandatory under Section 271. However, the fact that the pricing methodology is not mandatory does not resolve the issue of what is either proper or acceptable pricing under Section 271's just and reasonable standard as Verizon seems to think. More specifically, Verizon's apparent belief that "just and reasonable" rates must be higher than TELRIC rates is neither reasonable nor supportable.

As the FCC stated in paragraph 656 of the *TRO*, "As set forth below, we find that the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in Section 201 and 202."[78] Despite Verizon's implications to the contrary, the FCC has not provided any additional requirements as to what wholesale rates for network elements would satisfy Sections 201 and 202 or Section 271. Accordingly, Verizon's arguments in its Main Brief should be summarily rejected.

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78 In describing the ratemaking standard in 47 U.S.C. §§ 201 and 202 (and 66 Pa. C.S. § 1301), as the "just and reasonable" rate standard, parties frequently forget that there is a third prong to the standard – that being that the rates not be discriminatory.

III. CONCLUSION

For all of the foregoing reasons, the Commission should reject Verizon's arguments in its Main Brief and confirm the FCC's national impairment findings for mass market switching, dedicated transport and loops.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participants, listed below, in accordance with the requirements of § 1.54 (relating to service by a participant).

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

ORIGINAL

REPLY BRIEF OF VERIZON PENNSYLVANIA INC.
AND VERIZON NORTH INC.

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I. INTRODUCTION

Because neither the facts nor the law supports their case, the intervenors' briefs ignore both. First, they attempt to divert the Commission's attention from the undisputed evidence and, second, they attempt to change the applicable law so that none of their extensive facilities "count" toward the triggers analysis. This Commission, however, cannot ignore either the facts or the law, and must conclude that the FCC's triggers are satisfied and that competitors are "not impaired" without unbundled access to mass market switching, dedicated transport and high capacity loops in particular Pennsylvania locations

On the facts, the intervening CLECs fail to address the confirmations in sworn discovery of extensive CLEC facilities being used to provide switching, transport and loops. Instead they attempt to taint the largely undisputed factual evidence by devoting many pages to issues along the margins of the case that Verizon has already corrected for (such as TelCove's inclusion of state contract lines, and Allegiance and Cavalier's misidentification of certain transport routes). They never really take on the heart of the factual evidence, because they cannot. For example, Verizon's line count study shows that competitors are serving nearly 350,000 mass market lines (residential and small business customers) using their own switching throughout the eight Pennsylvania Metropolitan Statistical Areas ("MSAs") at issue here. The CLEC discovery responses uniformly confirm that all of the carriers Verizon has identified are in fact serving mass market customers with their own switching. The *TRO* does not require proof that CLECs are serving some precise number of customers – only that they are serving mass market customers.

Similarly, despite their accusations that Verizon's transport study was based on "assumptions," the CLECs have uniformly admitted the existence of all the operational, fiber-fed collocations that Verizon identified, and have acknowledged that they have their own extensive fiber networks in Pennsylvania. Likewise, the CLECs criticize Verizon for not physically "investigating" the customer locations in its loop case, without recognizing that the entire loop case is based on the sworn discovery responses of CLECs that are parties to this case.

Tellingly, several of the key companies in Verizon's switching triggers case – Cavalier, Allegiance, Choice One and XO – filed Main Briefs that did not even address mass market switching, and certainly did not challenge the factual conclusions Verizon reached with regard to their switching activities in Pennsylvania.

The second prong to the CLEC attack is the attempt to rewrite the *TRO*'s bright line, objective triggers to create nonexistent exceptions under which none of the extensive CLEC facilities would actually be counted for triggers purposes. This Commission is required to find "no impairment" if certain objective evidentiary "triggers" are satisfied, (*TRO* ¶ 494) and cannot modify or add to the trigger standards. As discussed in Verizon's Main Brief and again here, there is simply no basis for the CLECs' proffered exceptions and the Commission must consider all of the evidence before it and find that the FCC's triggers are satisfied.

II. MASS MARKET SWITCHING

A. The Mass Market Switching Triggers Are Specific, Objective and Mandatory And Do Not Permit the "Subjective" Analysis Proposed By The Intervenors.

As Verizon described in its Main Brief (VZ Main Brief at 3-7, 10-11), the *TRO*'s switching triggers are objective and mandatory. Under the "self-provisioning trigger," a state "***must*** find 'no impairment' when three or more unaffiliated competing carriers are serving mass market customers in a particular market with the use of their own switches." (*TRO* ¶ 501) (emphasis added). The intervenors nonetheless raise a variety of extraneous issues and scare tactics to divert the Commission from engaging in the straightforward process mandated by the FCC.

First, many intervenors continue to insist that the triggers analysis is "quantitative" and that it requires the Commission to consider factors like the "benefit to consumers" and the impact on competition, and they cite out-of-context snippets of the *TRO* in support of their views.[1] Their position is directly contrary to the deliberately objective nature of the "triggers" analysis described by the FCC. As the Florida Commission recently found, "[t]he 'triggers' analysis is a separate, discrete analysis from the 'potential deployment' analysis, and is, essentially, a counting exercise."[2] Factors that might be relevant in a "potential deployment" context – like operational and economic impairment – are not relevant in a triggers context, because the FCC found that when three competitive carriers have entered the market there is no impairment within that market.[3] The triggers analysis makes no sense as a discrete and objective test if all of the same factors used in a "potential competition" analysis must also be considered in a triggers case. This defeats the entire purpose of the triggers analysis, and certainly cannot be consistent with the FCC's clear direction that "if the triggers are satisfied, the states need not undertake any further inquiry . ." (*TRO* at ¶494.).

Moreover, the intervenors' claims that elimination of the UNE-P would be the death knell to competition are legally irrelevant. The fact that CLECs may "prefer" to use UNE-P over alternative service arrangements does not alter the triggers analysis. As the Ohio Commission recently ruled: "the market entry of competitors using UNE-P to serve customers, and their business plans that are

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[1] *E.g.*, AT&T Main Brief at 11-13; OCA Main Brief at 7-10. For example, AT&T claims that the results of the "potential competition" analysis and the triggers analysis "must" reach the same result, and uses this conclusion to shoehorn factors relevant to the "potential competition" analysis into the objective triggers analysis. AT&T Main Brief at 11-12.

[2] *In re: Implementation of requirements arising from Federal Communications Commission's Triennial UNE review: Local Circuit Switching for Mass Market Customers,* Docket No. 030851-TP (Florida PSC, Order entered February 20, 2004) ("*Florida Order*"). A copy of this Order is attached as Exhibit A to this Brief.

[3] *TRO* at ¶ 501 ("we believe that the existence of three self-provisioners of switching demonstrates adequately the technical and economic feasibility of an entrant serving the mass market with its own switch, and indicates that existing barriers to entry are not insurmountable.")

focused on using the highest profitability entry method, are irrelevant to the determination whether the competitive provider is impaired without access to the unbundled local switching." [4]

Moreover, these overwrought predictions of doom are distorted and inaccurate. For example, OCA claims that "over half" of the local lines served by CLECs are served via UNE-P,[5] but ignores the fact that CLECs use their own switches to serve approximately 350,000 mass market lines in the Pennsylvania markets that are the subject of Verizon's triggers analysis – only slightly less than the mass market UNE-P arrangements in these same areas.[6] There is every reason to believe that the number of facilities-based providers will continue to grow. In fact, several of the CLECs specifically testified that they used the UNE-P only as a "transition" to facilities based service.[7] But resale can – and does -- perform exactly the same "transition" function.[8]

Finally, claims of operational impairment have no place in a triggers analysis. MCI argues that CLECs are operationally impaired in their ability to serve current Verizon customers in Pennsylvania that are served via Integrated Digital Loop Carrier ("IDLC") facilities. (MCI Main

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[4] *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching in the [SBC Ohio and Cincinnati Bell Telephone Company, Mass Market, The Public Utilities Commission of Ohio*, Opinion and Order, Case Nos. 03-2040-TP-COI, 04-34-TP-COI and 04-35-TP-COI, January 14, 2004 ("Ohio Order") at 33 (VZ St. 1.2 (West-Peduto Rebuttal) Attachment 2).

[5] OCA Main Brief at 8. OCA also cites the total number of UNE-P customers within the entire Verizon territory, not the much lower number of customers served by UNE-P within the markets where Verizon is claiming that the mass market switching triggers are met.

[6] The *total* number of mass market lines served through UNE-P arrangements in the triggers area is **[BEGIN PROPRIETARY]** **[END PROPRIETARY]**. (AT&T Cross Ex. 2). The total number of mass market (DS0) lines served by carriers using their own switches in the same triggers area is estimated to be at least 336,000, which is likely an undercount because it omits mass market business lines served by CLECs over their own facilities.

[7] *E.g.*, **[BEGIN PROPRIETARY]**

[END PROPRIETARY] Similarly, Broadview establishes UNE-P arrangements and then migrates customers to Broadview's own switch "as quickly and expeditiously" as possible. CLEC Coalition St. 3.0 (Sommi Dir.) at 7.

[8] In fact **[BEGIN PROPRIETARY]**

[END PROPRIETARY]

Brief at 22-24). Not only are such claims of operational impairment inappropriate, but as MCI is well aware – and as it acknowledges in its testimony (Jenkins Direct at 26-34) – while Verizon does not provision UNE analog voice grade loops over IDLC, it routinely provisions such services to CLECs' customers over alternative copper loops or Universal Digital Loop Carrier ("UDLC") as expressly permitted under the FCC's hybrid loop unbundling rules. (*TRO* ¶ 297.) The Commission cannot consider this claim that the FCC has squarely addressed and dismissed. (*See* VZ Main Brief at 7, n. 12).

Similarly, the claims by some intervenors that the batch hot cut process needs to be addressed here are also without merit. (OCA Main Brief at 55-67; MCI Main Brief at 19-23). The FCC did require the state commissions to "approve . . . a batch cut migration process . . ." within 9 months of the *TRO*. (*TRO* at ¶ 488). As a procedural matter, however, in its October 3, 2003 Procedural Order, the Commission directed staff to "convene a technical conference to evaluate the feasibility of ELP" and "to develop a batch cut process in Pennsylvania," and assigned these matters to a different docket.[9] Verizon has since filed its batch hot cut proposal in that docket, and the Commission has scheduled a collaborative for March 11, 2004.[10] The Commission has therefore made it perfectly plain that these issues are to be addressed in the Commission's separate docket, not in this proceeding.

B. The Commission Should Reject The Intervenors' Divergent And Result-Oriented Market Definitions, And Adopt Verizon's Geographic Market Proposal

Applying the FCC's factors, Verizon appropriately defines the geographic market as 8 designated Metropolitan Statistical Areas ("MSA") in Pennsylvania, and seeks relief for the top three Density Cells (Cells 1, 2 and 3) in each of these MSAs. (Verizon Main Brief at 12). The

9 *Development of an Efficient Loop Migration Process*, Docket M—00031754 (Order entered October 3, 2003).

10 The Commission staff has also communicated informally to the parties that they be afforded due process rights with respect to any disputes remaining after the collaborative process.

public advocates – OCA, OTS and OSBA – essentially agree with Verizon on the result of the market designation, arguing that the appropriate market is the top three Density Cells within the MSAs, and that Density Cell 4 should be excluded. (OCA Main Brief at 14; OTS Main Brief at 9-10; OSBA Main Brief at 7).

The CLEC Main Briefs reveal, on the other hand, a wide divergence of opinion regarding the appropriate "geographic market" for application of the switching triggers. At one extreme, the CLEC Coalition argues for the broadest possible market to be set at the LATA level. (CLEC Coalition Main Brief at 16). At the other extreme, MCI, the PCC and Penn Telecom argue that the geographic market should be set at the most micro level at the wire center. (MCI Main Brief at 6; PCC Brief at 31-32; PTI Main Brief at 8). AT&T and Sprint agree with Verizon that the appropriate market is the MSA, but insist that Verizon should be required to seek relief for the Density Cell 4 areas in these MSAs as well. (AT&T Main Brief at 14; Sprint Main Brief at 7).[11]

Though far apart on their proposals, the CLECs are united in the purpose behind their geographic market arguments. Each one has chosen the market definition that it believes would make it most difficult for Verizon to prove its triggers case – not the market that flows most logically from the FCC's factors, which are "the locations of mass market customers actually being served (if any) by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets profitably and efficiently using currently available technologies." *(TRO* ¶ 495. *See also* 47 C.F.R. § 51.319(d)(2)(i)).

