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 Wireless Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

JOINT PETITION FOR STAY PENDING JUDICIAL REVIEW

Pursuant to 47 C.F.R. §§ 1.41, 1.43, BellSouth Telecommunications, Inc., Qwest Communications International Inc., SBC Communications Inc., the United States Telecom Association, and the Verizon telephone companies (collectively, "petitioners") jointly request the Commission to stay the specific portions of its recently released *Triennial Review* order that impose unbundling requirements with respect to elements of petitioners' traditional narrowband telephone networks.[1] For the reasons explained below, these requirements are fundamentally inconsistent with the terms of the Telecommunications Act of 1996 ("1996 Act" or "Act") and the previous directives of the Supreme Court and the D.C. Circuit, and will impede, rather than promote, the continuing development of meaningful competition. The requirements also will result in massive, immediate, and irreparable harm to petitioners and to the telecommunications

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 *et al.*, FCC 03-36 (rel. Aug. 21, 2003) ("Order").

sector as a whole. They should be stayed pending review in a federal court of appeals pursuant to 47 U.S.C. § 402(a).

Because of the severe harm that will be caused by these rules if they are permitted to take effect, and to allow sufficient time for the reviewing court to address a stay motion in the event that the Commission does not grant relief, petitioners respectfully request action on this petition by September 11, 2003. If the Commission fails to resolve this petition by that date, petitioners will be constrained to seek relief in the court of appeals pursuant to Rule 18 of the Federal Rules of Appellate Procedure.

DISCUSSION

The challenged aspects of the Order should be stayed if petitioners demonstrate either (1) a likelihood of success on the merits together with a showing of "irreparable injury," or (2) a "serious" question regarding the merits coupled with a more "substantial" showing that the balance of equities tips in the movant's favor. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). This petition meets both alternative standards, as petitioners are likely to succeed on the merits and the equities overwhelmingly favor a stay.

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS

The Order is legally flawed on at least four distinct grounds, and petitioners are likely to succeed as to each.

A. The Order's Circuit Switching Requirements Are Unlawful

The undisputed evidence in the record demonstrated that competitive local exchange carriers ("CLECs") can and do use their own switches to serve millions of mass-market customers. The Order nevertheless requires incumbent LECs (or "ILECs") to provide CLECs with access to unbundled switching – and thus to the UNE-P – for each and every mass-market customer in the country. The Commission reaches this incongruous result by taking two steps: first, it makes a provisional finding of impairment based on alleged operational and economic issues associated with hot cuts; and, second, it delegates to the states – which were on record as supporting continuation of the UNE-P without limitation – the authority to make the ultimate determination as to whether CLECs are impaired without access to unbundled switching. Both steps are unlawful.

1. The Commission concludes that the need for a hot cut creates an "operational impairment" to the use of CLEC switches to serve mass-market customers. *See* Order ¶¶ 460, 464-469, 474. It bases this conclusion on the finding that "the record indicates that competitive LECs have self-deployed few local circuit switches to serve the mass market." *Id.* ¶ 438. That finding, in turn, is based solely on data relating to the number of *residential* lines served by CLEC switches. The Commission's analysis is thus admittedly incomplete. Indeed, the portion of the record it ignores makes clear that petitioners have performed well over a million hot cuts for mass-market business customers and have done so very successfully.[2] The Commission itself, moreover, has concluded pursuant to 47 U.S.C. § 271 that, in 42 states and the District of Columbia, the Bell company performs hot cuts at a level that gives CLECs a meaningful opportunity to compete *and* can meet reasonably foreseeable demand.

At bottom, then, the Commission's "operational impairment" finding is premised only on speculation – *i.e.*, that it is "unlikely" (Order ¶ 468) that ILECs could satisfy *increased* demand

[2] *E.g.*, Ex Parte Letter from Jim Lamoureux, SBC, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338 *et al.* (FCC filed Feb. 5, 2003); Letter from Michael E. Glover and Susanne Guyer to William F. Maher, FCC (Jan. 10, 2003), attached to Ex Parte Letter from Ann D.

for hot cuts if the UNE-P were extinguished. Worse yet, the speculation on which the Commission bases its impairment finding is refuted by substantial record evidence that the Commission simply ignores. The record makes clear, for example, that petitioners' hot-cut performance has remained consistent even as volumes have increased.[3] It also shows that substantial increases in hot-cut volumes can be handled in many cases even without substantial additional ILEC resources, and that ILEC hot-cut processes are scalable.[4] In any event, even if these concerns were valid, the Commission could have addressed any hot-cut concern directly and in a tailored way – by, for example, requiring the incumbent to provide UNE-P on a line as a transitional matter unless and until it is able to perform the necessary hot cut, or as the Commission itself suggests with respect to the so-called "rolling" UNE-P. *See id.* ¶ 522.

The Commission's conclusion that the average cost of hot cuts, coupled with customer "churn," creates "economic impairment" nationwide is likewise unlawful. *Id.* ¶¶ 470-471. For one thing, hot-cut costs are set by state regulators and, as the Commission acknowledges, they

Berkowitz, Verizon, to Marlene H. Dortch, FCC, at 5, CC Docket Nos. 01-338 *et al*. (Jan. 10, 2003) ("Glover/Guyer Letter").

[3] *See, e.g.*, Glover/Guyer Letter at 5-6 (explaining that Verizon had consistently provided more than 95% of hot cuts on time and without problems even when volumes skyrocketed in major states like Massachusetts, Pennsylvania, and New Jersey).

