BEFORE THE FLORIDA 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

REBUTTAL TESTIMONY OF ORVILLE D. FULP

ON BEHALF OF VERIZON FLORIDA INC.

January 7, 2004

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I. INTRODUCTION

Q. WHAT IS THE PURPOSE OF THIS TESTIMONY?

A. This testimony is submitted on behalf of Verizon Florida Inc. ("Verizon") in response to the direct testimony of MCI, AT&T, Sprint, and the Florida Competitive Carriers Association ("FCCA") (collectively "the CLECs") concerning the elimination of unbundled mass market circuit switching pursuant to the *Triennial Review Order*'s("*TRO*") "self-provisioning" trigger.

Q. WHO IS SPONSORING THIS TESTIMONY?

A. This testimony is sponsored by Orville D. Fulp.

Q. DID YOU PROVIDE DIRECT TESTIMONY IN THIS PROCEEDING ON DECEMBER 4, 2003?

A. Yes.

Q. PLEASE DESCRIBE THE SCOPE OF THIS TESTIMONY.

A. In this proceeding, Verizon seeks the elimination of unbundled mass market switching in the Tampa-St. Petersburg-Clearwater Metropolitan Statistical Area ("MSA") under the self-provisioning trigger of the FCC's *TRO*. As I stated in my direct testimony, Verizon does not intend to present a "potential deployment" case in this nine-month proceeding. Whether the self-provisioning trigger is satisfied turns exclusively on whether there are three or more unaffiliated competing carriers serving the market with their own switches. As I demonstrated in my direct

testimony, (i) there are a substantial number of CLECs using their own switching to serve mass market customers within Verizon's serving territory in the Tampa-St. Petersburg-Clearwater MSA, (ii) as a result, that market area satisfies the FCC's self-provisioning switching trigger, and (iii) the Commission must therefore find that CLECs are not impaired without unbundled circuit switching for mass market customers in this market.

This testimony responds to the CLECs' broad allegations of economic and operational barriers to competitive entry into the mass market that, according to the CLECs, support the continued availability of unbundled mass market circuit switching. As explained in my direct testimony and as I elaborate below, claims regarding alleged economic and operational barriers have no place in this case, which addresses ***only*** the application of the mandatory and objective self-provisioning trigger. Because allegations of economic and operational barriers to entry have no bearing on Verizon's satisfaction of this trigger, this testimony does not attempt to address the substance of these irrelevant CLEC arguments. (And Verizon is filing a motion to clarify that operational and economic impairment issues are beyond the scope of Verizon's mass market switching case. *See* Motion of Verizon Florida Inc. To Clarify The Scope Of The Proceeding (Jan. 7, 2004). Verizon's decision not to engage in debates that are irrelevant to the application of the FCC's triggers in this case should not, however, be interpreted as agreement with or acquiescence in the CLEC contentions.

In addition, this testimony addresses the appropriate cutoff point for differentiating between "mass market" and "DS1 enterprise" customers within the relevant geographic market. As explained further below, the distinction between mass market customers and DS1 enterprise customers should be based on how those customers are *actually* being served, not on an arbitrary cutover point based on the number of analog lines used by the CLEC, as a number of CLECs have asserted in their direct testimony.

II. THE SCOPE OF THIS PROCEEDING

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

A. As I discussed in my direct testimony, and as Verizon discusses in greater detail in its January 7, 2004 motion to clarify the scope of the proceeding, the *TRO* establishes mandatory triggers for determining impairment for all of the network elements, including mass market switching, that are at issue in the nine-month proceedings. Briefly, under the "self-provisioning trigger," a state *"must* find 'no impairment' when three or more unaffiliated competing carriers are serving mass market customers in a particular market with the use of their own switches." *TRO* ¶ 501 (emphasis added). Under the "competitive wholesale trigger," states *must* find no impairment where there are two or more unaffiliated CLECs that offer wholesale switching service to other carriers in a particular market using their own switches. *TRO* ¶ 504. It is only after the Commission has determined that neither trigger

is met in a market that it may – if the ILEC continues to request mass market switching relief – conduct an analysis of the "potential" for CLECs to deploy their own switches in the relevant geographic market, given economic and operational conditions in that market. *TRO* ¶ 506.

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

A. No. As Verizon has stated from the outset, *see* Letter from Richard A. Chapkis to Blanca S. Bayo of 10/10/03, it does not intend to present evidence of potential deployment in this case. We rely exclusively on our satisfaction of the self-provisioning trigger.