The CLEC Coalition gives no cogent reasons why LATA-wide markets would meet the FCC's requirements, arguing only that these boundaries are "well understood" and conform to

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[11] Other CLECs, such as Allegiance, Cavalier and the Loop/Transport Carrier Coalition (Choice One, Focal, SNiP LiNK and XO), express no opinion on the issue.

existing boundaries in the ILEC's legacy network. (CLEC Coalition Main Brief at 16). Of course, LATA boundaries ***do not*** reflect the efficient construction of CLEC networks or how CLECs view their customers and customers view CLECs, nor do they bear any relevance to the area covered by mass market advertising. Clearly the only purpose to this attempt to broaden the market beyond what Verizon has proposed is to bring in more rural Density Cell 3 and 4 areas, as a complement to the faulty CLEC argument that trigger candidates must serve the entire market ubiquitously (an argument rebutted in Verizon's Main Brief at 25-27). The Commission should reject the LATA-wide market proposal.

MCI's and Penn Telecom's argument that each individual wire center should be considered a separate market is based on the same improper motive and is equally unsupported by consideration of the FCC's factors. MCI and Penn Telecom contend that CLECs enter the market selectively on a wire center basis. (MCI Main Brief at 8; PTI Main Brief at 8). Even the other CLECs disagree with this position. As the CLEC Coalition explained, MCI's wire center proposal is wrong because it "clearly ignores the defining feature of the mass market – i.e., that it requires *mass* for competition to succeed." (CLEC Coalition Main Brief at 18) (emphasis in original). AT&T's Dr. Mayo and OCA's Dr. Loube also agree that the relevant market under the FCC's factors must be broader than the wire center.[12] Verizon's Dr. Taylor discussed extensively why the wire center market definition is wrong.[13] Clearly the only purpose behind these CLECs' unworkably narrow market definition is to fragment the areas in which Verizon may seek relief and to remove from consideration many areas that CLECs could efficiently serve with their existing switching facilities. The Commission should reject the wire-center market proposal.

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[12] OCA St. 1 (Loube/Curry Dir.) at 19-20 (explaining that ILEC retail rates do not vary precisely with wire centers, UNE loop rates vary with density cells, not wire centers, efficient backhaul networks do not serve single wire centers, and marketing expenses are incurred over an area much larger than a wire center); AT&T St. 2.0 (Mayo Dir.) at 19, n.3 ("[d]ue to economies of scale associated with local exchange switches, the relevant geographic market is likely to be broader than single wire centers.")

[13] VZ St. 2.0 (Taylor Reb.) at 28-30.

AT&T and Sprint contend that the market is the entire MSA and that Density Cell 4 must be included in the market. (AT&T Main Brief at 14; Sprint Main Brief at 7). There is no disagreement between Verizon and these parties that the MSA best meets the requirements the FCC set forth in the *TRO*. Verizon ***also*** contends that the market is the whole MSA; it simply has chosen not to seek relief for Density Cell 4, allowing competitors to continue to use unbundled switching and the UNE platform there. The purpose of AT&T's and Sprint's argument that Verizon should be forced to seek relief in Density Cell 4 areas in the MSAs is transparent. It is simply a cog in CLECs' baseless larger argument that Verizon must prove that each CLEC candidate serves the entire "market" ubiquitously – an incorrect argument that Verizon rebuts below. AT&T and Sprint apparently believe that it would be more difficult for Verizon to show three CLEC self-provisioners of switching in each Density Cell 4 wire center, and thus hope to avoid the application of the triggers in the other Density Cells where the trigger is clearly met – but Verizon is not required to seek relief in those Density Cell 4 areas. As a corollary to this argument, AT&T contends that "the broader the geographic market, the more stringent the qualifying requirements must be," arguing that if the Commission sets the market at the MSA level it must disqualify more of the CLEC competitors from consideration under the triggers. (AT&T Main Brief at 21). The *TRO* trigger standards are straightforward and objective, however, and nothing in the order gives this Commission the option to change those standards based on its selection of the market.[14]

The Commission should therefore select the 8 identified MSAs as the relevant geographic markets, and should grant Verizon the relief requested in the top 3 Density Cells within those MSAs.

[14] *Id.* at 38.

C. Verizon's Definition of the Mass Market (Cross-Over Point) Is Reasonable And Supported By The Evidence.

Verizon proposed to distinguish between mass market customers on the one hand, and DS1 enterprise customers on the other, based upon the actual market conduct of customers; i.e., mass market customers are those customers that are actually being served with one or more voice grade DS0 circuits, while enterprise customers should be those customers actually being served by DS1 or higher capacity loops. (VZ Main Brief at 18-19). According to the FCC, mass market customers "are analog voice customers that purchase only a limited number of POTS lines, and can only be economically served via DS0 loops." (*TRO* ¶ 497). The FCC left it to the states to determine "where it makes economic sense for a multi-line customer to be served via a DS1 loop." (*Id.)*

Most of the intervenors agree with Verizon's approach. AT&T, for example, says that "the appropriate cross-over point between DS0 and DS1 loops is sufficiently high such that there is no practical need for the Commission to draw a line at some arbitrarily low number."[15] Other intervenors challenge Verizon approach, but their claims are without merit.

PCC, for example, claims that Verizon's proposal established "no cutover" and therefore is not compliant with the FCC's directive. (PCC Main Brief at 24). But there is no requirement in the *TRO* or the implementing regulations that a specific *number* of lines be selected for a cross-over; only that the state determine "where it makes economic sense for multi-line customers to be served via a DS1 loop." (*TRO* at ¶ 497). As both AT&T and the CLEC Coalition agree, the cross-over can, and should, be defined by customers' action, not regulatory fiat.[16] Other intervenors did not expressly object to Verizon's proposed cross-over point, but nonetheless complained that Verizon

[15] AT&T Brief at 72. The Stipulation between the OCA and the CLEC Coalition (CLEC Coalition Ex. No.1) also agrees that there is no need to set a specific number of lines for a cross-over point.

[16] AT&T agrees that "customers, rather than regulators . ." should decide the economic crossover point. *Id.* at 74.

treated every DS0 line as a mass market customer.[17] But the FCC's regulations themselves treat DS0 as virtually synonymous with "mass market." The caption for the section addressing mass market switching is entitled" "DS0 capacity (*i.e.*, mass market) determinations," thereby defining the mass market as DS0 capacity.[18]

Moreover, the complainants cannot have it both ways; once a cross-over point is selected, it must be applied consistently as the dividing line between enterprise and mass market customers for the application of the trigger,[19] and for determining if CLECs are in fact serving the "mass market" using their own switches.[20] Either the customers are mass market or they are not, and if they are, they count toward the self-deployment trigger and relieve Verizon of its obligation to provide unbundled switching to serve *all* mass market customers. The FCC specifically clarified this point in response to criticism from the dissenting Commissioners:

> If, on the other hand, a state finds based on the record that a cut-off of more than four lines is appropriate, more multi-line customers will be treated as mass market customers. . . . [A]s Commissioner Abernathy points out, "dozens of CLECs serve mass market customers of such size using their own switches." *Commissioner Abernathy Statement* at 8, n. 27. Such widespread deployment of competitive switches would be considered under our mass market triggers. In such markets, then, it is more likely that there will be a finding of no impairment for the *entire market*. . . .

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[17] *E.g.*, MCI Main Brief at 25; OCA Main Brief at 34-35.

[18] § 51.319(d)(2).

[19] These parties apparently ignore the fact that the FCC has already determined that there is no impairment for switching in the enterprise market, and this Commission did not seek to overturn that finding. *Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market*, Docket I-00030100 (Order entered December 18, 2003) (the Commission did "not find any compelling justification to petition the FCC for a waiver of no impairment for local switching to the enterprise market.") *Order* at 2 & 13 Therefore, for all of the DS0 customers that the intervenors apparently claim are part of the "enterprise market," there is no impairment and no Section 251 requirement to provide unbundled switching.

[20] OCA makes a related, but equally baseless, claim that some DS0 customers may be large customers that purchase individual lines and therefore should not "count" as mass market lines. OCA Main Brief at 34. While there may be some isolated incidents of this phenomenon, as discussed below, the overwhelming majority of the lines Verizon identifies as mass market were verified as such by the CLECs themselves and are not the "isolated DS0s" purchased by enterprise customers.

TRO ¶ 497 n. 1546 (emphasis added). Verizon's mass market definition is completely consistent with the *TRO* and should be adopted.

D. Verizon's Data In Support Of Its Switching Triggers Case Is Highly Reliable And Largely Corroborated By The CLECs Own Data

As described in Verizon's Main Brief, Verizon showed the presence of multiple CLECs serving DS0 mass market customers with their own switching through a Line Count Study that used data from Verizon's own billing databases and the E911 data base. (Verizon Main Brief at 20-21). In addition, Verizon used data provided by the CLECs themselves during discovery to corroborate Verizon's own data and to identify instances where Verizon's data would not necessarily reflect switching trigger candidates (e.g., if they were total "bypass" providers to mass market business customers).

Several intervenors claim that, because the Verizon counts and the CLEC counts don't match exactly, Verizon has not met its burden to "reconcile and validate" the data.[21] As an initial matter, there is absolutely no requirement in the *TRO* that Verizon demonstrate with precision the exact number of mass market lines or customers that are served by competitors using their own switches. To the contrary, the *TRO* only requires that "the competitive switch provider ... be actively providing voice service to mass market customers in the market." (*TRO* at ¶ 499). The *TRO* does not require a specific count of those customers.

In fact, Verizon's witnesses gave several plausible reasons why the data from the Line Court Study would be unlikely to match perfectly the data provided by the CLECs themselves. There could be differences based on the time frame in which the counts were made, or there could be differences in how the CLECs interpreted the Commission's data requests.[22] In addition, Verizon's Line Count study does not include mass market business customers served by CLECs like cable

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[21] *E.g.*, CLEC Coalition Main Brief at 10-14; PCC Main Brief at 27; OCA Main Brief at 45.

[22] Tr. at 114-115.

companies, so those CLECs would obviously present different data than Verizon's Line Count. The critical point is that – under either Verizon's line count or the CLEC's line count -- the CLECs identified as trigger candidates are serving mass market customers. Verizon's data alone is sufficient to meet the triggers; the CLEC data is additional corroboration.

Moreover, while the intervenors poke around the margins of the data, there is no question that the CLEC data on the whole corroborates Verizon's triggers analysis in the various markets. Most of the differences between the various counts are relatively minor and can easily be attributed to timing and similar factors. For example, **[CLEC PROPRIETARY]**

[CLEC PROPRIETARY].[23] OCA and PCC challenge the differences between Verizon and CLEC data for Choice One, (OCA Main Brief at 44; PCC Main Brief at 61) but ignore entirely Choice One's admission that it misunderstood the Commission's instructions and counted *customers* instead of lines. Given that small business customers often have more than one line, the comparison between the number of DS0 voice grade loops identified by Verizon and the number of DS0-only small business customers identified by Choice One is remarkably consistent. (Choice One Ex. 1). Moreover, providers like CTSI and Comcast that provide service using their own facilities would always have a different count from Verizon The main point, however, is that in each case the CLECs themselves admit that they provide DS0 service using their

[23] As other examples, looking at the Philadelphia MSA, **[BEGIN CLEC PROPRIETARY]**

[END CLEC PROPRIETARY].

own switches, corroborating Verizon's claim that they meet the mass market switching trigger. The Commission cannot ignore this evidence.

The most vocal debate concerns Verizon's treatment of the lines attributed to Adelphia and PECO TelCove, but Verizon has explained how it treated these entities consistent with its understanding of Adelphia's confusing and tardy responses to the Commission's data requests and Verizon's follow-up requests. As Verizon explained in its Main Brief (at 33-35), Verizon is *not* relying upon lines provided by TelCove to the Commonwealth to support its triggers case.[24] It is important to note that ***those lines have never been part of Verizon's count.*** As Mr. West explained, the lines attributed to Adelphia in Verizon's initial count are standalone voice grade loops provided by PECO TelCove, and these are not part of the Commonwealth contract.[25]

Finally, some parties challenge the reliability of using the E911 data to support Verizon's claim, but the responses by facilities providers like RCN and Comcast generally corroborate that the E911 data accurately identifies CLECs that serve mass market customers using their own switches. **[CLEC PROPRIETARY]**

[CLEC PROPRIETARY]. Moreover, both the Department of Justice and the FCC relied upon the E911 data in the Pennsylvania 271 proceeding, thereby endorsing its overall reliability.[26]

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[24] To avoid any confusion on this point, Verizon removed the Adelphia counts completely from the CLEC Counts column of Exhibit 1 to its Main Brief.

[25] *See* Tr. at 333-338

[26] *See, e.g., In the Matter of Application by Verizon Maryland Inc., Verizon Washington, DC, Inc. Verizon West Virginia Inc., etc., for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington DC, and West Virginia*, No. 02-384, 18 FCC Rcd 5212 (Rel. March 18, 2003(¶ 12 (recognizing the FCC's reliance on E911 data to track the number of competitive lines). OCA also raises, for the first time in its Main Brief, whether Verizon properly used aggregate E911 data in connection with this proceeding. OCA's claims are without merit. OCA Main Brief at 42. The portion of the E911 statute identified by the OCA only applies to "customer numbers, names and service addresses," none of which was disclosed here. Verizon used only aggregate data that did not include any end user customer specific data. Specifically, Verizon did not in any way use the MSAG data specifically referenced in the OCA's Brief. Moreover, even if there were any question about the disclosure of this data, it was

Under the *TRO*, it would highly irresponsible for the Commission to simply ignore the overwhelming data provided by both Verizon and the CLECs themselves that demonstrates that there are self-providers of switching in Pennsylvania serving mass market customers. There is nothing in the *TRO* that supports the intervenors' requests that it do so.