[4] *See* Declaration of John Berringer & David R. Smith ¶ 40, attached to Reply Comments of SBC Communications Inc., CC Docket Nos. 01-338 *et al*. (FCC filed July 17, 2002); Ex Parte Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, FCC, Attach. at 12, CC Docket Nos. 01-338 *et al*. (Dec. 18, 2002) (showing that Qwest had current capacity to meet 400% of current hot-cut demand, and could scale up even further); *see also, e.g.*, Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4114, ¶ 308 (1999) ("[W]e . . . find that Bell Atlantic demonstrates that its ability to provision hot cuts is scalable such that the company can expand its capacity to perform hot cuts in response to increases in commercial demand."), *aff'd*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

vary from state to state. *Id.* ¶ 470.[5] The Commission never reconciles its *national* finding of economic impairment with quantifiable, state-specific variations in hot-cut costs or its own conclusion that "a granular analysis must wherever possible account for market-specific factors." *Id.* ¶ 483.

In any event, the Commission's analysis of hot cuts and churn conflicts with *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"), *cert. denied*, 123 S. Ct. 1571 (2003). There, the D.C. Circuit made clear that cost disparities in isolation, without regard to such things as potential revenues, CLEC cost advantages, and retail rate distortions, cannot justify impairment. *See id.* at 422-26. Likewise, the court emphasized that the Commission cannot count *every* sort of cost difference as impairment, regardless of whether it is simply a transient issue faced by new entrants in any market. *See*, *e.g.*, *id.* at 427 ("[t]o rely on cost disparities that are universal as between new entrants and incumbents in *any* industry is to invoke a concept too broad, even in support of an *initial* mandate, to be reasonably linked to the [Act's] purpose").

The Commission's nationwide finding that hot cuts create "economic impairment" runs afoul of both mandates. The Commission made no attempt to view hot-cut costs in the larger context that the D.C. Circuit required; rather, it found them to be a source of economic impairment based solely on the self-serving allegations of a handful of CLECs that claimed they were experiencing high churn rates. But churn rates cannot, in and of themselves, create impairment. There may be many reasons why a CLEC experiences high churn, and many things

[5] Indeed, WorldCom's own evidence showed that the average cost of a hot cut in California is $19, far less than the average on which the Commission bases its analysis. *See* Letter from Ruth E. Holder, Lawler, Metzger & Milkman, LLC, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338 *et al*. (Feb. 12, 2003).

a CLEC can do about it. Indeed, churn is just another name for competition, as customer retention reflects a carrier's ability to compete in the marketplace. In any event, as the Commission recognizes, any concern about churn can be addressed directly through measures such as a 90-day rolling cut-over, which would cut churn costs in half. *See* Order ¶¶ 523-524. In short, the Commission did not demonstrate that, when considered in light of CLEC cost advantages and other relevant factors, churn and hot-cut costs prevent entry. Nor did it reconcile its finding of economic impairment with the more than one million mass-market customer lines that have already been transferred to CLECs via the hot-cut process. Rather, the Commission fell back on the false assertion that, because hot cuts and churn create *some* level of cost disparity for CLECs at the outset of entry, CLECs must be impaired. *See id.* ¶ 470. Under *USTA*, that isolated assertion is insufficient as a matter of law to justify unbundling.

Because the Commission's provisional conclusion that the hot cut process creates impairment is indefensible, so too is the Commission's failure to consider properly the hundreds of CLEC switches that have been deployed and are being used today to serve millions of enterprise customers. There is no reason those switches cannot readily be used to serve mass market customers, even if they are not so used today. The Commission erred by ignoring them.

2. The Commission's decision to delegate the ultimate unbundling determination to the states is likewise unlawful.

First, the 1996 Act does not permit the Commission to delegate unbundling decisions to the states. Congress required that "*the Commission* shall consider" "impair[ment]" in "*determining*" which network elements to make available, 47 U.S.C. § 251(d)(2) (emphases added), and further provided that "*the Commission* shall complete all actions necessary to establish regulations to implement the requirements of this section" – including the unbundling requirements of that section – within six months after the Act's enactment, *id.* § 251(d)(1) (emphasis added). Any effort to delegate this decisionmaking authority necessarily "subvert[s] the plain meaning of the statute, making its mandatory language merely permissive." *Miller v. French*, 530 U.S. 327, 337 (2000).

Second, any lawful delegation obviously would have to establish meaningful constraining standards that ensure that these state decisions comport with the Act as interpreted in *USTA* and *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). The Commission's "standards" for its delegation fail that basic test.

As an initial matter, the Commission's claim that the first part of its test is an "objective" one that relies on the states only for "fact-finding," Order ¶¶ 493, 498, is incorrect. In fact, although the test requires states to determine whether there are three switch-based competitors in "the market," the Commission left it to the states to decide the generally dispositive question of what constitutes the relevant geographic market. *Id.* ¶¶ 495-496; *see also id.* ¶ 497 (giving the states similar authority to decide what constitutes the "mass market" product market). Furthermore, as discussed in more detail below, the Commission gave the states broad latitude to determine which competitive switches count toward the triggers. In view of the discretion vested in the states in these matters, the suggestion that the first prong of the Commission's test establishes firm criteria to rein in unbundling is implausible.

The second part of the Commission's test likewise fails to impose any meaningful constraint on the states' discretion that would ensure that unbundling is limited in the manner contemplated by the Act and compelled by *USTA*. Indeed, in this aspect of the test, the Commission has not even provided the states with a rule of decision. Instead, the states are to examine a collection of factors, application of each of which will require the states to exercise considerable discretion, all without binding guidance from the Commission. *E.g., id.* ¶¶ 517, 520. The Commission has not provided the guidance necessary to ensure that these issues are resolved consistently across the country in a manner that comports with the 1996 Act and judicial precedent. Thus, although the ultimate decisionmaker differs from the framework previously found unlawful by the D.C. Circuit, the end result of the Commission's test – *i.e.*, the absence of any meaningful limiting principle, and the resulting requirement to unbundle in the absence of impairment related to natural monopoly characteristics – is the same.

