Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
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
	)	

REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

Lawrence E. Sarjeant
Indra Sehdev Chalk
Michael T. McMenamin
Robin E. Tuttle

Its Attorneys

1401 H Street, NW, Suite 600
Washington, DC 20005
(202) 326-7300

July 17, 2002

TABLE OF CONTENTS

Page

SUMMARY 2

DISCUSSION 3

I. The Courts Have Provided Clear Guidance To Direct the FCC in a UNE Impairment Analysis That Will Comply With Section 251(d)(2) of the 1996 Act 3

II. CLECs' Arguments Against a UNE Impairment Analysis Based on Limiting Standards, or a Granular Analysis, Have Been Addressed by the DC Court of Appeals 5

III. Limiting Standards, or a Granular Analysis, Must Be Applied To Assess What Network Elements Should Be Unbundled 6

IV. Several Network Elements Should Be Eliminated From the Current, National UNE List 9

CONCLUSION 10

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
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

REPLY COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTA),[1] through the undersigned and pursuant to Federal Communications Commission (FCC or Commission) Rules 1.415 and 1.419,[2] hereby submits its reply comments in response to the FCC's *Triennial Review Notice*[3] in the above-docketed proceeding. In the time since this proceeding was initiated and comments were filed, two important cases were decided – the United States Supreme Court (Supreme Court) case addressing the FCC's total element long-run incremental cost (TELRIC) costing methodology

[1] USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.
[2] 47 C.F.R. §§ 1.415 and 1.419.
[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147, FCC 01-361, Notice of Proposed Rulemaking (rel. Dec. 20, 2001) (*Triennial Review Notice* or *Triennial Review Proceeding*).

and unbundled network element (UNE) combinations and the Court of Appeals for the District of Columbia Circuit (DC Court of Appeals) case addressing the application of the standards necessary for determining what network elements must be unbundled.[4] These cases, in conjunction with the Supreme Court's decision in *AT&T Corp. v. Iowa Utils. Bd.* (*Iowa Utils. Bd.*),[5] provide clear guidance to the FCC in its review of Sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996 (1996 Act)[6] in this *Triennial Review Proceeding*.

SUMMARY

The Courts' decisions in *Iowa Utils. Bd.*, *Verizon*, and *USTA* affirm as necessary and appropriate the direction that the FCC has already taken in this proceeding to evaluate the standards for determining what and where network elements should be unbundled – that is, using a "more sophisticated, refined unbundling analysis."[7] As stated in the *Triennial Review Notice*, the FCC requests comment on the need for a granular analysis (*i.e.*, applying limiting standards such as service- and location-specific considerations, facility and capacity considerations, and customer and business considerations) of the need for network elements, which would be used to develop a revised UNE list.[8] USTA encourages the FCC to develop and apply such meaningful, limiting standards, specifically considering whether inter-modal competition exists, whether competitors can self-provision the needed network elements, whether competitors can obtain those network elements from third-party suppliers, and whether provision of any network elements inhibits facilities-based competition, as USTA suggested in its April 5, 2002 comments. These considerations are necessary to correct the deficiencies that the DC Court of Appeals found in its *USTA* decision with regard to the FCC's UNE impairment analysis. USTA believes

[4] *See Verizon Communications Inc. v. FCC*, 535 U.S. ___, 122 S.Ct. 1646 (2002) (*Verizon*) and *USTA v. FCC*, 290 F.3d 415, 2002 U.S. App. LEXIS 9834 (D.C. Cir. May 24, 2002) (*USTA*).
[5] 525 U.S. 366 (1999).
[6] 47 U.S.C. §§ 251(c)(3) and 251(d)(2).
[7] *Triennial Review Notice* at ¶34.

that the application of such a granular analysis will support the removal of high-capacity loops, the high frequency portion of the loop, dedicated transport, and switching from the current UNE list, allowing the remaining UNEs to continue promoting true, facilities-based competition.

DISCUSSION

I. The Courts Have Provided Clear Guidance To Direct the FCC in a UNE Impairment Analysis That Will Comply With Section 251(d)(2) of the 1996 Act.

In the past three years, the Courts have issued opinions, in response to appeals of FCC rulemakings on UNEs, which make clear the sort of analysis the FCC must do to require the unbundling of network elements in order to comply with the impairment standards of Section 251(d)(2) of the 1996 Act. It is critical that the FCC adhere to such guidance now, in light of the fact that the FCC's past two attempts to identify what and where network elements should be unbundled have resulted in the FCC's unbundling rules being vacated in one case and remanded in the another case.

In *Iowa Utils. Bd.*, the Supreme Court vacated the FCC's Rule 319,[9] finding that the "FCC did not adequately consider the 'necessary and impair' standards when it gave blanket access to these network elements, and others."[10] The Supreme Court further found that the 1996 Act required the "[. . . FCC to apply *some* limiting standard, rationally related to the goals of the Act . . . .]"[11] Notably, the Supreme Court added that the FCC "cannot, consistent with the statute, blind itself to the availability of elements outside the incumbents network."[12] In short, the Supreme Court found that the FCC failed to conduct an impairment analysis.