E. The Intervenors' Reasons For Excluding Various Categories of Carriers From The Triggers Are Not Supported By The *TRO.*

As described in Verizon Main Brief (pp. 23-33), the CLECs and other intervenors have consistently urged the Commission to ignore the *TRO* description of the triggers analysis by concocting various unwarranted "exclusions" to apply to various categories of carriers from the triggers analysis. The intervenors have taken enormous liberties with the plain language of the *TRO* in an increasingly desperate attempt to prevent a reasoned application of the straightforward "triggers" analysis. The poster child for this approach is AT&T's bogus "exception" to the triggers for companies that use both UNE-P and UNE-Loops, although AT&T provides no citation to the *TRO* to support this exception, and there is in fact no support.[27] But, as described in greater detail below and in Verizon's Main Brief, this is not the only instance where the intervenors have ignored the clear and straightforward application of the mass market switching triggers.

These attempts to twist the plain meaning of the *TRO* and implementing regulations should not be permitted. As the FCC explained to the Court of Appeals, "for switching for mass market customers, the [Triennial Review] Order requires *automatic elimination* of unbundling in any market where three competitors have deployed switching, either through traditional circuit switches

required by the Commission's data requests and is being used in connection with the Commission's investigation into this matter. In many instances, the aggregate E911 data is the only source of such information.

[27] *See* AT&T Main Brief at 36.

or intermodal alternatives such as cable or packet switches."[28] The Commission should reject the intervenors intellectually dishonest attempts to distort the plain meaning of the *TRO.*

1. CLECs Serving Either Mass Market Business Or Residence Customers Count Toward The Triggers.

As explained in Verizon's Main Brief (at 23-24), the *TRO* includes within the mass market both residential and small business customers, and CLECs meet the triggers so long as they are "serving mass market customers . . . with the use of their own switch." § 51.319(d)(2)(ii)(A)(1). Several intervenors are now claiming that CLECs that do not serve any residence customers, or that do not serve *both* residence and business customers, do not "count" for purposes of the triggers.[29] These claims are illogical and directly refuted by the *TRO.*

PCC and OTS claim that a CLEC must serve both residence *and* business mass market customers in order to qualify as a triggers candidate, and both claim that the *TRO* supports this interpretation where it states "mass market customers consist of residential customers and very small business customers."[30] But it is completely illogical to read that statement – which describes what is included in the category "mass market" – as mandating that a triggers candidate must include ***both*** types of customers. This argument is analogous to saying that because the category of CLECs includes both resellers and facilities-based providers, an entity is not a CLEC unless it does both. Contrary to the OTS's claim, this is not a "plain reading" of the *TRO,* but a calculated *mis*reading.

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[28] Opposition of Respondents to Petitions for a Writ of Mandamus at 2, *United States Telecom Association v. FCC*, Nos. 00-1012, 00-1015 *et al.* (D.C. Cir.) (Filed with the Court on October 9, 2003) (emphasis added).

[29] *E.g.*, MCI claims that "business only" mass market providers do not count (MCI Main Brief at 29); PCC and OCA both claim that a CLEC must serve "both" in order to qualify under the triggers. PCC Main Brief at 38-40; OTS Main Brief at 11-12.

[30] PCC Main Brief at 38-40; OTS Main brief at 12.

PCC also brazenly cites paragraph 499 of the *TRO* – ***as originally issued*** –to support its claim that a triggers candidate must serve both residence and business customers.[31] However, as even PCC is forced to acknowledge, the FCC issued an Errata that specifically *eliminated* any requirement that CLECs offer service to all segments of the mass market to count toward the self-deployment trigger. The following shows the redlined changes to *TRO* ¶ 499 made by the FCC in the Errata:

> Moreover, the identified competitive switch providers should be actively providing voice service to mass market customers in the market. ~~They must also~~ Identified carriers providing wholesale service should be actively providing voice service used to serve the mass market and be operationally ready and willing to provide service to all customers in the designated market. ~~They should be capable of economically serving the entire market, as that market is defined by the state commission. This prevents counting switch providers that provide services that are desirable only to a particular segment of the market.~~

(*TRO* ¶ 499). PCC claims that the FCC "could not have made the substantive changes to the *TRO*" through the Errata, because an Errata is "a procedural tool used to clarify its decisions and not to make substantive change to them."[32] But this is exactly what the Errata did – it clarified that CLECs serving one segment of the mass market – small business customers – count toward the trigger even if they do not serve the residential segment of the mass market. This clarification was necessary to conform ¶ 499 to the rest of the text of the *TRO,* which makes it clear that the mass market contains both residential and small business customers, and to the FCC's regulations which contain no distinction between residential and business mass market, but require only that trigger candidates "are serving mass market customers in the particular market with the use of their own local switches." § 51.319(d)(2)(iii)(A)(1). In any event, the Commission certainly cannot rely upon

[31] PCC Main Brief at 40- 41.

[32] *Id.* at 40. PCC makes the circular argument that the pre-Errata ¶ 499 must still have substantive viability because the rest of the TRO supports requiring triggers candidates to serve both residential and business customers, but provides no citation to any other section of the *TRO* to support its argument.

the pre-Errata ¶ 499 to support a finding that triggers candidates must serve both business and residential customers.

In addition, neither PCC nor OTS – nor any of the other parties that claim that triggers candidates must serve residential customers -- address the sheer illogic of their position in terms of the operation of the triggers. Under their interpretation, if three CLECs served ***only*** residential customers and three CLECs served ***only*** business customers, the triggers would not be met. Similarly, if two triggers candidates served only business mass market customers, one served residential, and two served both, the triggers would not be met. This interpretation is not supported by the language of the *TRO,* nor does it make any sense from a policy perspective.

The policy rationale supporting the FCC's triggers analysis is that "the presence of facilities-based competitors is the best indicator that requesting carriers are not impaired." *TRO at* ¶ 498. This rationale is met regardless of whether the mass market customer is residential or business customer. This Commission should follow the lead of the Ohio Public Utilities Commission and find that "once an unaffiliated CLEC is determined by the Commission to be providing service to mass market customers (customers with a limited number of POTS lines regardless of whether they are residential or small business) in a particular geographic market using its own switching equipment, the CLEC will be considered as one of the 'three self-provisioners of switching' for the purpose of the trigger analysis."[33]

Finally, although the PCC claims that a carrier must serve both residential and business mass market customers to qualify, it seeks to eliminate one carrier – Full Service Networks ("FSN") – as a trigger candidate on the grounds that it serves residential customers that live in an apartment complex. The PCC claims that these customers are "enterprise customers" for the purposes of the *TRO.* (PCC Main Brief at 57). The PCC is wrong. The out-of-context portions of the *TRO* cited by

[33] Ohio Order at 33-34. .

the PCC (*TRO* ¶ 197 n. 624) relate to the analysis of impairment with respect to *loop* facilities, not switching. As the FCC made clear, the difference between mass market and enterprise customers "may vary slightly from element to element because of the different economic considerations that surround different elements." *TRO* ¶ 123. The mass market for the purposes of *switching* includes all residential customers served over DS0 loops, even those that reside in multi-tenant buildings.

Moreover, FSN admits that it is using **[BEGIN CLEC PROPRIETARY]**

[END CLEC PROPRIETARY] Clearly, FSN meets the requirements of the FCC's trigger rule.

Nevertheless, the PCC claims that since FSN is planning to **[BEGIN CLEC PROPRIETARY]**

[END CLEC PROPRIETARY]

2. There is No Exclusion For An "Enterprise" Switch

AT&T and PCC make the related claim that CLECs that use an "enterprise switch" should be excluded from any triggers analysis. (AT&T Main Brief at 30-31; PCC Main Brief at 49-50). PCC goes so far as to claim that if 80% of a switch is used to serve enterprise customers, it does not "count" as a triggers candidate. (PCC Main Brief at 49). There is no basis in the *TRO* for such an exclusion. The FCC's regulations themselves explicitly say that a carrier counts 'if it is serving mass market customers ... with the use of [its] own local switch."[34] There is no requirement in the regulation that the switch serve a certain ratio of mass market and enterprise customers; if it serves mass market customers, it counts. It is also plain from the text of the order that the FCC understood that switches could serve both enterprise and mass market, and that did not in any way disqualify those providers from being triggers candidates. For example, ¶ 508 specifically references "switches being used to serve the enterprise market are likely to be employed in the mass market as well." While the FCC rejected counting switches serving *only* enterprise customers as part of the triggers, if there are three providers that use those switches to also serve mass market customers, the triggers are met.

Several parties also claim that Verizon's case is based on a few DS0 or fax lines provided to large enterprise companies (or to the chief executives of those companies.) (e.g., AT&T Main Brief at 31-32, 37; OCA Main Brief at 37) While there may be a few isolated lines that fall into this category, it strains credulity to suggest that all – or even a large portion – of the mass market lines Verizon has identified are "fax lines."[35] Significantly, those CLECs that responded to the Commission's data request were specifically asked to identify the number of "(a) residential

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[34] § 51.319(d)(2)(iii)(A)(1).

[35] Moreover, even if an end user customer hooks up a fax machine at its premises to a POTS line, the service provided by the carrier is still POTS service. In other words, a fax line is just a normal voice grade analog line, as anyone who has ever picked up the handset on a fax machine and used it to make a voice call knows. The FCC explicitly distinguished between "traditional narrowband services (*e.g.*, voice, fax, dial-up Internet access) and high-capacity services like DS1 and DS3 circuits." *TRO* ¶ 200 n. 627.

customers; (b) ***business customers to whom you provide only voice-grade or DS0 lines***; and (c) business customers to whom you provide DS1, ISDN-PRI, or other high capacity lines." (Commission Data Request Nos. 5). The responding CLECs would not have included such isolated "fax lines" or "executive lines" in their responses to parts (a) and (b) of this data request, and where the CLEC provided a response to parts (a) and (b) of Data Request No. 5, those are the ***only*** lines included in the "CLEC COUNTS" column of Verizon's Exhibit. In other words, the CLECs responding to the Commission's data requests most certainly are not identifying "fax lines" but bona fide mass market customers.

This is particularly relevant with respect to the lines identified by XO. Verizon presented evidence in its Direct Testimony that XO **[CLEC PROPRIETARY]**

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[36] In other words, PCC is wrong in interpreting XO's responses to the Commission's Data Requests as identifying only **[BEGIN CLEC PROPRIETARY]**

[END CLEC PROPRIETARY][37]

As discussed earlier, these CLEC counts in their responses to the Commission's Data Requests largely corroborate Verizon's own Line Count Study and support a finding that there are multiple CLECs serving mass market customers using their own switches in every MSA included in Verizon's case.

3. The Intervenors Have Advanced No Principled Basis For Eliminating Cable Telephony Providers From The Triggers Analysis.

The intervenors urge the Commission to ignore the express requirement of the *TRO* that triggers candidates include "intermodal providers of service comparable in quality to that of the incumbent LEC."[38] While they claim that cable telephony providers do not count because they do not use the incumbent's loop facilities, the FCC rejected that very premise.[39]

[END CLEC PROPRIETARY]

[37] Since the close of record in this case, XO won the right to purchase Allegiance's assets in bankruptcy. Although the sale has not yet been consummated, Verizon recommends that the Commission count XO and Allegiance together in the trigger analysis in anticipation of that sale. Contrary to the claims of PCC (PCC Brief at 59), this Commission does not have the discretion to refuse to count Allegiance as a triggering carriers based on the PCC's rank speculation that XO will no longer provide service to mass market customers using the Allegiance assets. Not only is the record devoid of any evidence to support this claim, but the TRO is clear that this is precisely the type of evidence that this Commission *may not* consider in applying the triggers. *TRO* ¶ 500 ("For the purposes of these triggers, we find that states shall not evaluate any other factors, such as the financial stability or well-being of the competitive switching providers. Competing carriers in Chapter 11 bankruptcy protection are often still providing service. Regardless of their financial status, the physical assets remain viable and may be bought by someone else and remain in service.").

[38] § 51.319(d)(2)(iii)(A)(1). .

[39] *See TRO* ¶ 501, n. 1560, which specifically recognizes that some triggering carriers would be using their own loops, but concluded, "Nevertheless, the presence of three competitors in a market using self-provisioned switching and loops shows the feasibility of an entrant serving the mass market with its own facilities."