Furthermore, to the extent that the FCC test *does* guide the states, it does so in ways that are affirmatively inconsistent with the 1996 Act. Most dramatically, under the "objective" prong of the test, incumbents may obtain relief only where each of three competitors is "operationally ready and *willing* to provide service to *all* customers in the designated market." *Id.* ¶ 499 (emphases added). The second part of the FCC test includes a similar rule. *Id.* ¶ 519 ("State commissions must ensure that a facilities-based competitor could economically serve all customers in the market before finding no impairment.").

As *USTA* makes clear, however, there are many reasons other than impairment that may dissuade a facilities-based carrier from being "ready and willing" to serve *all* customers in the designated market. CLECs may, for example, rationally avoid the segment of the market where the incumbent's retail rates are set below cost. *See* 290 F.3d at 422 ("[o]ne reason for . . . market-specific variations in competitive impairment is the cross-subsidization often ordered by state regulatory commissions" that "brings about undercharges for some subscribers"). In *USTA*, the D.C. Circuit emphasized precisely this point, criticizing the Commission's *UNE Remand*

Order[6] for failing to "address[] by what criteria want of unbundling" can be said to cause impairment in markets "where customers are already charged below cost." *Id.* The Commission's "all customers in the market" standard suffers from the same flaw.

Similarly, this standard ignores a second and independent holding in *USTA*: that the Commission must "consider[] the advantage CLECs enjoy in being free of any duty" to serve all customers in the market. *Id.* at 423. Even apart from universal-service distortions, CLECs can – and, indeed, the rational ones do – serve specific segments of the market, most notably the high-volume, high-revenue customers who present the most potential profit. The ability to engage in cherry-picking is one of the key competitive edges that CLECs have. The Commission's delegated "standard," however, turns this CLEC advantage on its head. It indicates that CLECs that follow such a rational strategy do *not* count for purposes of determining whether a market is competitive and thus whether CLECs are entitled to access to unbundled switching.

Indeed, the Commission's "all customers in the market" standard may well preclude consideration of existing intermodal competitors such as cable providers (which generally provide service only where they own cable facilities) and rapidly growing voice-over-Internet-protocol companies (which provide service only to customers with computers and broadband connections). In fact, despite the D.C. Circuit's express directive to consider intermodal competition, the Commission specifically discounts competition from cable companies – which already offer local telephone service to more than 10 million homes – because they do not offer a wholesale platform to other competitors. *See* Order ¶¶ 443, 446. Likewise, while the

[6] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *petitions for review granted and remanded*,

Commission holds that commercial mobile radio service ("CMRS") providers compete against ILEC local voice service and thereby qualify for UNEs, *see id.* ¶ 140, it nevertheless holds that their switches are *not* substitutes for ILEC switches, and thus do *not* count for purposes of the objective trigger, for the same reason, *see id.* ¶ 499 & n.1549; *see also id.* ¶¶ 445-446. The Act is concerned with ensuring that markets are open to *competition*, not with ensuring that individual *competitors* have an enduring wholesale supplier. The Commission's disregard of this principle exhibits "naked disregard of the competitive context," rendering its rules inconsistent with *USTA* and contrary to the Act. *See* 290 F.3d at 429.

Moreover, the Commission's standard for determining when a market is sufficiently competitive to preclude a finding of impairment – in particular, the existence of three competitors (plus the ILEC) serving all mass-market customers in the market in question – compounds these problems. *See* Order ¶ 501. Under the Act and *USTA*, the dispositive question is not whether, at any given moment, a particular market is characterized by multiple, facilities-based competitors. Rather, the Act requires that impairment determinations be based on the "ability" of a competitor to enter, 47 U.S.C. § 251(d)(2)(B), or, as the court put it, whether the market is "[]suitable" for facilities-based competition. *USTA*, 290 F.3d at 427. It takes far fewer than *four* facilities-based providers to establish that multiple competitive supply is feasible and thus that unbundling is not permissible. Telecommunications is a capital-intensive, high fixed-cost business, in which there are unlikely to be *four* facilities-based competitors fighting for the same mass-market customers in many geographic markets. Yet, under the Commission's rule, any market that does not meet that standard is presumptively not susceptible to competition and

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

therefore subject to additional analysis as to whether the impairment standard is met. By contrast, the D.C. Circuit threw out the Commission's line-sharing rules because the existence of extensive facilities-based competition from cable demonstrated that competition could flourish without unbundling and thus rendered those rules contrary to the Act. *See id.* at 428 (stressing "competition in broadband services coming from cable (and to a lesser extent satellite)"). Similarly, the Commission long ago declared the long-distance market to be competitive on the basis of the *potential* for competitors to compete with the incumbent throughout its markets. *See* Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3304, ¶ 60 (1995).

Finally, the Commission's failure to retain review authority over state unbundling decisions renders its delegation triply unlawful. Even where a federal agency is permitted to delegate decisionmaking authority granted by Congress, federal law requires that the agency not "relinquish . . . the final authority" to make the relevant decision; instead, that decision must ultimately be approved by the agency in question. *Southern Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983). Indeed, all the cases that the Commission cites on this issue (Order ¶ 188 n.604) make this very point. *See, e.g.*, *Vierra v. Rubin*, 915 F.2d 1372, 1379 (9th Cir. 1990) ("for a state to receive federal funds under the AFDC program, *the state must submit to the Secretary, and have the Secretary approve*," the relevant plan) (emphasis added); *see also* Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8987, ¶ 396 & n.1022 (1997) (delegating authority to state commissions to grant waivers of its "no-disconnect" rule for Lifeline customers, but providing for direct appeal to the FCC of any such decision). Under the Order, however, the Commission has no obligation to review the 51 separate state findings, either before or after they take effect approximately nine months from now. That failure confirms the unlawfulness of the Commission's delegation here.