Q. THE CLECS RAISE VARIOUS ALLEGED ECONOMIC AND OPERATIONAL BARRIERS TO COMPETITIVE ENTRY INTO THE MASS MARKET, SUCH AS ISSUES REGARDING THE CUTTING OVER OF LOOPS TO A CLEC'S SWITCH, AVAILABILITY AND COST OF COLLOCATION SPACE, FUNCTIONALITY OF VERIZON'S OPERATIONS SUPPORT SYSTEMS ("OSS"), DEPLOYMENT OF IDLC, AND COSTS TO CLECS OF DEPLOYING THEIR OWN SWITCHES (*E.G.*, AT&T BRADBURY DIRECT AT 22-50; AT&T TURNER DIRECT AT 10-43; AT&T VAN DE WATER DIRECT AT 1-72; AT&T WOOD DIRECT AT 1-11; MCI LICHTENBERG DIRECT AT 1-50; MCI WEBBER DIRECT AT 14-56; MCI BRYANT DIRECT AT 53-91; SUPRA STAHLY DIRECT AT 34-45). ARE THESE CLAIMS

RELEVANT TO THE SELF-PROVISIONING TRIGGER RELIED ON BY VERIZON IN THIS PROCEEDING?

A. No. As noted above, Verizon seeks the elimination of unbundled access to mass market circuit switching in the Tampa-St. Petersburg-Clearwater MSA based on its satisfaction of the *TRO*'s self-provisioning trigger. As my initial testimony demonstrated, the trigger is met by a wide margin – with *eight* CLECs providing mass market switching service in this market. This means that, regardless of the arguments the CLECs might offer to avoid the application of the triggers, the trigger analysis shows that CLECs are currently operating in the market in numbers far beyond what the FCC requires for relief. Thus, the CLECs' allegations of operational or economic impairment do not undercut – indeed, are not relevant to – Verizon's showing that the FCC's mandatory triggers have been met. The *TRO* unequivocally "*require[s]* state commissions to find 'no impairment' in a particular market when either [the self-provisioning trigger or the competitive wholesale facilities] trigger is satisfied." *TRO* ¶ 498 (emphasis added)

Here, Verizon has shown that well more than three CLECs have deployed their own switches in the market consisting of the Tampa-St. Petersburg –Clearwater MSA. Thus, the self-provisioning trigger is satisfied, and the various CLEC claims of operational and economic problems associated with the elimination of unbundled switching in this market are irrelevant. While these alleged problems may be relevant to

a potential deployment case, they have no bearing on the triggers analysis on which Verizon relies in this proceeding.

III. THE DISTINCTION BETWEEN MASS MARKET CUSTOMERS AND DS1 ENTERPRISE CUSTOMERS.

Q. SPRINT'S WITNESSES STAIHR (AT 26-27) AND DICKERSON (AT 1-6) AND THE FCCA'S WITNESS GILLAN (AT 24-27) ALL TESTIFY THAT THE CUT-OFF POINT BETWEEN MASS MARKET AND DS1 ENTERPRISE CUSTOMERS SHOULD BE SET AT A PARTICULAR NUMBER OF ANALOG LINES BASED ON A MATHEMATICAL FORMULA, WITHOUT REGARD TO WHETHER THE CLEC HAS CHOSEN TO SERVE THOSE CUSTOMERS USING DS1 OR DS0 ENTERPRISE FACILITIES. DO YOU AGREE?

A. No. A fixed crossover point based on a pre-determined number of analog lines, based on some calculation of average costs, would ignore the actual economic choices made by the CLECs and their customers. As I explained in my direct testimony, the Commission should establish that 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. It is the objective behavior of the CLEC that should drive the determination of whether or not it "makes economic sense" for that CLEC to serve particular customers over DS1 loops, rather than multiple voice grade DS0 lines. This objective test is far more reliable, and grounded in realities of the marketplace, than an

arbitrary "cutoff" at a particular number of lines regardless of how the customer is actually being served as a DS1 enterprise customer or a DS0 mass market customer.