The only permissible basis for excluding intermodal providers of service like cable providers from the triggers analysis is if their service is not "comparable in quality" to the ILECs. But, as summarized in Verizon Main Brief (at 28-31), Verizon presented evidence that cable telephony is "comparable" in quality to traditional telephone service, and this evidence was not seriously rebutted. The only claim about quality that was raised by anyone is that cable telephony does not provide remote back-up power in the case of a power outage.[40] However, the very evidence that they rely upon indicates that leading cable telephony providers *do* provide back-up power. (See VZ Main Brief at 30). Moreover, if this claim alone were sufficient to disqualify cable telephony, then it is unlikely that the FCC would have *directed* state commissions to consider intermodal providers as triggers candidates since "intermodal" service is, *by definition*, not *identical* to Verizon's service. Otherwise, it would not be "intermodal."

With respect to Comcast, one of the cable telephony providers that Verizon has identified as a triggers candidate in the Pittsburgh MSA, OCA and others claim as an additional disqualifying factor that the switch Comcast uses to provide service is owned by AT&T. (OCA Main Brief at 52). The record evidence shows that this switch **[CLEC PROPRIETARY**

[CLEC PROPRIETARY]. The *TRO* states that "if a carrier were to acquire the long term right to the use of a non-incumbent LEC switch sufficient to serve a substantial portion of the mass market, that carrier should be counted as a separate ,

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[40] *E.g.*, MCI St. 1.0 (Pelcovits Dir.) at 63-64; Tr. at 510-11.

[41] VZ Cross Ex. 6, (AT&T response to Switching Question 7)

unaffiliated self-provider of switching."[42] Under this standard, Comcast, **[BEGIN CLEC PROPRIETARY]** **[END CLEC PROPRIETARY]**, qualifies as a self-provider of switching under the FCC's rules. Significantly, while OCA raises this issue, AT&T itself has never denied that Comcast's arrangement with AT&T is the kind of long-term arrangement contemplated by the FCC.

4. CLECs with ILEC Affiliates Are Trigger Candidates

The CLECs further claim that the Commission may not count CLEC affiliates of ILECs operating out-of-franchise as triggering CLECs. As Verizon demonstrated in its Main Brief (pp. 31-33), there is no basis in the FCC's rules for this limitation. To the contrary, the FCC affirmatively states that affiliates of incumbent LECs serving the mass market outside of the incumbent's territory can count toward the self-deployment trigger, if they otherwise meet the requirements of the trigger. (*TRO* n. 1352 (noting deployment by affiliates of incumbents "could be considered by states in determining whether the triggers discussed below have been satisfied.")).[43] Here, each of the CLEC affiliates of ILECs identified in Verizon's direct case "are serving mass market customers in the particular market with the use of their own local switches" (Rule 319(d)(2)(iii)(A)), using UNE loops leased from Verizon, and thus unequivocally meet the requirements of the trigger.

Penn Telecom argues, however, that the FCC only contemplated CLECs that were affiliated with "large, independent incumbent LECs" expanding into adjacent areas, and therefore CLEC affiliates of *small* independent ILECs – like Penn Telecom – are excluded from being triggers candidates. (Penn Telecom Main Brief at 22-23). There is no basis in the *TRO* for excluding ILEC

[42] *TRO* ¶ 499 n. 1551,

[43] AT&T apparently relies upon ¶ 440, to which note 1352 is appended, to support its exclusion of ILEC affiliates from a triggers analysis, (AT&T Main Brief at 34-36), but nothing in paragraph 440 can be read to contradict the clear language of the "triggers" analysis which unambiguously requires that ***any*** "competing provider ... serving mass market customers . ." using its own switch must be counted as a triggers candidate.

affiliates simply because they are small, and, moreover, such an exclusion would turn the entire rationale for the *TRO* completely on its head. The fact that a ***small*** CLEC affiliate is able to successfully overcome any alleged operational and economic difficulties to serve mass market customers using its own switches and unbundled loops leased from Verizon is powerful evidence that there is no impairment in that market.

5. The "De Minimus" Exclusions Proposed By The Intervenors Are Not Supported by the TRO.

Many intervenors claim that the *TRO* excludes "de minimus" participants in the market, and they propose various line-drawing schemes designed to identify players that they believe fall into this category. For example, OCA – without any citation whatsoever to the *TRO* – suggests that each trigger candidate must serve 3% of the market. [44] Others accuse Verizon of relying upon triggers candidates that serve only "one or two" mass market customer to make its case for relief. [45] These extravagant claims are nothing more than attempts to divert attention from the overwhelming evidence that the triggers are met by making ridiculous assertions that have nothing to do with the actual evidence presented in this case.

As Mr. West explained, the TRO does not have a "de minimus" exception, so that ***theoretically*** a CLEC could serve one or two customers and qualify as a triggers candidate. Instead, the FCC concluded that requiring three separate triggers candidates "adequately demonstrates the technical and economic feasibility of an entrant serving the mass market with its own switch and indicates that existing barriers to entry are not insurmountable." (*TRO* at ¶ 501). In other words,

[44] OCA Main Brief at 46. The OCA's 3% test is misguided for several reasons. There is no market share test in the *TRO*, nor any other basis for this proposed test. Moreover, it makes no logical sense. For example, under the OCA's test, the triggers would not be met where two providers have 10% of the market while another provider has only 1% -- an anomalous result even under the OCA's pretzel logic.

[45] *E.g.*, AT&T Main Brief at 34-36; OCA Main Brief at 45-47.

the stringent requirement to have ***three*** separate trigger candidates addresses any possible concerns with any ***single*** candidate among those three.

More important, however, Mr. West also emphasized that the "one customer" scenario that the intervenors have latched onto was "an extreme hypothetical" that is "not consistent with the evidence that we present to show that there is no impairment to local switching." (Tr. 95-96). There is not a single geographic market area on Pennsylvania where Verizon is relying as the third trigger candidate on providers that serve only one or two customers – or even fewer than 100 mass market customers.[46] For example, looking at the Philadelphia MSA, the intervenors focus on the providers like **[CLEC PROPRIETARY]** **[CLEC PROPRIETARY]** that have only a handful of customers in the Philadelphia MSA, but apparently ignore the fact that there are 11 more CLECs serving approximately 100,000 mass market customers using their own switches in the Philadelphia MSA.[47] And Philadelphia is not alone; a similar analysis could be done in the other MSAs.[48] Verizon has not presented a case that relies upon "de minimus" trigger candidates, but a case that plainly shows that there is no impairment for mass market switching in the MSAs in Pennsylvania for which Verizon seeks relief.

III. DEDICATED TRANSPORT

The CLEC intervenors uniformly ***admit*** the existence of an extensive network of competitive fiber facilities and SONET rings in Pennsylvania, as well as the presence of operational fiber-fed collocations at all of the locations identified by Verizon through its inspections and CLEC

[46] Verizon does not concede, however, that a CLEC with fewer than any number would not "count" under the FCC's analysis, only that such a circumstance does not exist here.

[47] *See* Verizon Main Brief Exhibit 1, which provides data for all of the MSAs.

[48] As another example, Allentown-Bethlehem- Easton has fully six CLECs with well over 100 lines each – either by Verizon's count or their own count; and Harrisburg-Carlisle MSA has five CLECs in that category.

discovery responses. In fact, Penn Telecom, which bills itself as a very small operation, brags that it has over 300 route miles of fiber in the Pittsburgh area alone. (PTI Main Brief at 4).

In the few discrete cases where CLEC parties identified mistakes in their discovery responses regarding the existence of facilities (for example, Cavalier's acknowledgement that it mistakenly reported fiber-fed collocations in two offices and Allegiance's clarification that some of the transport routes it identified were actually UNE transport), Verizon already made necessary clarifications in its updated pairing reports attached as Exhibit 2 to its Main Brief.

The dispute here is ***not*** whether these extensive CLEC facilities exist, but rather whether they should be counted as competitive sources of self-provisioned or wholesale dedicated transport within the meaning of the *TRO*'s dedicated transport triggers. The parties that oppose Verizon's transport triggers case raise very similar arguments attempting to rewrite the *TRO* to create nonexistent exceptions under which they contend certain types of facilities do not qualify to be counted under the triggers. While the CLECs chastise Verizon for resting its case on unfounded "assumptions," in fact they have largely confirmed Verizon's evidence and assumptions regarding the existence and configuration of facilities. Their actual dispute is not over the facts, but rather over how the admittedly existing facilities should be treated for purposes of the *TRO* triggers. For example:

- Some CLECs argue that if any part of a CLEC's fiber facilities are used for "backhaul" -- transporting traffic between the CLEC's collocation and the CLEC's switch – then it cannot be counted for the triggers. This argument is based on a deliberate confusion of two separate concepts under the *TRO*. While Verizon is no longer required to unbundle ***its own*** dedicated transport facilities for CLEC's to backhaul traffic to their own switches, that does not mean that CLEC fiber that is otherwise operationally ready to connect two Verizon offices (but is also used or usable for backhaul) cannot count as an alternative transport facility under the triggers. Indeed, the *TRO* acknowledged that most, if not all, CLEC transport would be used for backhaul because of the way CLEC networks are configured, so there would be no purpose to the triggers if these facilities were not to be counted. (*See* Verizon Main Brief at 53-56). In its brief, AT&T abandons this argument and agrees that backhaul facilities can be considered. (AT&T Main Brief at 77).

- Some CLECs argue that if their fiber facilities pass through an intermediate CLEC switching location in the process of connecting their collocation in one Verizon central office to their collocation in another, then they cannot be counted for the triggers. The FCC's rules, however, expressly recognize that a route still qualifies as dedicated transport even if it passes through an "intermediate wire center or switch." Moreover, simply because the fiber passes through a CLEC wire center does not mean that it must be "switched." As AT&T acknowledged, a circuit could be completed simply by attaching digital cross-connect equipment at this "hub." (Tr. at 438, 448; *see also* Verizon Main Brief at 56-59). Even AT&T admits that facilities that pass through and are connected at a CLEC "switching location" qualify as dedicated transport under the rule. (AT&T Main Brief at 81).

- Some CLECs argue that if network modifications are required in order to complete a circuit between two Verizon central offices then the existing fiber facilities between those two offices cannot be counted for the triggers. The *TRO*, however, only requires a CLEC to be "operationally ready" to provide transport over a route – not to have a dedicated circuit already established. As AT&T admits, a connection could be completed simply by using digital cross-connect equipment *that AT&T already has.* (Tr. at 438, 448). This is not a major or particularly costly undertaking, and comes under the category of "routine network modifications" that do not prevent CLECs from being considered "operationally ready." (See Verizon Main Brief at 59-62).

- Some CLECs argue that because AT&T leases "special access" from Verizon on some, but not all, of the routes where Verizon contends AT&T is operationally ready to self-provision transport, that AT&T (and presumably other CLECs) is not operationally ready to provide transport themselves. This argument is a non sequitur, first because there are many reasons a carrier could be leasing special access even if it has its own operationally ready facilities, second, the *TRO* mentions nothing about a CLEC's use of ILEC "special access" as a measure of operational readiness or trigger candidacy, and finally because the only record evidence on this issue applies to one carrier and a few routes, and proves nothing regarding the bulk of Verizon's case.

A. The CLECs Largely Admit The Presence Of Fiber Facilities And Operational Collocations As Depicted In Verizon's Testimony

As discussed at page 38 of Verizon's Main Brief, no carrier has contended that Verizon has misidentified its operational, fiber-fed collocations based on Verizon's inspection, and therefore the Commission must conclude that the CLECs have operational collocations served by non-Verizon fiber at the Verizon wire centers identified in Verizon's testimony and exhibits. The CLEC complaints that Verizon simply "assumes" the fiber is operational are misleading and untrue. Verizon visually inspected many of these collocation arrangements, and either through their discovery responses or their failure to make any specific denials the CLECs have admitted that they are operational.

Similarly, as discussed on pages 42 through 45 of Verizon's Main Brief, the CLECs admit to the presence of their own extensive fiber networks in Pennsylvania connected to these collocation arrangements, and their admissions in discovery or other evidence indicates that they have the optronics necessary to channelize that fiber into the lower capacities at issue in this proceeding. Contrary to some carriers' argument that Verizon is simply "assuming," without any additional evidence, that all carriers that have provisioned fiber at the OCn level have channelized that capacity into DS3 (AT&T Main Brief at 89; PCC Main Brief at 94; Sprint Main Brief at 28), in fact the carriers have largely admitted to provisioning DS3 transport for themselves or retail users (meaning they have the equipment in place to channelize to that capacity) or admitted that they have DS3 terminating equipment. (VZ Main Brief at 42-45). These admissions are consistent with the uncontested fact that CLECs typically activate their fiber at the OCn level and then attach the optronics required to provide lower speed service, such as DS1 and DS3. (VZ Main Brief at 38).[49]

Allegiance and Cavalier devote their briefs almost entirely to unreasonably criticizing Verizon for relying on ***these carriers' own discovery responses*** to update its case in its Supplemental Direct Testimony. However, based on these carriers' corrections or clarifications to the record made in rebuttal testimony or at the hearings themselves, Verizon made the corresponding corrections to its pairing reports attached as Exhibit 2 to its Main Brief, resulting in a reduction in the number of routes for which Verizon shows that the triggers are satisfied. (Verizon Main Brief at 41-42).