B. The Order's Transport, High-Capacity Loops, and Dark Fiber Unbundling Requirements Are Likewise Unlawful

For many of the same reasons, the Order's unbundling requirements with respect to high-capacity loops and dedicated transport – including dark fiber – are also unlawful. Here too the Commission adopted nationwide findings of impairment that have no basis in the record, and, here too, the Commission delegated the ultimate unbundling determination to the states. Again, both steps are unlawful.

1. In *USTA*, the D.C. Circuit pointed specifically to the *UNE Remand Order*'s finding that, as of 1999, "47 of the top 50 areas ha[d] 3 or more competitors providing interoffice transport," and it admonished the Commission for failing to "explain[] why the record supports a finding of material impairment where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis." 290 F.3d at 422. The undisputed record before the Commission demonstrated that high-capacity loops, dedicated transport, and dark fiber are now even *more* "significantly deployed on a competitive basis." Indeed, as of year-end 2001, *49* of the top 50 areas had *five* or more competitors self-providing transport.[7] The Commission itself acknowledges that competitors have deployed at least 184,000 miles of fiber, and perhaps as much as 339,500 miles, the bulk of which is in "densely populated areas" where it is "significantly" *more* expensive to deploy facilities. Order ¶¶ 371, 378. The record also demonstrated, moreover, that CLECs had entered the market and were competing successfully

[7] *See UNE Fact Report 2002*, App. K, *attached to* Comments of SBC Communications Inc., CC Docket Nos. 01-338 *et al.* (Apr. 5, 2002) ("*UNE Fact Report 2002*").

using wholesale special access services – rather than UNEs – to meet their high-capacity transmission needs.[8]

Just as it did in the *UNE Remand Order*, however, the Commission "find[s] on a national basis" that competitors are impaired without access to high-capacity loops and dedicated transport, and it accordingly requires unbundling throughout the country. *See id.* ¶¶ 311, 381 (dark fiber loops and transport); *id.* ¶¶ 320, 386 (DS3 loops and transport); *id.* ¶¶ 325, 390 (DS1 loops and transport). The Commission's rationale in this respect is that, even though "competitive [facilities] ha[ve] been deployed in many areas," "the record lacks the specificity" to permit the Commission "to analyze appropriately [these facilities] on a *route-specific* basis." *Id.* ¶ 392 (emphasis added); *see id.* ¶¶ 314, 321, 384, 387. The Commission thus orders unbundling of these facilities *everywhere*, subject to a location-specific analysis to be conducted by state commissions.

Even if a route-specific analysis were appropriate – which, as we explain below, it is not – the Commission's analysis here gets things exactly backwards. Under the 1996 Act, the Commission must make a finding of impairment with respect to an element *before* it orders unbundling of that element. *See, e.g.*, 47 U.S.C. § 251(d)(2) (Commission "shall" consider the "impair[ment]" standard "[i]n determining what network elements should be" unbundled); *Supplemental Order Clarification*,[9] 15 FCC Rcd at 9596, ¶ 16 (Commission must determine

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[8] *See UNE Rebuttal Report 2002* at 7-8, 44-46, *attached to* Ex Parte Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338 *et al.* (Oct. 23, 2002); Ex Parte Letter from W. Scott Randolph, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338 *et al.* (Jan. 10, 2003).

[9] Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*"), *petitions for review denied*, *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).

"impairment" "before imposing additional unbundling obligations on incumbent LECs" rather than "impos[ing] such obligations first and conduct[ing] our 'impair' inquiry afterwards"). Simply put, if the Commission is unable to determine where, if anywhere, competitors are impaired without access to a particular network element, the answer is not to unbundle it *everywhere*. Quite the contrary, under the express terms of the Act, the Commission may impose an unbundling obligation only where it makes a determination, based on substantial record evidence, of impairment in a particular market – which the Commission concedes does not exist. *See United Scenic Artists, Local 829 v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985) (agency "is not free to ignore statutory language by creating a presumption on grounds of policy to avoid the necessity for finding that which the legislature requires to be found").

The Commission's "unbundle first, ask questions later" approach is particularly inappropriate in view of the fact that it is the *CLECs* that know specifically where they have deployed the facilities that would meet the Commission's triggers. By presuming impairment – and then leaving it to the ILECs to *dis*prove it before the state commissions – the Commission has effectively shifted the burden of proving impairment *away* from the parties that have within their control the very information the Commission claims to need to conduct the inquiry properly. That arbitrary step further undermines the legitimacy of the Commission's so-called "national findings" here.

2. The Commission cannot cure these deficiencies by delegating to the states the authority to reverse its nationwide impairment findings based on location-specific analyses. As with its delegation of switching, the Commission's attempt to assign to the states the ultimate unbundling determination – with no obligation on the part of the Commission to review those determinations – is contrary to the language and structure of the statute and is accordingly unlawful.

Apart from this threshold failing, moreover, the Commission's delegation on loops and transport – like its delegation on switching – fails to provide any meaningful limiting standards to ensure that the state decisions are consistent with the Act and judicial precedent.

