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

In the Matter of	)	
	)	
Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
In the Matter of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	

OPPOSITION OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
TO PETITION FOR STAY

Now comes NASUCA[1] and, pursuant to 47 C.F.R. 1.45(d), files this opposition to the Joint Petition for Stay Pending Judicial Review ("Petition") filed on September 4, 2003 by BellSouth Telecommunications, Inc. ("BellSouth"), Qwest Communications International Inc. ("Qwest"), SBC Communications Inc. ("SBC"), the United States Telecom Association ("USTA") and the Verizon telephone companies (Verizon") (collectively, "the Petitioners"). Petitioners, the regional Bell Operating Companies ("RBOCs") and their trade association, seek to stay the "specific portions of [the]

[1] NASUCA is an association of 43 consumer advocates in jurisdictions including 40 states and the District of Columbia. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

recently released *Triennial Review* order that impose unbundling requirements with respect to elements of petitioners' traditional narrowband networks."[2]

NASUCA opposes the Petition because the Petitioners have failed utterly to present sufficient legal or factual grounds for a stay of the *Triennial Review Order*. Each of the reasons for a stay presented in the Petition distorts the law, the findings of the Federal Communications Commission ("Commission") that supported the order, and the facts in the record that support the Commission's findings. Basically, the RBOCs object to the Commission's order because the Commission did not accept their "self-serving allegations"[3] and ordered the continued unbundling of the narrowband network elements that are vital to residential and small business local exchange competition, subject to detailed state review of actual competitive conditions.[4] In large part, the Petitioners' allegations in support of the stay are nothing more than recitations of information in the record that was implicitly rejected by the Commission in the *Triennial Review Order*.[5]

The Petition cites four grounds in support of the argument that the *Triennial Review Order* is "legally flawed."[6] These grounds, hoever, address only the unbundled switching requirements[7] and the unbundled transport, high-capacity loops and dark fiber

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[2] Petition at 1; see *In the Matter of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, et al., Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. August 21, 2003) ("*Triennial Review Order*"). As discussed below, the Petition does not identify the "specific portions" of the Order -- or the implementing rules -- sought to be stayed.

[3] Petition at 5.

[4] See, e.g., *Triennial Review Order*, ¶¶ 459-461.

[5] Compare, e.g., Petition at 4, n. 3 to *Triennial Review Order*, ¶ 469.

[6] Petition at 2.

[7] *Id*. at 2-12.

requirements from the *Triennial Review Order*.[8] Yet the Petition seeks a stay of *all* the portions of the order that impose unbundling requirements applicable to the Petitioners' traditional narrowband networks. For example, the grounds cited do not complain about narrowband loops, but the Petitioners apparently want to stay those requirements as well. The Commission should not have to parse a request for stay in this fashion.

The Petitioners state that the Commission must act on their non-specific request by September 11, 2003.[9] If the Commission does not do so, the Petitioners will be "constrained to seek relief in the court of appeals pursuant to Rule 18 of the Federal Rules of Appellate Procedure."[10] Inn making this threat, the Petitioners conveniently overlook the fact that they have already sought relief from the D.C. Circuit Court of Appeals, via a petition for a writ of mandamus filed on August 28, 2003,[11] and via appeals filed September 3, 2003.

The Petitioners' claimed urgency is itself telling. They assert that the "requirements [of the Order] will result in massive, immediate, and irreparable harm to petitioners and to the telecommunications sector as a whole."[12] Yet the *Triennial Review Order* merely *continues* -- rather than initiates -- the unbundled network element ("UNE") regime that has been operational since 1996.[13] The fundamental requirements of

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[8] *Id*. at 12-13.

[9] The Petitioners are asking the Commission to act the very day that responses to their Petition would be due under § 1.45(d) of the Commission's procedural rules. Clearly, the request for a stay is not one of the matters that the Commission can dispose of on an *ex parte* basis, per § 1.45(e) of the Rules. This attempt to foreclose response makes the Petitioners' request for expedited treatment further suspect.

[10] Petition at 2.

[11] *Id*. at 25.

[12] *Id*. at 1-2.