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[49] There is no self-provisioning trigger for DS1 transport. As to carriers that satisfy the wholesale trigger for DS1 transport, see pages 48-50 of Verizon's Main Brief for a discussion of the evidence that they offer or have the equipment in place to channelize their OCn transport facilities to the DS1 level.

Allegiance apparently misunderstood one of the Commission's transport questions and reported having its own fiber at collocation arrangements in 37 wire centers where it now clarifies that it relies only on Verizon UNE transport. (Allegiance Main Brief at 7). Verizon relied on that misreported information in its Supplemental Direct Testimony, but once Allegiance made it clear that a mistake had been made, Verizon removed it from the new pairing report attached to its Main Brief. Verizon's new pairing reports do not contain the collocation information that Allegiance misreported in its discovery responses. Verizon corrected not only for the four wire centers given as an "example" in Allegiance's direct testimony, but the 37 locations depicted on Allegiance's Table 4. For the remainder of the routes for which Allegiance has been identified as a self-provider of DS3 transport, the Commission should consider Allegiance to have admitted this fact. (*See e.g.*, Allegiance Main Brief at 9) ("the characterization of Allegiance as a self provider of transport is incorrect in ***a majority*** of cases"-- i.e., the case Verizon has corrected for in its revised exhibits).[50]

Cavalier's Main Brief similarly spends the bulk of its time insisting that Verizon make adjustments to its pairing reports that Verizon has already made. Verizon has already removed the information that Cavalier erroneously reported about its collocation arrangements at the Verizon **[BEGIN PROPRIETARY]** **[END PROPRIETARY]**.[51] Although Verizon removed Cavalier as a self-provider from the Verizon wire centers misidentified by Cavalier, Verizon failed to remove City Signal itself, but agrees with Cavalier that it should do so for **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** [52]

[50] Allegiance also argues that it should not count toward the wholesale trigger, even though (1) its filed Pennsylvania tariff offers dedicated transport to other carriers, (2) it actively and presently advertises transport and other wholesale services on its website, and (3) sworn filings at the SEC describe its wholesale business plans. Verizon has explained why Allegiance counts as a wholesale trigger candidate under the FCC's rules. VZ St. 1.2 (West/Peduto Reb.) at 62; VZ Main Brief at 48-49.

[51] VZ Main Brief at 42.

[52] Cavalier reported leasing dark fiber from City Signal and attaching its own optronics to that fiber. Under the FCC's rules, Cavalier is counted as a self provider in that situation, not City Signal. In its visual inspection process,

Cavalier claims that the record evidence does not show three carriers with self-provisioned fiber transport facilities containing unlit fibers (*i.e.*, dark fibers) (i) connecting the Dewey and Trooper wire centers, (ii) connecting the Dewey wire center and any other Verizon wire center in the Philadelphia LATA 228, and (iii) connecting the Trooper wire center and any other Verizon wire center in the Philadelphia LATA 228. Verizon agrees that the record evidence shows only two carriers – **[BEGIN PROPRIETARY]** **[END PROPRIETARY]**– with self-provisioned dark fiber transport facilities between the Dewey and Trooper wire centers, as well as between the Dewey wire center and the Ambler, Bala Cynwyd, Conshohoken, Hatboro, King of Prussia, Norristown, Paoli, Locust, Market, and Pennypacker wire centers. Verizon has therefore removed those routes from its dark-fiber self-provisioning trigger exhibit in its Main Brief Exhibit 2. Cavalier is mistaken, however, in claiming that fewer than three carriers self-provision transport facilities with unlit fibers connecting the Trooper wire center with the Ambler, Bala Cynwyd, Conshohoken, Hatboro, King of Prussia, Norristown, Paoli, Locust, Market, and Pennypacker wire centers. (Cavalier Main Brief at 8). **[BEGIN PROPRIETARY]**

[END PROPRIETARY] each self-provisions unlit fibers at these wire centers. The record evidence is summarized below:

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Verizon management employees determined that City Signal has collocation arrangements fed with non-Verizon fiber at the **[BEGIN PROPRIETARY]** **[END PROPRIETARY]**

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Cavalier also asserts that Above Net should not be "counted" toward routes that originate or end at the Verizon Bryn Mawr wire center. (Cavalier Main Brief at 13). In its response to subpoena, **[BEGIN PROPRIETARY]**

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The remainder of the CLEC arguments challenging Verizon's "evidence" of facilities deployment are actually attempts to apply their invalid exceptions to the *TRO* triggers to argue that existing facilities should not count. For example, the Loop/Transport Carriers Coalition ("LTCC") misstates the record evidence on whether AT&T, Sprint, MCI, Focal, Choice One, XO, and Above Net are operationally ready to provide interoffice dedicated transport. For the most part, these

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[54] *Id.*

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carriers rely on the ludicrous legal argument that the definition of the dedicated transport UNE precludes the Commission from considering competitive carriers' backhaul facilities (although AT&T appears to have now abandoned this argument, as discussed below). To the extent that other carriers are making the same operational readiness argument, Sprint, MCI, Focal, Choice One, and XO have not introduced a shred of actual evidence establishing that they are in fact operationally impaired from providing interoffice transport, even though this evidence is entirely within the control of those carriers.

B. There Is Substantial Evidence That Carriers Are Operationally Ready To Provide Wholesale Transport

The LTCC claims that there is no evidence other than Verizon's assertions confirming that

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[END PROPRIETARY] provide wholesale transport. (LTCC Main Brief at 15). This is simply incorrect. **[BEGIN PROPRIETARY]**

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The LTCC further contends that Verizon disregarded claims by AT&T, Allegiance, MCI, Choice One, and XO that they do not provide wholesale transport. (LTCC Main Brief at 16). The LTCC's argument is both misleading and wrong. The argument is misleading because, as the LTCC wells knows, the claims by AT&T, Allegiance, and XO not to have any transport facilities

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that count for purposes of the FCC's triggers are based on their erroneous interpretation of the FCC's rules (discussed below), but they acknowledge offering wholesale dedicated transport within their own networks. And in part, the LTCC's argument is flat wrong: **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** admits that it offers wholesale DS1 and DS3 transport (indeed, **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** has identified transport in Pennsylvania that it presently provides at wholesale).[61] Verizon does not claim that Choice One provides wholesale transport.

The LTCC also argues that Verizon should not have identified carriers as wholesale providers in its initial testimony based on whether they had CATT facilities, sold transport to Universal Access, filed dedicated access tariffs in Pennsylvania, advertised wholesale transport services on their websites, or reported offering dedicated access in the New Paradigm Report. (LTCC Main Brief at 17). To the contrary, each of these sources of information is a valuable tool for identifying whether a carrier's business plan includes wholesale transport services. Under well-established Pennsylvania law, a carrier is bound to its offerings in a tariff; a filed tariff should therefore be *conclusive* of whether a carrier is a wholesale provider for purposes of the FCC's trigger.[62] Also, since the CLECs are the best source of information about their own business plans, the Commission should place great weight on their own statements or offerings – usually made before the FCC released the *TRO* -- in website materials and the New Paradigm Report. Universal Access is a broker of dedicated transport and loop facilities and a certificated carrier in Pennsylvania; therefore, every carrier it identifies as a provider of facilities is by definition a wholesale provider. (Although the LTCC complains about Verizon relying on Universal Access's

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62 *See Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067, 1070, 63 Pa. Commw. 238 (Pa. Commw. 1981) (*citing Behrend v. Bell Telephone Co.*, 363 A.2d 1152 (Pa. Commw. 1980)); *see also Kossman v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Commw. 1997).

identification of wholesale providers, no carrier identified by Universal Access has actually claimed to have been misidentified.) And finally, the entire reason for establishing a CATT facility at a Verizon wire center is to offer fiber to other carriers. Therefore, the Commission should find that the existence of a CATT facility is conclusive evidence of a carrier's wholesale status.

The LTCC also overlooks that, for the vast majority if not all carriers identified as wholesale providers, Verizon relied on *multiple sources* of evidence. A few examples will make this clear:

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Finally, in connection with its arguments regarding CATT arrangements, the LTCC improperly attaches to its Main Brief two Verizon interrogatory responses that were never admitted into the record. (LTCC Main Brief at 20-21, notes 55 and 57, and Exhibits 1 and 2). The LTCC never requested that these documents be admitted as late filed exhibits, and therefore these attachments and all arguments about them should be stricken from the LTCC's brief.

C. The CLECs' Opposition To Verizon's Transport Case Turns On Their Attempt To Create Baseless Exceptions To The FCC's *TRO* Transport Triggers

After the Commission sorts through the squabbles over the factual evidence of facilities deployment discussed above, it becomes readily apparent that the CLECs' opposition to Verizon's dedicated transport triggers case hinges on the Commission's acceptance of their laundry list of invented "exceptions." Verizon has already addressed these arguments at length on pages 52-62 of its Main Brief, and addressed them again briefly here.

1. The fact that a CLEC may use its fiber for "backhaul" does not disqualify it from consideration under the transport triggers

According to AT&T and other CLECs – and recognized by the FCC in the *TRO* – CLEC fiber transport networks are usually configured in a hub and spoke arrangement, to aggregate traffic and bring it back to the CLEC switch. (*See, e.g., TRO* at ¶ 361, 370). AT&T has argued, and several CLECs now echo in their briefs, that CLEC transport facilities that are used (or might be used) for "backhaul" – to carry CLEC traffic from the Verizon central office to the CLEC switch – cannot be counted as an alternative source of dedicated transport for purposes of the *TRO* triggers. (AT&T Main Brief at 76; LTCC Main Brief at 23; PCC Main Brief at 84-87; Sprint Main Brief at 26).

As Verizon explained in its Main Brief, this argument is based on a deliberate confusion of two different concepts under the *TRO*. The FCC made a binding national finding that ILECs are no longer required to unbundle ***their own*** transport facilities to allow CLECs to use them for backhaul, because CLECs have sufficient competitive alternatives for backhaul and are not impaired without access to UNE transport for this purpose. This does not mean that CLEC fiber facilities that are configured in such a way that they pass through the CLEC's switching location before going to another Verizon central office cannot be considered as a source of CLEC transport, even if they are also partially used, or useable, for "backhaul." (Verizon Main Brief at 53-56). Indeed, this argument is simply illogical because it would mean that the FCC devised a trigger test already knowing that no CLEC facilities could be counted.[64]

Interestingly, in its Main Brief, AT&T appears to back away from the backhaul argument. AT&T now claims that it is "not AT&T's position" that CLEC "backhaul facilities are not to be considered when applying the FCC's transport triggers." (AT&T Main Brief at 77). Rather, AT&T now claims, the fact that its network is configured in this way is simply another reason that "AT&T is not operationally ready to provide dedicated transport." (*Id.*) In other words, AT&T now admits that facilities used or configured for "backhaul" may nonetheless be considered for the triggers, and is simply relying on its separate operational readiness arguments, which Verizon rebuts below.

2. The fact that a CLEC's fiber might have to pass through a CLEC switching office or hub location before connecting two Verizon central offices does not disqualify it from consideration under the transport triggers

Based on the hub and spoke network configuration discussed above, AT&T and others again attempt to disqualify CLEC transport facilities from consideration under the triggers by arguing that if the CLEC fiber must be "switched" to connect two Verizon central offices, then the facility cannot be considered dedicated transport. (AT&T Main Brief at 76-77; PCC Main Brief at 88-90).

As Verizon explained in its Main Brief, the FCC's definition of "dedicated transport" – which AT&T concedes applies to CLEC transport facilities, as well as ILEC facilities[65] -- expressly

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[64] *See, e.g.*, Tr. at 475, 477 (AT&T recognizes that this argument would disqualify all of its extensive fiber facilities from consideration).

[65] AT&T St. 1.0 (Kirchberger/Nurse Dir.) at 91 n.130, 112.

contemplates that "[a] route between two points (e.g., wire center or switch 'A' and wire center or switch 'Z') may pass through one or more intermediate wire centers ***or switches*** (e.g., wire center or switch 'X')."[66] Thus, it is irrelevant that the transport facilities of AT&T and other CLECs may be routed through intermediate switching facilities, rather than running directly between two Verizon wire centers. (Verizon Main Brief at 56-59).