First, the Commission's competitive "trigger" analysis focuses only on *specific* locations – *i.e.*, particular point-to-point routes in the case of transport, and particular premises in the case of loops. In *USTA*, however, the D.C. Circuit specifically directed the Commission to *infer*, based on the evidence of competitive deployment, the characteristics of markets where, even if CLECs have not yet deployed their own facilities, they could. *See* 290 F.3d at 422. By focusing on the purported absence of location-specific evidence, the Commission willfully declines to draw any such inference. Instead, the Commission's trigger analysis reflects the belief that, if alternative suppliers have not yet arrived on a particular route, CLECs may be impaired without access to facilities on that particular route. The FCC "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998); *see Warshawsky & Co. v. NLRB*, 182 F.3d 948, 953 (D.C. Cir. 1999) (same). Here, the Commission failed to draw any inference at all, much less the inferences "fairly demand[ed]" from the extensive and undisputed evidence of competitive deployment.

The Commission's failing here is particularly striking in light of the fact that, in analogous circumstances, the Commission has drawn precisely the sort of inferences that are appropriate in this context. In the *Special Access Pricing Flexibility* proceeding, the Commission permitted ILECs special access pricing flexibility in markets that the Commission concluded were disciplined by competition. The Commission conducted this inquiry not on a route-by-route basis, but rather across metropolitan statistical areas ("MSAs"). MSAs, the Commission explained, "best reflect the scope of competitive entry," and more narrowly defined markets would be "administratively [un]workable." Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221, 14259-60, ¶¶ 71-72 (1999), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001). That rationale – which the D.C. Circuit expressly affirmed, *see WorldCom*, 238 F.3d at 461 – applies equally here.

The Commission's defense of this inconsistency is strikingly contrary to the 1996 Act's language, structure, and purpose. In the Commission's view, the pricing flexibility rules "go to protecting consumers from anticompetitive pricing," whereas the unbundling rules "serv[e] a host of [other] statutory goals." Order ¶ 104. In other words, "competition in some parts of a market may be sufficient to constrain prices, but insufficient to demonstrate a lack of impairment." *Id.* But, if a market is already competitive enough to restrain prices, the social costs that come with forced sharing outweigh, as a matter of law, any countervailing benefits. As the D.C. Circuit held, the Act *forecloses* unbundling in the absence of a "reason to think doing so would bring on a significant enhancement of competition." *USTA*, 290 F.3d at 429. Where there is sufficient "competition in some parts of a market . . . to constrain prices" throughout the market, Order ¶ 104, it is clear that there is no "significant enhancement of competition" to be had. It follows that, in such circumstances, "nothing in the Act" gives the Commission "license . . . to inflict on the economy the sort of costs" associated with unbundling. *USTA*, 290 F.3d at 429.

Second, the Commission's location-specific analysis fails even on its own terms. As with switching, the Commission's "objective" trigger permits unbundling even where *multiple* competitors serve specific locations using their own facilities. Thus, for example, even where a CLEC has self-deployed its own facilities on a particular route, another CLEC would be entitled to unbundled access to the ILEC's facilities on that same route. *See* Order ¶ 407. Unbundling of a high-capacity loop would be permitted in similar circumstances, despite the fact that even the largest business customers would have little reason to buy high-capacity circuits from more than two suppliers (which would provide diversity), and frequently will buy circuits to a particular location from only one among the competitive alternatives. *See id.* ¶ 329. It is impossible to see how the Commission (or a state) could lawfully order unbundling on such specific locations, where the existence of such competitive deployment demonstrates conclusively that the facility is subject to competitive supply. *See USTA*, 290 F.3d at 422. Yet the Commission's standards permit exactly that result.

Finally, the "analytical flexibility" (Order ¶ 410) the Commission grants to the states fails to cure these failings. The Commission permits the states to "find no impairment on a particular route that it finds is suitable for 'multiple, competitive supply,' but along which [the relevant] trigger is not facially satisfied." *Id.*; *see id.* ¶ 335. Such determinations are to be based on a mix of factors, ranging from "local engineering costs" to "the cost of equipment needed for transmission"; from "local topography such as hills and rivers" to "the availability or feasibility" of unspecified "alternative transmission technologies." *Id.* ¶ 410; *see id.* ¶ 335. But, as with switching, the Commission fails to provide clear standards as to how the states are to weigh these factors, nor does it suggest a rule of decision to ensure that the ultimate unbundling determination will be consistent with *USTA* and Congress's core goal of enhancing facilities-based competition. Indeed, the Commission itself concedes as much. It candidly explains that, far from compelling states to make determinations that will faithfully adhere to the direction given by the statute and the courts, the Order "provides no guidance on how these various factors are to be assessed and weighed." *Id.* ¶ 425 n.1300. Such a standardless delegation plainly fails to fill the gap left by the Commission's failure to determine the characteristics of markets that are suitable for competitive supply, and equally plainly leaves in place the prospect of overly expansive unbundling in conflict with the Act and judicial precedent.[10]

C. The Order's Evisceration of the Restrictions on EELs Is Arbitrary and Capricious and Contrary to Precedent

The Commission's expansive rulings on loops and transport are exacerbated by its dramatic undoing of the restrictions that apply to the use of enhanced extended links, or "EELs."

As the D.C. Circuit has explained, an EEL can be useful not just for the provision of local service, but also for *non*local services – in particular, for the origination and termination of long-distance calls to high-volume customers, or "special access." *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8, 11 (D.C. Cir. 2002) ("*CompTel*"); *see WorldCom*, 238 F.3d at 453. Until this Order, however, the Commission sought to "channel CLECs' use of EELs toward local service" and to prevent their use for special access. *CompTel*, 309 F.3d at 11; *see Supplemental Order*,[11] 15 FCC Rcd at 1760, ¶ 2; *Supplemental Order Clarification*, 15 FCC Rcd at 9598-600, ¶ 22. The reason it did so was plain. No party demonstrated impairment with respect to nonlocal

[10] The concerns resulting from the Commission's pervasive loop and transport unbundling rules are compounded by the unlawful requirement – set out for the first time in the Order – that ILECs deploy new equipment (such as multiplexers and the like) solely for the purpose of unbundling it at TELRIC prices. *See* Order ¶ 635; *compare Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 812-13 (8th Cir. 1997) (the 1996 Act "requires unbundled access only to an incumbent LEC's *existing* network – not to a yet unbuilt superior one"), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd*., 525 U.S. 366 (1999).