The mathematical calculations proposed by Sprint and the FCCA rely on a theoretical determination of whether it might make sense to serve a customer using multiple analog voice grade loops rather than a DS1 circuit, not whether a CLEC has actually determined that it makes economic sense to do so in any particular case. For example, Mr. Dickerson claims that, based on a cost model using Sprint's own average costs (not necessarily the costs of other carriers), "purchasing individual loops is more cost effective than purchasing single DS-1" whenever there are "12 DS-0s at a customer's location." (Sprint Dickerson Direct at 32) However, if this were true, then a rational CLEC would never use more than 12 analog voice grade loops to serve a single customer – yet they do in Florida. Obviously, Sprint's "one-size-fits-all" methodology does not capture the actual economic decisions made by CLECs in the field.

Even Mr. Gillan, who advocates the use of a mathematical formula to calculate the "cut-off" at a particular number of lines (although he does not perform the calculation himself), admits that his own proposed formula will necessarily be both under- and over-inclusive. He states that "this simple calculation does not take into account a number of factors that, in the real world, would explain why a customer with multiple voice loops would not want to move its POTS service to a

higher-capacity facility." (FCCA Gillan Direct at 30) In many cases, according to Mr. Gillan, "the customer would have good reasons to preserve its analog POTS service; even if it were at or above the theoretical cut-over point . . . ." (FCCA Gillan Direct at 31) Therefore, as Mr. Gillan concedes, establishing a break-point at an arbitrary number of lines based on some average cost calculation will ignore the fact that many customers are still being served as mass market customers using a larger number of analog lines, and that there are legitimate economic reasons for doing so.

Q. SPRINT'S WITNESS STAIHR CLAIMS THAT A SINGLE, STATEWIDE CROSS-OVER POINT FOR ALL CLECS IS MORE EFFICIENT FOR CLEC MARKETING PURPOSES. WHAT IS YOUR REACTION?

A. That is a clear case of the regulatory tail wagging the business dog. The determination of how a carrier markets its services to a particular customer – whether using multiple analog lines or a DS1 enterprise circuit – should be made by the carrier on a case-by-case basis according to the particular business needs of the carrier and the customer, not on regulatory fiat that pre-determines how a carrier theoretically should serve the customer.

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

A. Tellingly, there is not. As an initial matter, only two of five parties submitting testimony (Sprint and the FCCA, which is a coalition of multiple CLECs) proposed a method for establishing the crossover point between mass market and DS1 enterprise customers in Florida. Sprint proposed a cost model using weighted average UNE prices across the state and a calculation of its own equipment costs for installing a channel bank at a customer premises, amortized over nine years, to establish a proposed a crossover point at 12 DS0s at a single customer premises. (Sprint Dickerson Direct at 4-6). The FCCA, on the other hand, proposed a different mathematical formula to establish a crossover point at a particular number of lines, without advocating any particular output. (FCCA Gillan Direct at 23-27).

Moreover, experience in other states demonstrates that CLECs do not agree on the appropriate crossover point. For example, in the nine-month proceeding in California, Sprint proposed a crossover point at 15 DS0s at a particular customer location. See Direct Testimony of Brian K. Staihr on Behalf of Sprint Communications Company L.P. Regarding Mass Market Switching, at 7-8, and Direct Testimony of Kent W. Dickerson on Behalf of Sprint Communications Company L.P. Regarding Mass Market Switching, at 4, Case Nos. 95-04-043 and 95-04-044, filed December 12, 2003 (California Public Utilities Commission). AT&T, on the other hand, proposed two different crossover points – 11 DS0s per customer in Verizon territory and 19 DS0s in SBC territory. *See* Opening Testimony of Brian F. Pitkin on

Behalf of AT&T, at 15, Case Nos. 95-04-043 and 95-04-044, filed December 12, 2003 (California Public Utilities Commission). Clearly, if the CLECs themselves do not agree on any particular "magic number" between DS0 mass market customers and DS1 enterprise customers, the economic decisions that drive CLECs to serve customers using multiple analog lines rather than over a DS1 are not susceptible to a single formula. This further demonstrates that the FCC's original four-line cutoff is not an appropriate basis for distinguishing between mass market and DS1 enterprise customers because it does not reflect the manner in which CLECs actually serve their customers.