---

[8] *Id*. at ¶¶36-44.
[9] 47 CFR §51.319 (1997) (FCC's requirements for unbundling network elements).
[10] *Iowa Utils. Bd*. at 387.
[11] *Id*. at 386.
[12] *Id*. at 389.

In *USTA*, the DC Court of Appeals remanded the FCC's unbundling rules, which were promulgated in the *UNE Remand Order*[13] following the Supreme Court's earlier *vacatur* of the same rules. Although the FCC attempted to apply an impairment analysis in its *UNE Remand Order*, the DC Court of Appeals dismissed as inaccurate some of the FCC's reasons – certainty in the marketplace; administrative practicality; and reduced regulation – for adopting, for the most part, undifferentiated national UNE rules.[14] More importantly, the FCC's other reasons – rapid introduction of competition and promotion of facilities-based competition, investment, and innovation – were also dismissed because the DC Court of Appeals found that the FCC had not argued that the synthetic competition of services provided over ubiquitously provided ILEC facilities was the type of competition that would fulfill Congress's purposes and because the FCC's real reasoning essentially boiled down to its belief that more unbundling is better.[15] The DC Court of Appeals concluded that the FCC "must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible," particularly that the absence of UNEs would genuinely impair competition.[16] Further, relying on the Supreme Court's point in *Iowa Utils. Bd.* that "if 'Congress had wanted to give blanket access to incumbents' networks,' it 'would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided,'" the DC Court of Appeals added that it "read the statute as requiring a more nuanced concept of impairment than is reflected in findings such as the Commission's – detached from any specific markets or market categories."[17]

Not only have the Courts' direction been clear when the matter of unbundling is directly at issue, but the Supreme Court has also provided guidance when considering the separate matter

---

[13] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*).
[14] *USTA* at **21-23.
[15] *Id*. at **23-24, 28.

of the pricing methodology that applies to UNEs. In *Verizon*, the Supreme Court acknowledged that "entrants may need to share some facilities that are very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology)."[18] Indeed, the Supreme Court plainly infers that access to network elements on an unbundled basis is limited. Where a network element is not "costly-to-duplicate" or "unnecessarily expensive," unbundled access to that element is not required.[19]

II. CLECs' Arguments Against a UNE Impairment Analysis Based on Limiting Standards, or a Granular Analysis, Have Been Addressed by the DC Court of Appeals.

In their comments in this proceeding, competitive local exchange carriers (CLECs) argue that the FCC should continue to apply the impairment standard established in the *UNE Remand Order*.[20] Since the CLECs' comments were filed, the DC Court of Appeals has specifically addressed the impairment standard established in the *UNE Remand Order*. As noted previously, in *USTA*, the DC Court of Appeals determined that a more nuanced concept of impairment is required than that which the FCC established in the *UNE Remand Order* and that the FCC must do more than state that more unbundling is better. In particular, the DC Court of Appeals found that the impairment standard applied in the *UNE Remand Order* did not adequately assess when and where competitors were impaired. Accordingly, the FCC cannot rely on the impairment standard adopted in the *UNE Remand Order* to determine what and where UNEs must be unbundled. Thus, the CLECs' arguments are moot.

---

[16] *Id*. at *28.
[17] *Id*. at *29 (*quoting Iowa Utils. Bd.*, 525 U.S. at 390).
[18] *Verizon*, 535 U.S. ___, ___ n.27, 122 S.Ct. 1646, 1672 n.27 (2002).
[19] *Id*.
[20] *See e.g.*, WorldCom Comments at 50, AT&T Comments at 34-40, and ALTS Comments at 26-27.

Underneath the CLECs' arguments to retain the FCC's UNE impairment analysis adopted in the *UNE Remand Order* is the desire to obtain and maintain access to as many of the ILECs' network elements as possible without having to address whether or not there are competitive alternatives to those network elements and whether or not there is a genuine need for those network elements.[21] Yet, the 1996 Act does not require ILECs to provide their network elements to competitors simply for their convenience. The 1996 Act requires ILECs to unbundle certain network elements when access to such network elements is necessary and lack of access would impair competitors' ability to offer services.[22] ILECs' network elements are not necessary when competitors can self-provision the same facilities, when the same facilities are available from third-party suppliers, or when there is inter-modal competition for the same facilities. When there are competitive alternatives available for any ILEC network element, the removal of such network element from the current unbundling list would not impair competitors.

III. Limiting Standards, or a Granular Analysis, Must Be Applied To Assess What Network Elements Should Be Unbundled.

As the Courts have made clear, the application of limiting standards is necessary to determine what and where network elements must be unbundled. The Courts have not dictated what those limiting standards should be. Specifically, neither the Supreme Court nor the DC Court of Appeals has mandated the application of an antitrust essential facilities standard, but it is clear that the Courts are insisting that the requirement to unbundle network elements must be determined by more than a showing of inconvenience to ILECs' competitors. Importantly, the application of limiting standards does not foreclose the possibility that there may be a continued need to unbundle certain network elements, and even to unbundle them on a national basis.