[11] Supplemental Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 1760 (1999) ("*Supplemental Order*"), *petitions for review denied*, *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).

services, and, in the absence of such a showing, the EEL could not, consistent with the Act, be unbundled for use in providing such services. *See CompTel*, 309 F.3d at 14 ("[I]t is far from obvious . . . that the FCC has the power, without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis.").

The mechanisms by which the Commission achieved this limitation – which the D.C. Circuit specifically upheld in *CompTel* – are significant. Recognizing that the only use of an EEL that could be justified under the 1996 Act was to provide *local* service, the Commission required that CLECs do exactly that. It insisted that EELs be available only to carriers that would use the facility to provide "a *significant* amount of local exchange service." *Supplemental Order Clarification*, 15 FCC Rcd at 9598-600, ¶ 22 (emphasis added). And it put teeth in that standard by establishing objective criteria to ensure that the EEL would actually be used as a legitimate portion of a local service offering, and by prohibiting "commingling" of UNEs (such as loops) with special access services (such as special access transport) in order to prevent widespread evasion of those objective criteria. *Id.* at 9598-600, ¶ 22, 9602, ¶ 28; *see CompTel*, 309 F.3d at 17-18.

The Order eviscerates these requirements. Most dramatically, whereas previously the Commission required the facility in question to provide a "significant" amount of local service, now it need provide only a *de minimis* amount, if anything at all. Under the Commission's new test, a facility used predominantly if not exclusively to provide *non*local services – in markets in which there is no claim, much less a finding, of impairment – is nevertheless subject to unbundling.

Nothing in the Commission's new requirements protects against that unlawful result. *See* Order ¶¶ 601-611. The first three requirements – state certification, local number assignment, and an E911 record – establish only that a competitor *could* use the EEL to provide local service, not that it actually does so. Thus, for example, state certification – which the major long-distance incumbents (which are the chief purchasers of special access and thus the chief beneficiaries of the new rules) have already obtained in virtually every state – is a necessary prerequisite to providing local service, but it does not require that the carrier actually do so, much less that it use any particular circuit for that purpose.[12] Likewise, the Order's insistence that each DS1 circuit (or its equivalent) be assigned a local telephone number establishes only that some portion of a circuit *might* be capable of providing local service; it again says nothing about how it actually *is* used.[13] And the E911 record similarly is something that rests entirely within the competitor's discretion and need not necessarily correlate in any way with the actual provision of local service.[14]

The Commission's next two requirements – which require that the facility terminate to a collocation arrangement, with a switch that could in theory provide local service – are equally meaningless. As to the requirement that EELs terminate to a carrier's collocation arrangement, the major long-distance incumbents already have nearly ubiquitous collocation arrangements, and they accordingly already terminate a significant portion of special access circuits to collocation arrangements and could readily reconfigure the rest to do so.[15] And, as to the

[12] *See* Ex Parte Letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, FCC, Attach. at 2, CC Docket Nos. 01-338 *et al*. (Feb. 6, 2003) ("Verizon Feb. 6 Ex Parte"); *see also* Ex Parte Letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, FCC, Attach. at 7, CC Docket Nos. 01-338 *et al*. (Jan. 30, 2003) ("Verizon Jan. 30 Ex Parte").

[13] *See* Verizon Jan. 30 Ex Parte, Attach. at 7.

[14] *See id*.

[15] *See id.* Indeed, fully 90% of the special access services purchased by Verizon's two largest special access customers already terminate in offices with collocation. *See* Verizon Feb. 6 Ex Parte, Attach. at 2.

requirement that EELs terminate to a switch that is *capable* of providing local service, the Commission itself appears to recognize that CLECs, including the major long-distance carriers, have already deployed switches that can be used for this purpose in essentially every major market. *See* Order ¶ 436.[16]

Finally, the last requirement – that each DS1 (or equivalent) be associated with a *single* interconnection trunk – permits the tail to wag the dog. This part of the test simply requires that there be a single interconnection trunk in the same LATA for every 24 circuits in a particular EEL arrangement. Here again, however, the long-distance incumbents have *already* satisfied this goal in the main, with interconnection trunks with available capacity in most LATAs ready to be associated with an EEL.[17] Moreover, in the most common configuration – a D3 EEL with a single DS1 interconnection trunk – even if that interconnection trunk actually does carry only local traffic (as opposed to, say, Internet-bound traffic), the amount of local traffic carried on the entire facility, relative to the nonlocal traffic, would be minimal.[18] Yet, in these circumstances, the competitor would still be entitled to the facility on an unbundled basis.

In short, the Order places the Commission squarely where the D.C. Circuit said it could not go. It broadly permits the use of EELs to provide special access, with *no* practical limitation on the extent to which they can do so. And it does this in the absence of any suggestion – much

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[16] *See also UNE Fact Report 2002* at II-1, II-2 (noting that the two largest long-distance carriers account for more than 25% of CLEC local switches).

[17] *See generally* Verizon Feb. 6 Ex Parte, Attach. at 2; Verizon Jan. 30 Ex Parte, Attach. at 7.