As a result, the Commission should ignore those proposals and look at how the CLECs are actually serving their customers. If customers are being served using analog voice grade lines rather than DS1 circuits, they should be treated as mass market customers for regulatory purposes, not as DS1 enterprise customers. Verizon's proposal does not speculate on what might theoretically make economic sense for a CLEC, or why a particular customer may want to be served in a particular manner, but rather relies on actual market realities and actual economic decisions made by CLECs to serve customers as mass market customers using analog voice grade loops.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

ORAL ARGUMENT SCHEDULED FOR JANUARY 28, 2004

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 00-1012 (AND CONSOLIDATED CASES)

UNITED STATES TELECOM ASSOCIATION, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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similar to standards that the ILECs had advocated. *See id.* n.275 (JA). The Commission's analysis also takes into account countervailing cost advantages that new entrants may possess. *Id.* ¶89 (JA). And the Commission's revised rules give greatest weight to evidence of actual deployment by facilities-based competitors in determining whether any relevant cost disparities that exist actually constitute impairment-causing barriers to entry. *Order* ¶¶93-95 (JA [7]

Third, the Commission phased out line sharing. *Order* ¶¶255-269 (JA -). In reaching this decision, the Commission considered all the revenues that a new entrant could expect to receive from use of the whole loop (*id.* ¶258 (JA)); the development of "line splitting" as a viable way for two CLECs to share a loop, one using the low frequency portion of the loop, the other using the high frequency portion (*id.* ¶259 (JA)); and the relevance of other broadband platforms (such as cable) to the costs and benefits of mandatory line sharing (*id.* ¶¶262-263 (JA).

The revised impairment framework results in a significantly shorter list of UNEs. The Commission removed unbundling obligations with respect to the highest capacity enterprise loops, as well as lower capacity enterprise loops at locations where state commissions find that deployment-based triggers are met. The Commission curtailed unbundling obligations with respect to mass market loops that have fiber components used in the provision of broadband services. The Commission removed unbundling obligations with respect to the highest capacity transport facilities, as well as lower capacity transport facilities along routes where state commissions determine that deployment-based triggers are met. The Commission removed

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[7] *See also Order* ¶¶329-331, 359, 394-404, 498-500 (JA - , , - , -) (adopting deployment-based "triggers" for geographic market-specific impairment fact-finding by state commissions).

unbundling obligations with respect to switching for the enterprise market, as well as mass market switching at locations where state commissions find that deployment-based triggers are met. The Commission also removed all existing unbundling obligations with respect to packet switching, and, subject to grandfather provisions and a transition, eliminated ILEC line sharing duties. *See generally Order* ¶¶4, 7 (JA).

The FCC determined that CLECs remained impaired in serving mass market customers without access to unbundled switching. *Order* ¶¶7, 459-461 (JA). This determination stemmed in large part from the fact that the ILEC networks – developed in a monopoly environment – are designed to permit easy electronic connection and disconnection of customers served by ILEC switches, but require expensive and operationally difficult manual "hot cuts" to rewire connections between a customer's loop and a CLEC switch. *Order* ¶465 & n.1409 (JA).

The hot cut process "create[d] an insurmountable disadvantage to carriers seeking to serve the mass market" with their own switches (*id.* ¶475 (JA)), as demonstrated not only by commenters' submissions regarding costs and operational difficulties (*id.* ¶¶464-474 (JA)) but also by the "extremely limited deployment of [CLEC] circuit switches to serve the mass market" (*id.* ¶435 (JA)). Indeed, because there currently was no economically efficient way of connecting CLEC switches to mass market loops, the Commission found that ILEC switches shared many of the essential characteristics of voice grade loops, which all parties agree should be made available as UNEs. *See id.* ¶¶226, 429 & n.1316, 439 (JA).

Although the record supported a national impairment finding with respect to mass market switching, certain high-capacity loops, and some types of transport, the Commission recognized

the possibility that circumstances in some geographic markets might warrant a different finding. The Commission thus adopted deployment-based triggers (or standards) for the states to apply to make market-specific determinations. *See Order* ¶¶462-463, 493-505 (JA). If those triggers are satisfied, the element at issue must be withdrawn following a period of transition designed to avoid market disruption. *Id.* ¶¶528-532 (JA). If the triggers are not satisfied, state commissions are to undertake further analysis of potential deployment under the Commission's general impairment standard. With respect to switching, the Commission directed state commissions to institute procedures to address and mitigate the source of impairment. If the triggers for switching are not satisfied and if further analysis of potential deployment under the Commission's general "impairment" standard does not rebut the existence of impairment, states that undertake this process are directed to consider whether narrower "rolling" access requirements would cure the impairment, and, if so, to implement such requirements. *Id.* ¶¶463, 521-524 (JA). Under such a regime, CLECs would be given "rolling" access to unbundled switching for 90 days on the theory that CLECs could aggregate customers and obtain hot cuts in more efficient and less costly "batches." If states determine that such procedures are inadequate, they are directed to conduct "continuing reviews of impairment for unbundled switching." *Id.* ¶463 (JA). In the event that states decline to participate in this process, the FCC will assume their role. *Id.* ¶527 (JA