It has become apparent from AT&T's Main Brief that AT&T is playing semantic games with this argument in a deliberate attempt to confuse the issue. While AT&T starts this argument by contending that dedicated transport is a circuit that cannot be "switched," and that the record established that the only "connection" between the AT&T facilities is "through a switch at an AT&T node," (AT&T Main Brief at 76-77), a few pages later AT&T admits that it is not claiming that the "connection" that would be required to complete a transport circuit between two Verizon offices is a "switched" connection at all. Rather, AT&T recognizes that "[t]here remains the theoretical possibility of cross-connection . . . at an AT&T node." (AT&T Main Brief at 91). In fact, AT&T and Verizon agree that AT&T's OC48 facilities would ***not*** be connected together by switching. (*See* AT&T Main Brief at 82). Rather, at the hearing AT&T conceded that as a technical matter it can establish a dedicated circuit with digital cross-connect equipment – and that it presently has digital cross-connect equipment at its switching locations. (Verizon Main Brief at 60).[67]

AT&T's Main Brief therefore actually rebuts its own argument. In an attempt to refute Verizon's claims, AT&T argues that the FCC regulation quoted above that states that a dedicated transport route "may pass through one or more intermediate wire centers or switches" did not mean

[66] 47 C.F.R. § 51.319(e) (emphasis added); *see TRO* ¶ 401.

[67] Tr. at 448 ("we don't dispute that it's technically feasible to connect one ring to another at a digital cross-connect machine in the hub[.]") ("If we had a Verizon Wire Center A to Verizon Wire Center Z and we had a fiber route that was digitally cross-connected at our switch at a Transport Hub X, yes, that would be a route from A to Z. It would be A to X to Z."). *See also* Tr. at 438.

that the circuit could be "switched," but rather meant that it could physically pass through a "switch location." (AT&T Main Brief at 81). While Verizon does not agree with this interpretation, that dispute is no longer relevant. It is evident here that neither Verizon nor AT&T is claiming that AT&T's fiber would have to be "switched" to make a connection between the two Verizon offices, but rather than it would be connected with digital cross-connect equipment, at a "hub" or "switching location." AT&T therefore admits that its facilities qualify as dedicated transport under this rule.

AT&T's admission makes clear that both this argument regarding "switching" and the "backhaul" argument discussed in the previous section have collapsed into what is really AT&T's ***only*** argument – that because it would have to connect its facilities with digital cross-connect equipment it is not "operationally ready" to provide transport. Verizon refutes this argument in the next subsection.

3. The fact that a CLEC might have to connect its fiber to complete a circuit between two Verizon central offices does not disqualify it from consideration under the transport triggers

AT&T and others argue that Verizon must prove that each CLEC transport route is "always on," has "electrical connectivity" or already forms a complete connection or circuit in order for it to qualify as dedicated transport under the triggers. (AT&T Main Brief at 80-89; Allegiance Main Brief at 4; LTCC Main Brief at 61-62).

As Verizon explained in its Main Brief, the *TRO* does not require proof of an "always on" connection. Rather, the only questions the Commission must ask is whether AT&T and the other CLECs have facilities in place between the end points of a particular route, and whether those facilities are "operationally ready" to provide bandwidth dedicated to a particular customer or carrier (which is the FCC's definition of dedicated transport). (Verizon Main Brief at 59-62).

The CLECs complain that they should not be considered "operationally ready" because they still must do some work to complete the connection, which Allegiance characterizes as needing "add-drop multiplexers," (Allegiance Main Brief at 4), the LTCC characterizes as "splice work," (LTCC Main Brief at 61-62), and AT&T vaguely characterizes as "engineering and associated equipment augmentation." (AT&T Main Brief at 91).

At the hearing, AT&T abandoned its testimony that it "would" have to make a laundry list of costly changes to provide interoffice transport.[68] AT&T's sole contention for the Commission not counting its extensive fiber facilities is that AT&T "could" be required to make unspecified augmentations to provide interoffice transport.[69] Regardless of how the CLECs characterize the work or equipment they would use, as Verizon witness Peduto explained, the equipment required to establish a dedicated transport circuit is common place and available to every telecommunications carrier; and establishing a dedicated circuit is the sort-of everyday operation that the FCC refers to as routine network modifications.[70] At the hearing, AT&T admitted that it could establish a dedicated circuit with digital cross-connect equipment, and that it has such equipment at its switching locations. (Verizon Main Brief at 60-61).[71] Digital cross connect equipment is bread and butter equipment for telecommunications carriers; it allows a carrier to connect fibers from multiple locations to create a continuous circuit. There is no dispute that, as a technical matter, AT&T is ready and able to connect the fiber from various Verizon wire centers with the digital cross connect equipment that is presently at its switching locations.

Not only have AT&T's first two arguments regarding backhaul and switching collapsed into this operational impairment argument, but its operational impairment claim has collapsed on itself. First, neither AT&T nor the other CLECs have ever identified what -- if anything -- they would

[68] AT&T Ex. 1 (Corrected page 119 to testimony).

[69] *Id.*; Verizon Main Brief at 60.

[70] Tr. 536 ("I believe that AT&T does have the digital cross-connect systems, the ability to make cross-connects between fiber optic cables, the ability to de-multiplex and multiplex signals in their switching locations and in most of their collocations."); at 537 ("what's required for AT&T to actually create a route between A and B is within the confines of normal network modifications").

[71] Tr. at 438 ("In the hub there is digital cross-connection equipment[.]").

have to do to be operationally ready to provide interoffice transport, nor have they identified precisely where -- if anywhere -- it would need to make those purported investments. Indeed, the best AT&T can now do is assert that "[t]o be operationally ready to provide dedicated transport between any of the collocation pairs Verizon has identified *could* require investment in engineering and associated equipment augmentation."[72] In other words, as Verizon witness Peduto observed, AT&T's corrected testimony makes it equally likely that no investment "could" be required at all.[73] The Commission cannot reasonably find AT&T or any other CLEC not to be operationally ready based on the unsubstantiated assertion that maybe – *or maybe not* – it has to undertake some unidentified effort.

4. AT&T's purchase of "special access" on some routes is irrelevant to the analysis

AT&T's only attempt to put forth evidence to rebut the fact that it is operationally ready is its claim that on ***some*** but not all of the transport routes identified by Verizon as meeting the triggers, AT&T purchases special access from Verizon. (AT&T Main Brief at 85. *See also* LTCC Main Brief at 25; PCC Main Brief at 94).

As a threshold matter, since AT&T does not purchase transport on all of the routes identified by Verizon, there is no support for its blanket assertion of operational impairment on all routes. Moreover, since AT&T could be purchasing transport on the routes identified by Verizon for reasons that have nothing to do with whether it is operationally ready to provide its own transport, this evidence does not prove anything. As Verizon witness Peduto explained, a carrier might purchase special access or UNE transport from Verizon even if it is operationally ready to provide interoffice transport. The fact that the transport is "special access," rather than the less expensive UNE transport that may be used to carry local voice traffic, suggests that was set up to carry at least

[72] AT&T Ex. 1.

[73] Tr. at 534-35.

some long distance and/or data traffic rather than purely local voice traffic. These links could have been in place before AT&T's local transport facilities were available and no one has thought about moving them.[74] Another reason a carriers might keep Verizon transport in place is a form of diversity to allow for continuous of service in the event of an outage on another part of the network.[75]

In any event, AT&T's evidence of transport purchased from Verizon on some but not all routes is a poor substitute for actual, wire center-specific evidence of impairment. If AT&T were actually unable to connect its facilities at some of all of its switching locations it would have told the Commission precisely where and how it would have to invest "in engineering and associated equipment augmentation equipment." *This evidence is completely within AT&T's control*, and the Commission should find it highly probative that AT&T has chosen not to reveal it.

While there is no other evidence in the record of CLECs purchasing Verizon transport on the routes in question, the LTCC improperly suggests that the Commission should conclude without evidence that "undoubtedly" AT&T is not the only one. The LTCC complains that Verizon objected to a discovery request to identify routes where CLECs purchase UNE transport – an objection the presiding officers sustained based on the extreme tardiness of the request.[76] (LTCC Brief at 26). The LTCC fails to acknowledge, however, that each CLEC party must know precisely whether or not and where it purchases UNE transport or special access from Verizon, and other than AT&T, none of them chose to put that information in the record through their testimony when they had the opportunity to do so. Moreover, nowhere in the *TRO* does it say that this Commission

[74] Tr. at 539 ("One of the reasons is that the links have probably and likely been in place since the beginning of the world of wholesale telecom and that they're in use and they've got active customers working on them every day, and that in a sense it's a form of the legacy of the network, and that it's just there and it's working and nobody stepped up to rearranging it. Everyone's maybe a little more focused on growth of the network and prospective new customers.")

[75] *Id.*

[76] Tr. at 645-46.

should consider the purchase of special access as a factor in whether a carrier is operationally ready to provision its own dedicated transport.

IV. HIGH CAPACITY LOOPS

A. "Customer Locations" Under The *TRO* Means Buildings, Not Sub-Units Within Buildings

Sprint criticized defining a customer location to be a building, but provides no alternative definition. (Sprint Main Brief at 31-32). As outlined in Verizon's Main Brief, while the FCC does not expressly provide a definition of a customer location, its rules distinguish between "customer locations" and individual units within that location. (47 C.F.R. §§ 51.319(a)(4)(ii), (5)(i)(B); *TRO* ¶ 337). This distinction indicates that a customer location is a building, not an individual unit or suite in a multi-unit building. Any other reading would be nonsensical, as an individual suite or unit in a building would not itself have other units. More significantly, Verizon specifically asked CLECs in discovery to identify the "customer locations" to which they have deployed loop facilities. In response, the CLECs uniformly provided the addresses of specific buildings. (VZ St. 1.1 (West/Peduto) at 20).

B. Verizon Properly Applied The Self Provisioning Trigger For Loops

1. The CLEC arguments regarding access to the entire customer location are unfounded

AT&T and the LTCC attempt to redefine the self-provisioning triggers. Both claim that Verizon must demonstrate that a self-provisioning trigger candidate has access to the entire customer location. (AT&T Main Brief at 97; LTCC Main Brief at 27). In particular, AT&T criticizes Verizon for assuming that a CLEC's deployment of dark fiber into a building automatically gives the CLEC access to the entire building. (AT&T Main Brief at 97). Verizon made no such assumption at all with respect to dark fiber loops, as a CLEC's access to the customer location is totally irrelevant to the self-provisioning trigger for dark fiber. The self-provisioning trigger for dark fiber requires only that:

> two or more competing providers not affiliated with each other or with the incumbent LEC, have deployed their own dark fiber facilities at that specific customer location.

(47 C.F.R. § 51.319(a)(6)(i). See also *TRO* ¶¶ 332-333). The self provisioning trigger for DS3 loops requires that two or more competing providers (including intermodal providers) not affiliated with each other or with the incumbent LEC have:

> either deployed its own DS3 facilities at that specific customer location and is serving customers via those facilities at that location, or has deployed DS3 facilities by attaching its own optronics to activate dark fiber transmission facilities obtained under a long-term indefeasible right of use and is serving customers via those facilities at that location.

(47 C.F.R. § 51.319(a)(5)(i)(A)).

The FCC explicitly required access to the entire customer location, including each individual unit within that location, for the competitive wholesale triggers, but omitted such a requirement from the self-provisioning trigger for dark fiber and DS3 loops. Under the principle of *expressio unius est exclusio alteriu,* the FCC's exclusion of the access requirement in the self-provisioning trigger after including it in the competitive wholesale trigger was intentional.[77]

2. The information regarding the customer locations came from the CLECs themselves

AT&T and the LTCC incorrectly claim that Verizon did not "investigate" any of the specific locations it identified as satisfying the dark fiber trigger. (AT&T Main Brief at 96; LTCC Main Brief at 27). While it is true that Verizon did not physically inspect the customer locations identified as satisfying the triggers,[78] that fact is neither surprising nor unreasonable and this entire

[77] *See Russello v. United States*, 464 U.S. 16, 23 (1983) (where Congress includes particular language in one section of a statute but omits t from another, exclusion is generally presumed to be intentional).

[78] Tr. 82 (Peduto).

argument is nothing but a red herring. As Mr. Peduto explained, Verizon would not have even known where to look for CLEC-deployed enterprise loop facilities, and in fact Verizon's loop case is based solely on CLEC discovery responses in this proceeding:

> There are hundreds, thousands, maybe tens of thousands of potential commercial buildings in Pennsylvania where carriers may have terminated facilities, high capacity loops; and, quite honestly, in order to even get a small subset of those buildings where the actual deployments have occurred, we'd have to rely on the CLECs for that information.[79]

Thus, notwithstanding AT&T's claims to the contrary (AT&T Main Brief at 6), Verizon did engage in discovery to determine specifically where CLEC-owned fiber facilities (including dark fiber) were deployed, at what capacities, and in what configurations. The results of this discovery are outlined in detail in Verizon's Main Brief. (Verizon Main Brief at 69-70).