[18] *See* Ex Parte Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, Attach. at 3-4, CC Docket Nos. 01-338 *et al*. (Feb. 12, 2003).

less a finding – that competing carriers are impaired in their ability to provide special access without access to UNEs.[19]

This unlawful result is compounded, moreover, by the Commission's abandonment of the restriction on commingling. Before the D.C. Circuit, the Commission took the position that this restriction "is the only way to prevent carriers from using [EELs] 'solely or primarily to bypass special access services.' " *CompTel*, 309 F.3d at 17 (quoting *Supplemental Order Clarification*, 15 FCC Rcd at 9602, ¶ 28). That was so because the Commission had *not* placed local use restrictions on unbundled loops, and, without such restrictions, commingling would permit competitors to convert "the entire base of the loop or 'channel termination' portion of special access circuits . . . into unbundled loops." *Id.*

That concern remains equally valid today. To be sure, the Commission requires that unbundled loops satisfy the new requirements when commingled with special access services. Order, App. B at 6 (new rule 51.318(b)). But, for the reasons explained above, those requirements do not in fact impose any meaningful local usage obligation. As a result, as was the case previously, in the absence of a "restriction against commingling," carriers will be permitted to use UNEs to provide special access on a widespread basis, in direct conflict with the purposes of the 1996 Act. *See CompTel*, 309 F.3d at 17.

Finally, the Commission's broad allowance of "conversions" – *i.e.*, the reclassification of special access services as UNEs, without any change in the underlying facility or the service to

[19] The Commission suggests that these requirements are "based largely on . . . solutions advanced by" certain of the petitioners here. Order ¶ 596. Although the solutions advanced by petitioners did include *some* of the requirements articulated by the Commission, they also contained *additional* requirements that would have meaningfully limited the ability of competing carriers to use EELs to displace special access service. The Commission rejected these additional requirements, thus eliminating the effectiveness of the new rules.

which it is put – is likewise unlawful. By definition, a "conversion" can occur only if the requesting carrier already is using special access services to provide the services that it seeks to offer; otherwise, there would be nothing to convert. And, if a carrier already is using special access services to provide the services that it seeks to offer, it cannot be said that it requires UNEs in order to offer those services. Indeed, the only effect of a conversion would be to give that carrier a price break – and hence higher profits – for a service that it already is providing. But, as the Supreme Court made clear in *Iowa Utilities Board*, the impairment standard is not satisfied simply because unbundled access would permit competitors to reduce their costs and earn higher profits. The Order's allowance of special access conversions generally is thus inconsistent with the Act.

D. The Order Unlawfully Permits CMRS Providers To Use UNEs for Interoffice Transmission Between Cell Sites and Mobile Switching Centers and Between Mobile Switching Centers and IXCs' Points of Presence

In the *Line Sharing Order*,[20] the Commission required ILECs to provided unbundled access to the high-frequency portion of the loop, to facilitate CLEC provision of broadband services. It did so, however, with a "naked disregard of the competitive context" – which featured multiple, facilities-based providers competing without any access to (or need for) one another's facilities – thus rendering the line-sharing rules unlawful. *USTA*, 290 F.3d at 429.

The Order makes a similar mistake here, only this time in a different market. The Order makes clear that facilities between cell sites or mobile switching centers ("MSCs") and ILEC central offices are not eligible for UNE treatment. *See* Order ¶ 368. Then, however, in the very

[20] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications*

same paragraph, the Commission expressly permits CMRS providers to gain access to ILEC interoffice transmission facilities on an unbundled basis, even when this could allow CMRS providers to connect their MSCs to their cell sites or to interexchange carrier ("IXC") points of presence ("POPs") through the use of ILEC transport when the ILEC network would otherwise have nothing do with that connection. The Commission imposes this new requirement, moreover, without so much as hinting that CMRS providers are in any way impaired without access to these facilities. Rather, the Commission simply concludes that, because CMRS providers compete with ILECs in a "core" market – *i.e.*, wireline voice, *see id.* ¶ 139 – and because the economics of self-deployment for *wireline* competitors purportedly establish impairment with respect to interoffice transport, *see, e.g., id.* ¶¶ 370-372 – CMRS providers are entitled to interoffice transmission at TELRIC rates.

That analysis is patently inconsistent and untenable. Wireless carrier competition clearly has not been impaired by the unavailability of unbundled dedicated transport to carry calls between their MSCs and cell sites or between their MSCs and IXC POPs. To the contrary, CMRS providers have used their own facilities or special access services to accomplish that end, and they have done so quite successfully. Indeed, the Commission's own most recent report on competition in the CMRS market confirms that "the CMRS industry continue[s] to experience increased service availability, lower prices for consumers, innovation, and a wider variety of service offerings"[21] – all without the availability of dedicated transport at TELRIC rates.

Act of 1996, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), *vacated and remanded*, *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

[21] Eighth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 02-379, FCC 03-150, ¶ 17 (rel. July 14,

The Order acknowledges this basic, incontrovertible fact, *see, e.g., id.* ¶ 53 ("[w]ireless telephone subscriber growth for the mass market has been remarkable"), yet it wholly fails to explain how the introduction of UNEs into this vibrantly competitive market could be thought to further the goals of the Act. The Order thus exhibits the same "naked disregard of the competitive context" that infected the Commission's prior line-sharing rules, and the resulting rules are accordingly equally unlawful.