INTRODUCTION AND SUMMARY OF ARGUMENT

In the *Order*, the FCC revised its interpretation of the statutory impairment standard. It concluded that CLECs requesting unbundled access are impaired "when lack of access to an [ILEC] network element poses a barrier or barriers to entry, including operational and economic

was "unable to conclude ... that the availability of unbundled local circuit switching either depresses or stimulates infrastructure investment." *Id.* ¶449 (JA The Commission explained that the section 706 directive that it promote advanced telecommunications is not implicated in the decision to require unbundling of circuit switching, because such unbundling involves only "the legacy telephone network, and thus does not deter carriers' investment in advanced telecommunications capabilities." *Id.* ¶450 (JA). Indeed, the Commission concluded that 'incumbents have every incentive to deploy these [advanced packet switching networks], which is precisely the kind of facilities deployment we wish to encourage." *Id.* n.1365 (JA). Accordingly, the Commission concluded that the "at a minimum" language of section 251(d)(2) did not require it to override its impairment findings with respect to circuit switching. The Court should affirm that reasonable conclusion.

Finally, the ILECs maintain that the Commission should have addressed its hot cut concerns in a more "[n]arrowly-tailored" way. Br. 20-21 (citing *USTA*, 290 F.3d at 422-26). The FCC did address the impairment caused by hot cuts in a narrowly tailored way. The Commission directed the states to eliminate compulsory access to unbundled circuit switching if deployment-based triggers were satisfied. *Order* ¶¶498-505 (JA). After finding that incumbents do not now have efficient bulk hot cut processes (*id.* ¶474 (JA)), the Commission also directed states to develop batch cutover processes that could reduce hot cut burdens, make competitive entry more likely, and thereby increase the likelihood that the triggers would be satisfied. *See id.* ¶¶487-490 (JA). And the Commission directed states to examine whether, notwithstanding the absence of actual competition as reflected in the triggers, CLECs economically could deploy their own switches without impairment. *Id.* ¶¶506-520 (JA -).

(JA .[21] The Commission explicitly recognized that where the trigger counts a carrier deploying its own loops, the evidence might bear less heavily on the ability of a CLEC to access the incumbent's loops. *See id.* n.1560 (JA). "Nevertheless," the FCC concluded, "the presence of three competitors in a market using self-deployed switching and loops shows the feasibility of an entrant serving the mass market with its own facilities" (*ibid.*), which is the ultimate point of the statutory impairment criterion.

The CLECs next contend that the trigger unlawfully "does not address ... sources of impairment" other than hot cut issues. Br. 37. But the Commission reasonably concluded that satisfaction of the trigger would show that multiple, competitive supply is possible and that there likely is no entry barrier reaching the level of impairment from any source. *Order* ¶¶498, 501 (JA). In any event, the Commission also allowed states to petition for waiver if they "identify specific markets that facially satisfy the self-provisioning trigger, but in which some significant barrier to entry exists such that service is foreclosed even to carriers that self-provision switches." *Id.* ¶503 (JA).

The CLECs also claim that the trigger points themselves – three, in the case of self-provisioning competitors; two, in the case of switching wholesalers – are arbitrary because "the numbers appear to have been made up out of thin air." Br. 37. This claim fares no better than the ILECs' similar challenge to the FCC's line drawing, which was reasonably designed to ensure that unbundling is required only where the market cannot "support 'multiple, competitive'

[21] The Commission also specifically targeted impairment caused by hot cuts by directing the states to develop batch cut proceses. *See Order* ¶¶487-490 (JA -).

INITIAL BRIEF

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and UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order of the
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December 1, 2003

reasons. First, the record demonstrates that numerous parts of the country have no cable modem or other alternative platforms at all.[22] Second, cable competition creates, at best, a broadband duopoly.[23] That is why, after several of the largest data CLECs were driven out of the market, the ILECs were, notwithstanding cable "competition," able to raise their prices by 25%. AT&T 2/3/03 Ex Parte 7 n.30 (J.A.__). Indeed, absent competition from data CLECs, the ILECs have incentives not to deploy inexpensive DSL service to prevent DSL from "cannibaliz[ing] the traditional services offered by ILECs," such as the second phone lines that consumers use for dial-up Internet access services. NERA Decl. ¶167 (J.A.__).