The LTCC criticizes Verizon for not confirming whether or not the trigger candidates purchase unbundled loops or special access services from Verizon to serve the specific customer locations to which they have deployed loop facilities. (LTCC Main Brief at 27). As discussed above with regard the transport, the CLECs themselves well know whether or not they are purchasing such services at the locations in question, and chose not to put that information in the record. More important, the self-provisioning trigger looks at whether CLECs have deployed dark fiber or DS3s to customer locations, and in the case of DS3s, are using those facilities to serve end user customers. Whether a CLEC purchases special access or unbundled loops to a customer location is not relevant to the question of whether it is a self-provisioning CLEC.

3. Verizon properly applied the self-provisioning trigger for dark fiber

AT&T and Sprint claim that Verizon did not affirmatively determine that specific CLECs ***offered*** dark fiber at particular locations. (AT&T Main Brief at 96; Sprint Main Brief at 34). The

[79] Tr. 344 (Peduto).

dark fiber trigger, however, is a self-provisioning trigger, not a wholesale trigger. As the FCC explained:

> When applying the Self-Provisioning Trigger to eliminate an incumbent LEC's requirement to unbundle dark fiber loops at a particular customer location, the mere existence of two unaffiliated competitive providers (in addition to the incumbent LEC) that have deployed fiber to that location, ***whether or not they are offering dark fiber to other carriers to serve end-user customers at that location***, will satisfy the Self-Provisioning Trigger for dark fiber loops and require a finding of no impairment at that location.

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

AT&T incorrectly claim that Verizon has not established that the fiber facilities deployed to the customer locations identified as satisfying the dark fiber trigger are "dark fiber" as defined by the FCC because it provides no evidence that dark fiber loops are terminated. (AT&T Main Brief at 98). AT&T cites to *TRO* ¶ 201 n. 628 for the proposition that under the FCC's definition, dark fiber must "connect two points within the incumbent LEC's network" and be "installed and easily called into service." *Id.* However, n. 628 does not contain such a definition at all. AT&T appears to be relying on the FCC's *UNE Remand Order* for its definition. As AT&T knows, the *UNE Remand Order* was vacated. The FCC's rules adopted by the *TRO* define dark fiber as "fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services." (47 C.F.R. 51.319(a)(6); *TRO* ¶ 311).[80]

[80] The FCC further defines dark fiber as:

> Dark fiber is optical fiber through which no light is transmitted and no signal is carried. It is unactivated deployed fiber that is left dark, *i.e.*, with no necessary equipment, *i.e.*, "opto-electronics" or "optronics" attached to light the fiber to carry a signal to serve customers.

Penn Telecom and Sprint incorrectly claim that Verizon relied merely on an assumption to identify CLEC deployed dark fiber. (Penn Telecom Main Brief at 30; Sprint Main Brief at 34). However, as outlined in Verizon's Main Brief, Verizon made certain conclusions about the existence of dark fiber only for the two CLECs that did not respond to discovery seeking information about dark fiber facilities deployed in Pennsylvania. (Verizon Main Brief at 69-70). This conclusion is based on standard industry practice to maintain spare/unlit facilities where fiber facilities are deployed.[81] The discovery responses of the remaining CLECs confirm this practice. (*See* Verizon Main Brief at 69). Penn Telecom contends that Verizon's rejection of Penn Telecom inquiries for dark fiber between adjacent wire centers undermines any conclusion that self-provisioned loop facilities contain dark fiber. (Penn Telecom at 30-32). However, Verizon's rejection rate for dark fiber between wire centers has nothing whatsoever to do with the availability of dark fiber at a customer location.[82]

4. Verizon properly applied the self provisioning trigger for DS3 loops

AT&T claims that Verizon does not provide any proof that each of the two trigger candidates identified for each customer location satisfying the DS3 self-provisioning trigger has deployed the specific type of high-capacity loop for which Verizon seeks non-impairment. (AT&T Main Brief at 99). AT&T further claims that Verizon provided no hard evidence of facilities in place serving customers at that location over the relevant loop capacity level. (*Id.* at 99). Sprint

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TRO n. 628 (quoting *See* NEWTON'S TELECOM DICTIONARY 201 (18th ed. 2002) (definition of Dark Fiber).

[81] *See* VZ St. 1.1 (West/Peduto Supp. Dir.) at 25.

[82] VZ St. 1.2 (West/Peduto) at 93. Penn Telecom claims that Verizon's current process for requesting and securing dark fiber is fraught with operational barriers that impair CLEC deployment of "such high capacity loops," (Penn Telecom Main Brief at 34-35) but these vague claims leave it unclear what capacity of loops Penn Telecom claims it is impaired in providing. The triggers look to the presence of self-provisioning or wholesale competitive CLECs, not provisioning by Verizon. 47 C.F.R. §51.319(a)(4)-(6); *TRO* ¶ 328. Penn Telecom's complaints are too vague and insufficient to properly invoke Paragraph 336 of the *TRO*, which grants state commissions the "analytical flexibility" to petition the FCC for a waiver to maintain an ILEC's unbundling obligation at a particular customer location where impairment remains due to the existence of a barrier to further competitive facilities deployment with respect to the self-provisioning trigger.

contends that Verizon's only support to show DS3 capacity at each location is the assumption that carriers deploying fiber have attached OCn electronics and channelize the OCn system into lower transport levels, including DS3s. (Sprint Main Brief at 33). All of these claims are wrong.

As outlined in Verizon's Main Brief, Verizon identified the capacity if lit fiber loops deployed and whether they are being used to serve end users at the DS3 level of capacity through discovery. (Verizon Main Brief 67-96, 70-71). Two CLECs failed to identify the capacity at which their loop facilities are being used, and Verizon drew conclusions from these CLECs' vague, generalized responses for each customer location they identified based on their ability to channelize the OCn facilities they have deployed to the DS3 level. (Verizon Main Brief at 67-68). Neither of these CLECs denied that they serve end users over at a DS3 capacity at the customer locations where they have been identified as DS3 self-provisioners.

AT&T suggests that Verizon has failed to meet the DS3 self-provisioning triggers because it has failed to show that the trigger CLECs are operationally ready. However the self-provisioning trigger for DS3 loops does not contain such a requirement.[83]

Finally, AT&T claims that a self-provisioning trigger candidate for DS3 loops must be providing service at the DS3 level for only one or two DS3s of demand. (AT&T Main Brief at 99). This is a blatant misreading of the FCC's rules for DS3 loops. Rule 319(a)(5)(1)(A) requires a finding of non-impairment where two or more unaffiliated CLECs have deployed their own DS3 facilities (or have deployed DS3 facilities by attaching their own optronics to activate dark fiber transmission facilities obtained under a long-term indefeasible right of use) and are serving customers via those facilities at that location. There is no requirement that the CLECs provide service over no more than two DS3s. Thus, the test is whether a CLEC has deployed ***any*** DS3s and is using them to serve its end-user customers, not how many they have deployed.

[83] *See* 47 C.F.R. §§ 51.319(a)(5)(i); *TRO* ¶¶ 332-333.

AT&T appears to be relying on Rule 319(a)(5)(iii), which limits CLECs to obtaining a maximum of two unbundled DS3 loops for any single customer location where DS3 loops are available as unbundled loops. This rule, however, has nothing to do with the DS3 triggers. Indeed, AT&T's claim makes no sense. For example, a CLEC that has deployed 6 DS3s to a customer location is clearly not impaired without access to an ILEC's unbundled DS3 loops. It would make no sense to find that where two CLECs have deployed DS3 loops that impairment still exists simply because one has provisioned more that two DS3s.

C. Verizon Has Properly Applied The Competitive Wholesale Trigger For Loops

AT&T claims that Verizon did not show that the wholesale trigger CLECs offer DS1 or DS3 loops on a widely available basis, (AT&T Main Brief at 103), or have access to the entire customer locations identified as satisfying the wholesale trigger. (*Id.* at 102). Again, Verizon did provide this information, which was gathered through discovery, tariffs and term and condition sheets, and presented in its Main Brief. (Verizon Main Brief at 73-74). The wholesale CLECs' web pages merely confirmed that these carriers widely advertise wholesale loop facilities in Pennsylvania. Tellingly, ***none*** of the carriers identified as satisfying the competitive wholesale trigger (all of whom are parties to the case) denied offering DS1 and/or DS3 loop facilities on a widely available wholesale basis to other carriers or having access to the entire customer locations identified as satisfying the competitive wholesale triggers.

AT&T also claims that Verizon failed to establish that the CLECs identified as wholesalers are operationally ready to serve. (AT&T Main Brief at 104). However, the wholesale triggers for DS1 and DS3 loops (unlike the wholesale triggers for dedicated transport) do not contain such a requirement.[84] Finally, AT&T's claims notwithstanding, the triggers do not require a showing that

[84] *See* 47 C.F.R. §§ 51.319(a)(4)(ii) and (5)(i)(B).

Verizon's OSS are capable of handling LSRs that are provisioned to a wholesale provider's facilities.

Sprint notes that the FCC directed state commission analysis of the wholesale trigger to reveal "some reasonable expectation that these providers are operationally capable of continuing to provide wholesale loop capacity to that customer location." (Sprint Main Brief at 35). As Sprint notes, the FCC instructed state commissions not to undertake a financial viability analysis with respect to each provider. (*TRO* ¶ 338). However, in stating that there should be some reasonable expectation that wholesale loop providers are operationally capable of continuing to provide wholesale loop capacity to that customer location, the FCC did not place the burden on making such a showing on any particular party. *See Id.* Indeed, only the wholesaler has the information necessary to make such a showing. No party has provided any evidence suggesting that the wholesale trigger candidates identified by Verizon are not operationally capable of continuing to provide wholesale loop capacity to the specific customer locations identified as satisfying the trigger. All of them are parties to this case, and their silence on their wholesale capabilities gives the Commission every reason to believe they can continue providing wholesale service at the specific locations identified.[85]

Penn Telecom criticizes Verizon for assuming that CLECs have access to the entire customer location where its loops are deployed, based on its experiences with building managers and owners resisting requests to provide service to tenants or restricting its access in a building. (Penn Telecom Main Brief at 32-33). Sprint also claims Verizon asked the Commission to make a blanket finding for all buildings. (Sprint Main Brief at 31). Again, Verizon only made certain conclusions about CLEC access to customer locations for the two CLECs who did not provide information on whether they have access to the entire customer location. (*See* Verizon Main Brief

[85] VZ St. 1.2 (West/Peduto) at 99.

at 73-74). Building owners restricting such access is generally the exception, not the rule. Penn Telecom presents broad generalizations with no factual support, but did not identify ***any*** of the customer locations identified by Verizon as satisfying the wholesale trigger as one in which a building owner or manager has restricted access. Nor did any other CLEC (including the trigger candidates themselves) identify any of those customer locations as ones at which CLEC access is restricted. *Id.* Absent evidence of such restrictions, the Commission should conclude that the two carriers who remained silent on their access indeed have access to the entire customer location.

Penn Telecom also discusses its "limited success" obtaining capacity from alternative wholesale providers. (Penn Telecom Brief at 33-34). Again, Penn Telecom presents a general anecdote with respect to AT&T, but did not identify any of the customer locations identified by Verizon as satisfying the wholesale trigger as one in which it has been refused wholesale facilities from AT&T or any other alternative provider.[86]

V. SECTION 271 AND STATE LAW ISSUES

OCA and the PCC argue that, even if this Commission finds that the FCC's mandatory triggers are satisfied and CLECs are not impaired without unbundled access to mass market switching in some locations, the Commission should nonetheless require Verizon to continue to unbundled switching (and combine it with other elements in the UNE platform) under "other existing obligations." (OCA Main Brief at 67-72; PCC Main Brief at 103-109).

Verizon already addressed these arguments at length in its Main Brief. (Verizon Main Brief at 76-83). In sum, neither section 271 of the Telecommunications Act nor the *Global Order* provides authority for this Commission to require Verizon to continue to unbundle elements for which the Commission has found "no impairment" under the *TRO*'s mandatory triggers analysis, and any attempt to do so would directly conflict with federal law and would be preempted.

[86] VZ St. 1.2 (West/Peduto) at 101.

The PCC cites selectively from the FCC's brief before the D.C. Circuit Court of Appeals to argue that the FCC does not believe it has preempted state commissions from continuing to require unbundling even where the FCC's rules require a finding of no unbundling. (PCC Main Brief at 106). The PCC fails to point out that, after the general comments that the PCC cites, the FCC's D.C. Circuit Brief goes on to conclude that a state attempt to require unbundling where the FCC's rules do not require unbundling would be preempted. According to the FCC, "[i]n the UNE context, however, a decision by the FCC not to require an ILEC to unbundled a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element. . . . Any state rule that struck a different balance would conflict with federal law, warranting preemption."[87] Surely the PCC is not suggesting that this Commission should issue an order it knows is preempted and wait for the FCC or the federal courts to tell it that it is flouting federal law. Moreover, to the extent the PCC relies on Section 271 of the Act, Verizon has already explained that this statute provides no authority for this Commission to act, but rather applies only to the FCC. (Verizon Main Brief at 76-78).