II. THE BALANCE OF EQUITIES FAVORS A STAY

The Commission's previous efforts to impose maximum unbundling have caused petitioners substantial and irreparable injury. As petitioners documented in their recent petition for mandamus, they lose thousands of lines *every day* to the purely synthetic competition spawned by the Commission's unbundling rules.[22] For each such line lost, moreover, petitioners lose 60% of the revenues on that line, while retaining 95% of the costs.[23]

A stay is necessary to prevent these losses from mounting. In the wake of the Order, CLECs have announced their intention to adopt UNE-P as their entry strategy of choice.[24]

2003). *See also* Report and Order, *2000 Biennial Regulatory Review, Spectrum Aggregation Limits For Commercial Mobile Radio Services*, 16 FCC Rcd 22668 (2001).

[22] *See* Affidavit of Jimmy Glenn McGuire, Attach. 1 to USTA *et al*. Petition for a Writ of Mandamus To Enforce the Mandate of this Court, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al*. (D.C. Cir. filed Aug. 28, 2003) ("USTA Mandamus Pet."); Affidavit of William M. Campbell, Attach. 2 to USTA Mandamus Pet.; Declaration of Guy L. Cochran, Attach. 3 to USTA Mandamus Pet.

[23] *See* J.P. Morgan Securities Inc., *Industry Update – No Growth Expected for Bells in 2003*, at 15 (July 12, 2002).

[24] *See, e.g.,* Sprint Press Release, *Sprint Moves Forward with Portfolio of Local, Long-distance and Nationwide Wireless Bundles; FCC UNE-P Order Encourages Expansion of Successful Sprint Trials* (Aug. 27, 2003) (Sprint's Complete Sense bundled offering "is in direct response to the recent FCC order on UNE-P"); *Through the Fire*, Wireless Week, Mar. 8, 2003, at 18 ("If we get a favorable [UNE-P] ruling that says let the states decide and it lasts for a couple of more years, then we want to aggressively offer UNE-P to our 15 million Sprint

Plainly, the additional customer losses that would result from even more widespread use of the UNE-P – which would stem not from competition on the merits but rather from the regulatory arbitrage permitted by the FCC's expansive unbundling rules – establish irreparable injury. *See, e.g., Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994). And the staggering financial losses that go hand-in-hand with these customer losses bolster that showing. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (suggesting that, in the absence of "adequate compensatory or other corrective relief," "economic loss" amounts to irreparable harm) (citation and internal quotation marks omitted); *cf. Independent Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 929-30, 951-52 (D.C. Cir. 1976) (losses that stem from "competitive disadvantages" based on unfair competition constitute irreparable injury).

It is no answer to contend that the 51 state proceedings contemplated by the Order provide petitioners an opportunity to avoid these losses. "Litigation in scores of cases is not an adequate remedy for an agency's failure to carry out its statutory duties." *American Trucking Ass'ns, Inc. v. ICC*, 669 F.2d 957, 961 (5th Cir. 1982) (per curiam). Moreover, even apart from the fact that many state commissions have already announced their intention to retain the UNE-P, the Order permits them to eliminate it only after nine months of wrangling in the states, followed by a "transition" period that requires continued unbundling for up to 27 months. *See*

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customers."); *Covista Communications, Inc. Announces Intention to Market Local Telecommunications Services and Completion of Credit Facility*, Bus. Wire, Apr. 29, 2003 ("Covista Communications, Inc. . . . intends to . . . utilize the Unbundled Network Element Platform (UNE-P) . . . first in New Jersey and later in other markets throughout the United States."); *see also Revenues for the UNE-P CLEC*, *at* http://www.isg-telecom.com/une%20p%20clec.htm (visited May 8, 2003) (advising CLECs that they "owe it to [themselves] and [their] investors to look seriously at" UNE-P entry: "Do as the big boys do without the expense").

Order ¶ 532. The prospective harms associated with such continuing obligations are more than sufficient to justify a stay.

A stay is also necessary to prevent the Commission's expansive loop and transport rules – coupled with the harms that will inevitably come with the Commission's relaxation of the rules regarding EELs and its extension of unbundling rights to CMRS providers in certain respects – from causing irreparable injury. Indeed, the Commission itself previously recognized the substantial dislocation that could result from widespread "flipping" of special access services to UNEs. *See Supplemental Order Clarification*, 15 FCC Rcd at 9597, ¶ 18; *see also CompTel*, 309 F.3d at 16. The Commission's new rules – which require pervasive unbundling of transport throughout the country, while dramatically loosening the restrictions on EELs and permitting CMRS providers to access UNEs as described above – necessarily threaten petitioners with substantial harm. Indeed, petitioners demonstrated in the record before the Commission that their collective financial exposure on these issues could amount to *billions* of dollars.

Nor is there any cognizable harm to CLECs resulting from a stay that could offset the staggering losses that ILECs will experience as a result of the Order. A stay of the Commission's UNE rules would leave in place CLECs' ability to resell ILEC retail services at a federally mandated discount. *See* 47 U.S.C. § 251(c)(4). Those CLECs that find themselves without access to the UNE-P will thus be able to avail themselves of resale – the entry vehicle that Congress created for carriers that wished to rely exclusively on ILEC facilities. And those CLECs that require high-capacity transmission will of course still be entitled to order such services from the many competitive access providers in the market, including from the ILECs.

Finally, the public interest likewise favors a stay. As the D.C. Circuit has explained, overly expansive unbundling rules create significant costs, "spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *USTA*, 290 F.3d at 427. On the other side of the ledger, the "competition" generated by such rules is "completely synthetic" and does not further "Congress's purposes" — *i.e.*, the promotion of "investment and facilities-based competition." *Id.* at 424. Because the Order imposes overly expansive unbundling rules, a stay will both limit the societal costs that come with such rules and further the 1996 Act's objectives of investment and facilities-based competition.

CONCLUSION

The Commission should issue a stay pending appeal of those portions of the Order discussed above.

Respectfully submitted,

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