II. THE *ORDER*'S MECHANISMS FOR DETERMINING WHETHER SWITCHING SHOULD BE UNBUNDLED VIOLATE THE ACT.

A. MASS-MARKET SWITCHING

1. The FCC's treatment of unbundled switching for mass-market (residential and small business) customers is unlawful. Although the FCC correctly found that new entrants are impaired on a national basis without access to unbundled local switching for mass-market customers, *Order* ¶¶464-471, it 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. *Id.* ¶¶493-520. But the triggers, by their terms, do not do that.

The FCC's impairment finding is unassailable. With the exception of those cable television systems that offer telephony, competitors have no economic alternative to the ILECs' bottleneck "voice-grade loops" to serve the mass-market, *id.* ¶¶226, 439. Those loops are

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ILEC access lines nationwide as of December 2002, approximately 10.2 million were being used by CLECs to provide local voice service. *Local Telephone Competition Report* 1 & Table 4.

[22] *See* p.28 & n.14, *supra*; *see also*, *e.g.*, Covad 10/15/02 Ex Parte 3 n.12 (J.A.__).

[23] *See* p.28, *supra*.

hardwired to the ILECs' switches, and there is not now an efficient method of breaking the two apart. *Id.* ¶¶464-471. As a result, CLECs need access to the ILECs' switches every bit as much as they need access to their loops.

In this regard, the FCC found that competitors have deployed thousands of switches, now sitting with idle capacity, and that they have strong economic incentives to fill up those switches by connecting them to ILEC loops to serve mass-market customers. *Id.* ¶¶436-437, 447 n.1365, 449 n.1371, 466, 468. If CLECs could economically use their own switches, they obviously would do so. Nonetheless, virtually no carrier is doing so, and carriers initially attempting to do so were forced to "discontinue [those] plans" because of the direct costs and service disruptions caused by ILEC "hot-cut" processes for disconnecting loops from their switches and reconnecting them to CLEC switches. *Id.* ¶¶438, 440, 447 n.1365, 459, 465, 466-469.

The FCC also noted additional problems that CLECs face when they seek to use ILEC loops to serve the mass market absent unbundled switching. *See, e.g., id.* ¶480 (backhaul costs); *id.* ¶¶477-478 (collocation costs).

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." *Id.* ¶501.[24]

The FCC adopted this trigger on the ground that it provides a "granular" test for determining whether the sources of impairment identified by the FCC have been eliminated in a

[24] In addition, under the "wholesale trigger," a state must find no impairment wherever "two or more competing carriers . . . offer wholesale switching service for that market using their own switch." *Id.* ¶504.

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December 31, 2003

Further, §261(b) provides that no section of the Act may be "construed" to limit state unbundling authority.

Thus, the Commission could simply have directed states to apply the general impairment standard to local markets – as the ILECs formerly urged. *Local Competition Order* ¶¶50-52. There plainly can be no valid objection to requiring willing states to make these determinations only where (1) the FCC has not found nonimpairment and (2) FCC's triggers are not met.

In all events, the *Order* provides ample constraints. In defining local markets, states must apply principles similar to those used to define geographic markets in antitrust law. *Compare Order* ¶495; 47 C.F.R. ¶ 51.319(d)(2) *with FTC v. PPG Indus.*, 798 F.2d 1500 (D.C. Cir. 1986). The ILECs did not advance a better approach, and the Commission reasonably concluded that there was no credible record evidence establishing how to draw market boundaries for mass-market switching. *Order* n.1536.

Nor does the *Order* authorize states to replicate the "open-ended inchoate framework" that *USTA* invalidated. ILEC Br. 28. States must apply locally the same impairment standard the FCC applies nationally – a standard the ILECs do not challenge. The FCC cannot be faulted for going further and specifying relevant criteria under that standard.

The ILECs' complaint is thus nothing more than rank speculation that states are determined to preserve UNE-P regardless of the record and can manipulate their delegated authority to do so. But state commissions, like federal agencies, are entitled to a presumption of regularity (*see supra*) and the ILECs point to nothing remotely sufficient to overcome that presumption. Should the ILECs object to any state's market definitions or impairment determinations, "[they] may seek a declaratory ruling from the Commission" (*Order* n.1552) or review in federal district court (§252(e)(6)).