To the extent these parties are arguing that the *Global Order* provides an independent state law basis to require Verizon to continue to provide the UNE platform, Verizon pointed out many reasons why this is not true. The Commission cannot act without an authorizing statute, and the only statutes mentioned in the *Global Order* were Section 251 of the Act and Chapter 30. The Commission cannot interpret Section 251 in a manner different from the FCC – if there is no "impairment" based on satisfaction of the triggers, there is no unbundling under Section 251. As to Chapter 30, 66 Pa. C.S. § 3005 only applies to services declared "competitive" by the Commission, and therefore could not have been used to require unbundling to serve residential and small business

[87] Brief for Respondents, USTA v. FCC, Nos. 00-0012(D.C. Cir., filed December 31, 2003) at 92-93 (noting, for example that a state decision to unbundled the packetized functionality of ILEC loops in the face of the FCC's decision not to require such unbundling "would substantially prevent the implementation of the Act" and would be preempted.).

customers in the *Global Order*. Chapter 30 alone, without Section 251, also does not authorize TELRIC pricing or combinations of elements such as the UNE-platform, and in any event, has since expired. OCA argues, based on the Commission's "Statement of Policy" declaring all orders entered before Chapter 30 expired to remain in full force and effect, that the expiration of Chapter 30 at the end of last year is not relevant. (OCA Main Brief at 70, n 61). As Chairman Fitzpatrick pointed out, however, "there continues to be legal uncertainty regarding the scope of the Commission's authority. A statement of policy does not have the force of law, and if a question of the Commission's authority (following the expiration of Chapter 30) is raised in a Commission proceeding, it may be resolved in the appellate courts of Pennsylvania" (or, in this case, the federal courts).[88] Finally, even the *Global Order's* UNE platform requirement for customers with less than $80,000 total billed revenue ("TBR") expired by its own terms on December 31, 2003, pending a finding of "no impairment" which the Commission would necessarily have made if it finds the triggers to be satisfied.

[88] *Sunset of Chapter 30, Title 66 of the Public Utility Code*, No. M. 00041786 (Statement of Chairman Terrance J. Fitzpatrick) (Jan. 16, 2004).

VI. CONCLUSION

The record developed before this Commission compels the conclusion that the FCC's mandatory and objective "triggers" are satisfied for mass market switching, dedicated transport and high capacity loops in the areas described in Verizon's testimony.

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March 1, 2004

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EXHIBIT A

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal Communications Commission's triennial UNE review: Local Circuit Switching for Mass Market Customers.	DOCKET NO. 030851-TP ORDER NO. ISSUED:

ORDER GRANTING VERIZON FLORIDA INC.'S MOTION TO CLARIFY THE SCOPE OF THE PROCEEDING

I. Case Background

In response to the Federal Communications Commission's ("FCC's") August 21, 2003, Triennial Review Order ("TRO"), this Commission opened two dockets to ascertain whether a requesting carrier is impaired by lack of access to certain incumbent local exchange companies' network elements. Unbundled network elements ("UNEs") are those portions of telephone networks that incumbent local exchange companies ("ILECs") must, under applicable federal law, make available to competitive local exchange companies ("CLECs"). In the TRO, as it relates to this docket, the FCC held that whether an ILEC must offer unbundled local circuit switching as a UNE depends upon whether a CLEC would, according to the guidelines established by the FCC, be impaired in the provision of its telecommunications services without such. The TRO does not address the issues of UNE pricing or rates charged by ILECs or CLECs. This docket was initiated to implement those provisions of the TRO concerning whether CLECs are impaired without access to unbundled local circuit switching.

On January 7, 2004, Verizon Florida, Inc. ("Verizon") filed a motion to clarify the scope of the proceeding. On January 15, 2004, AT&T Communications of the Southern States, LLC (AT&T) and MCImetro Access Transmission Services LLC and MCI WorldCom Communications (MCI) filed their joint response to Verizon's motion.

II. Verizon

Verizon asks for clarification that the scope of this proceeding does not include a consideration of a "potential deployment" showing for Verizon, and that any evidence concerning alleged operational or economic impairment or impediments to entry is irrelevant to whether Verizon must, under the applicable analysis, continue to unbundle mass market circuit switching in the Tampa-St. Petersburg-Clearwater MSA. In support of its request, Verizon argues that the TRO directs state commissions to "apply a two-step process to determine whether CLECs are impaired in a particular market," with the first step being a "triggers" analysis and the second step, reached only if the "triggers" analysis is not satisfied, being a potential deployment analysis. In response to the TRO, Verizon has only put forth a "triggers" case; it has not put forth a potential deployment case. Verizon argues that, pursuant to the TRO, state commissions should only consider potential deployment in markets where neither the "self-deployment trigger" nor the "wholesale facilities trigger" is satisfied. Verizon further argues that state commissions should not engage in the potential deployment analysis unless there is a finding that neither of the "triggers" has been met and the ILEC nonetheless continues to seek mass market switching relief. In addition, Verizon notes that its requested clarification is authorized by Rule 28-106.305, Florida Administrative Code, to ". . . promote the just, speedy, and inexpensive determination of all aspects of the case."

III. AT&T and MCI

AT&T and MCI contend that Verizon's motion for clarification is nothing more than an untimely motion for reconsideration of Order No. PSC-03-1200-PCO-TP, issued on October 22, 2003. Moreover, AT&T and MCI disagree with Verizon that "the operational and economic considerations are irrelevant to the 'trigger' analysis . . . ." They also argue that the scope of this proceeding has already been addressed, and the parties have filed testimony accordingly. They add that, "Any attempt to derail the process at this late date violates the spirit of the Commission's Procedural orders in this case." Lastly, they argue that Verizon's motion is substantively and legally incorrect because it "deprive[s] the CLECs of the ability to present relevant evidence on the triggers issues . . . ."

IV. Discussion and Decision

In the TRO, the FCC established two distinct tests for determining impairment in the mass market: (1) a "triggers" test and (2) a "potential deployment" test. If either of the two "triggers" is satisfied, or if the "potential deployment" test is met, the UNE at issue is removed from the national list.

The TRO is clear that our consideration involves a two-step process: first is an analysis of the triggers, and second, if the triggers are not satisfied, is an analysis of potential deployment under an impairment standard. As the FCC recently reiterated, in its brief filed in the United States Court of Appeals for the District of Columbia Circuit, the "triggers" analysis is a separate, discrete analysis from the "potential deployment" analysis, and is, essentially, a counting exercise. See, e.g., United States Telecom Association v. Federal Communications Commission, No. 00-1012 (D.C. Cir.)(Br. of Respondent FCC ("FCC Brief") at 17). A state commission only proceeds to the more intensive "potential deployment" analysis if neither of the triggers identified in the TRO have been satisfied. TRO, FCC 03-36 at paragraph 506.

Under the "triggers" test, requesting carriers are not impaired if either of two triggers are satisfied: (a) if, in the relevant geographic market, there are three or more unaffiliated CLECs, including intermodal providers of service comparable in quality to that of the ILEC, serving mass market customers with their own switches ("local switching self-provisioning trigger"); or

(b) if, in the relevant geographic market, there are two or more unaffiliated CLECs, including intermodal providers of service comparable in quality to that of the ILEC, who have their own switches and are offering wholesale local switching to customers serving DSO capacity loops in that market ("wholesale trigger"). TRO at ¶¶ 405-416. In view of the fact that all parties to this proceeding have stipulated that the wholesale triggers are not met, only the local switching self-provisioning trigger is relevant here.

If the local switching self-provisioning trigger is satisfied, a state commission must find "no impairment." TRO at ¶ 501; FCC Brief at 17. As the FCC explained its reasoning for use of the local switching self-provisioning trigger:

> We find that, when three carriers, in addition to the incumbent LEC, have each made sunk investment in transport facilities on a route, that is a sufficient indication that sunk costs, economies of scale, and other barriers to deploying transport facilities do not present an insurmountable barrier on a particular route such that requesting carriers are not impaired without access to unbundled transport.

TRO at ¶ 405. See also TRO at ¶ 506.

In its brief to the D.C. Circuit in the TRO appeal, the FCC reiterated the mandatory nature of the triggers test and reiterated its relationship to the potential deployment test.

> The Commission thus adopted deployment-based triggers (or standards) for the states to apply to make market-specific determinations....If those triggers are satisfied, the element at issue must be withdrawn [from the UNE list] following a period of transition designed to avoid market disruption. If the triggers are not satisfied, state commissions are to undertake further analysis of potential deployment under the Commission's general impairment standard.

FCC Brief at 17.[1] See also TRO at n. 1405 (additional factors "come into play only if our deployment triggers are not met.") (emphasis added).[2]

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[1] In its brief to the D.C. Circuit, the FCC also explained its rejection of the argument, advanced by AT&T and MCI here, that the trigger does not address other potential impairment issues: "The Commission reasonably concluded that satisfaction of the trigger would show that multiple consecutive supply is possible and that there likely is no entry barrier reaching the level of impairment from any source. FCC Brief at 45.

[2] The fact that the TRO provides for a two-step process lends support to Verizon's earlier proposal that the Commission conduct a separate, initial proceeding to address the "triggers" analysis, to be followed, only if necessary, by a "potential deployment" proceeding. However, in spite of the overall practicality of that proposed approach, we are faced with conducting our review in a very expedited manner. Hence, Verizon's proposal for a separate proceeding to just address "triggers" was rejected, as set forth in Order

Indeed, AT&T and MCI have previously conceded that if the local switching self-provisioning trigger is satisfied, then the FCC has required the removal of switching from the UNE list. In their brief before the D.C. Circuit in the appeal of the TRO, AT&T and MCI state:

> Despite its finding of nationwide impairment, the FCC established automatic triggers for removing mass-market switching from the mandatory UNE list. Under the "self-provisioning trigger," "a state must find 'no impairment' when three or more unaffiliated competing carriers each is serving mass-market customers in a particular market with the use of their own switch."
>
> ...[The FCC] nonetheless required switching to be automatically removed from the mandatory UNE list when states find that certain "triggers" are met in individual markets – on the ground that satisfaction of triggers establishes a lack of impairment in that area.

AT&T and MCI Brief at pp. 35, 36 (citations omitted). As the FCC has made clear, AT&T and MCI are indeed correct. If the "automatic triggers" are met, "a state must find 'no impairment.'" FCC Brief at 17.[3]

The one exception to a mandatory finding of "no impairment" where a trigger is met is discussed in paragraph 411 of the TRO. That paragraph provides for a state commission to petition the FCC for a waiver of the trigger where, despite satisfaction of the trigger, evidence of a "significant barrier to entry exists such that deploying additional facilities is entirely foreclosed." An example of such an insurmountable barrier is "a municipality that has imposed a long-term moratorium on obtaining the necessary rights-of-way such that a competing carrier cannot deploy new facilities." TRO at ¶ 411. See also FCC Brief at 45.

Based upon the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, Prehearing Officer, that Verizon Florida Inc.'s Motion to Clarify the Scope of the Proceeding is granted, to the extent and as set forth herein; and it is further

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No. PSC-03-1200-PCO-TP. As such, both the "triggers" analysis and the "potential deployment" analysis for an ILEC that is presenting a "potential deployment" case will be conducted in the context of this established proceeding.

[3] See, e.g., Pennsylvania PUC, Procedural Order, Docket No. I-0030100 at 14 ("The Commission will find no impairment in a particular market if the evidence shows three or more non-affiliated competing providers are serving mass market customers in the particular market with use of their own switches.").

ORDERED that evidence of alleged economic or operational barriers to deploying transport facilities in the mass market (evidence that is relevant to Issue 5 in this docket) is not relevant to application of the local switching self-provisioning trigger (Issue 4); and it is further

ORDERED that evidence that a "significant barrier to entry exists such that deploying additional facilities is *entirely foreclosed*" (i.e., evidence that deploying additional facilities is rendered impossible) is relevant to application of the local switching self-provisioning trigger; and it is further

ORDERED that evidence as to whether a particular competitive switch provider "counts" for purposes of application of the local switching self-provisioning trigger (e.g., is the competitive switch provider unaffiliated with the incumbent LEC) is relevant; and it is further

ORDERED that, with regard to Issues 4 and 5 in this docket, Verizon may properly limit its "case" to whether the local switching self-provisioning trigger is satisfied. Verizon is cautioned, however, that by choosing not to present a "potential deployment" case in this docket, it cannot later call for an opportunity to present a "potential deployment" case relating to this docket. If the TRO is reversed and ultimately "re-implemented" by the Commission, parties will be free to assert positions relating to any new or revised TRO from the FCC; and it is further

ORDERED that nothing in this order shall otherwise limit the ability of the parties to present evidence and argument as to market definition (Issues 1 and 2), the batch cut process (Issue 3), the potential for self provisioning of local switching (Issue 5), and the transitional use of unbundled local switching (Issue 6).

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 20th day of February, 2004.

CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

(S E A L)

JLS/bk

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.