[21] For example, ALTS claims "that not much has changed since the Commission's review of UNEs in the *UNE Remand Order* . . . " and that "for the most part, the Commission should reestablish all existing UNEs more or less on the same terms and conditions." ALTS Comments at 7-8.

However, evaluating the availability of alternatives to ILECs' network elements based on limiting standards, using a granular analysis, provides the FCC with the necessary information to determine what and where network elements are truly necessary and thus what and where network elements must be unbundled. As the DC Court of Appeals in *USTA* noted, under the FCC's latest attempt at an impairment analysis, "UNEs will be available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have the object of Congress's concern."[23] Indeed, the DC Court of Appeals recognized that competitors have reduced incentives to innovate and invest in facilities – the foundation of true competition – when unbundling is mandated at mandated prices.[24] Notably, the DC Court of Appeals faults the FCC for failing to consider what level of investment might have occurred in the absence of unbundling (or more likely, in the complete absence of certain network elements and in the absence of the availability of certain network elements on a national basis) and comments that it expects the FCC should, at least, confront this issue.[25]

The question is, then, what limiting standards should the FCC consider and how should it apply them? USTA reiterates its belief that the FCC must evaluate the necessity of ILECs' network elements on a product and geographic level. More specifically, the FCC should consider whether there are third-party suppliers of the same, or similar, network elements that ILECs provide; whether there are inter-modal competitors providing consumers with alternatives to the ILECs' network elements (e.g., from wireless, cable, satellite or other non-wireline providers of telecommunications); whether competitors can self-provision the facilities that they

---

[22] *See* 47 U.S.C. §251(d)(2).
[23] *USTA* at *17.
[24] *Id*. at *25.
[25] *Id*. at *27.

seek to acquire from ILECs; and whether requiring the unbundling of certain network elements inhibits the development of facilities-based competition.[26] USTA urges the FCC to develop an impairment analysis based on geographic- and product-level limiting standards, and applied on a granular basis, to all networks elements on the current UNE list. In at least one case, such an analysis was already attempted, resulting in the partial removal of one UNE from the national list. Specifically, the FCC recognized that CLECs are not impaired in their ability to obtain scalable switches to meet their needs because they are deploying them and serving customers with them. Based on this recognition, the FCC eliminated unbundling requirements for local circuit switches serving customers with four or more lines in the highest density zone in any of the top 50 Metropolitan Statistical Areas. USTA believes that the application of such an impairment analysis to the current list network elements that are required to be unbundled would support the complete removal of several network elements from the current UNE list.

USTA continues to oppose the inappropriate focus on cost disparities between new entrants and incumbents, which the FCC relied upon in its *UNE Remand Order*, to justify maximum unbundling of network elements. Importantly, in *USTA*, the DC Court of Appeals stated that "cost comparisons of the sort made by the Commission, largely devoid of any interest in whether the cost characteristics of an 'element' render it at all unsuitable for competitive supply, seem unlikely either to achieve the balance called for . . . by the [Supreme] Court . . . in its disparagement of the Commission's readiness to find 'any' cost disparity reason enough to order unbundling."[27] Any consideration of cost as a limiting standard must take into consideration the Court's comment and implied guidance.

[26] The importance of encouraging true, facilities-based competition is underscored by the national security need for redundant networks.
[27] *USTA* at **34-35.

IV. Several Network Elements Should Be Eliminated From the Current, National UNE List.

USTA believes that the application of limiting standards on a granular basis to the current network elements that ILECs are required to unbundle would indicate that ILECs' competitors would suffer no impairment if high-capacity loops, the high frequency portion of the loop, switching, and dedicated transport were removed from the national UNE list. High-capacity loops are readily available from third-party suppliers; competitors can economically self-provision them; and an inter-modal alternative for such loops is available from wireless carriers. Likewise, cable is the dominant provider of high-speed Internet access, and as such, cable is an inter-modal alternative to the ILECs' high frequency portion of the loop. With regard to switches, CLECs have deployed and are using their own switches to serve customers. Finally, competitors are capable of self-provisioning dedicated transport, notably through fiber networks, or obtaining it from third-party suppliers.

CONCLUSION

USTA urges the FCC to heed the guidance of the Courts, using this *UNE Triennial Proceeding* to develop and apply limiting standards in its UNE impairment analysis that will comport with the requirements of the 1996 Act and continue to promote and foster facilities-based competition.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: /s/ Robin E. Tuttle

Lawrence E. Sarjeant
Indra Sehdev Chalk
Michael T. McMenamin
Robin E. Tuttle

Its Attorneys

1401 H Street, NW, Suite 600
Washington, D.C. 20005
(202) 326-7300

July 17, 2002

CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on July 17, 2002, Reply Comments Of The United States Telecom Association was either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the attached service list.

/s/Meena Joshi
Meena Joshi