[13] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*First Report and Order*"); *id*. Third Report and Order and Fourth

that regime -- other than the Commission's determination of what constitutes "impairment"[14] -- have been upheld by the United States Supreme Court.[15] In *USTA*, the D.C. Circuit remanded for reconsideration the impairment standard contained in the rules. Contrary to the RBOCs' apocalyptic prose, the Commission largely succeeded in addressing the *USTA* Court's directives in the *Triennial Review Order*.[16]

No important new unbundling obligations are imposed on the RBOCs by the *Triennial Review Order*; there is no new or immediate harm resulting from the *Triennial Review Order*. The Petitioners state that "they lose thousands of lines *every day* to the purely synthetic competition spawned by the Commission's unbundling rules."[17] Clearly, this competition -- synthetic or not -- and the harm -- real or not -- did not arise in the three short weeks since the *Triennial Review Order* was issued. A stay of the *Triennial Review Order* will not, therefore, alleviate the "harm" claimed by the Petitioners. In the *Triennial Review Order*, the Commission itself implicitly dismissed the RBOCs' claims of catastrophic harm from the continued unbundling regime. The Petitioners' assertions in support of a stay of the Order are misdirected.

Despite the fact that the Petitioners' arguments for a stay lack any legal basis -- which constrains NASUCA to oppose the Petition -- a stay of the *Triennial Review Order*

Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *petitions for review granted and remanded, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"), *cert. denied*, 123 S. Ct. 1571 (2003).

[14] See 47 U.S.C. § 251(d)(2)(B).

[15] *AT&T Corp. v Iowa Utils. Bd.*, 525 U.S. 366, 179 U.S. 721 (1999) ("*Iowa Utilities*"). *Verizon Communications v. FCC*, 535 U.S. 467, 122 S. Ct. 1646 (2002) ("*Verizon*").

[16] NASUCA's opposition to the RBOCs' opposition to the Order does not mean that NASUCA supports the Order in its entirety.

[17] Petition at 25 (emphasis in original). As support, Petitioners cite to affidavits -- filed with the Circuit Court in their mandamus action -- that are not before the Commission.

pending judicial review might further, rather than disserve, the public interest. As mentioned, a stay of the *Triennial Review Order* would leave in place the unbundling regime that has been in effect since the *First Report and Order* and the *UNE Remand Order*.

The Petitioners apparently believe that issuing a stay of the *Triennial Review Order* would eliminate the unbundling regime deriving from the *First Report and Order* and the *UNE Remand Order*. For example, the Petitioners state, "A stay of the Commission's UNE rules would leave in place CLECs' [competitive local exchange carriers'] ability to resell ILEC [incumbent local exchange carrier] retail service at a federally mandated discount."[18] This is true, but misses the point.

First, a stay of the *Triennial Review Order* that leaves resale of ILEC services as the only means of competitive entry goes far beyond the alleged errors asserted by the Petitioners.[19] The Petitioners characterize the situation after a stay as one where "[t]hose CLECs that find themselves without access to the UNE-P [unbundled network element platform] 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."[20] Yet a stay of the *Triennial Review Order* on the Petitioners' apparent terms would require all CLECs, *including those who wish to rely on a mix of their own facilities and ILEC facilities*, to use only resale. Thus a stay under Petitioners' terms would deny CLECs access to the ILECs' narrowband loops -- as to which the Petitioners do not challenge the Commission's finding of impairment. The Petitioners' vision is fundamentally flawed in

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[18] Petition at 27.

[19] Competitors would also be able to provide service entirely over the competitors' own facilities.

[20] *Id*.

this result, because the Supreme Court specifically found that the Telecommunications Act of 1996 did not require CLECs to construct their own facilities in order to use UNEs.[21]

Second, and more importantly, the Petitioners do not directly address the impact of a stay of the *Triennial Review Order* other than by implying that resale would remain as a the sole vehicle for competition. This begs the question of how unbundling occurred before the *Triennial Review Order* -- and the answer is, according to the terms of the *First Report and Order* and the UNE *Remand Order*. In *USTA*, the D.C. Circuit Court of Appeals remanded the *UNE Remand Order* for reconsideration; the Court *did not* abrogate the *UNE Remand Order*.[22] Further, the Supreme Court's denial of certiorari left that ruling intact.

If the D.C. Circuit's decision in *USTA* had eliminated the unbundling requirements set forth in the *UNE Remand Order*, then ILECs would no longer have been obligated to unbundled the network elements set out in the *Remand Order*. Clearly, ILECs have continued to make UNEs available, despite their claims as to the catastrophic impact on their finances and the telecommunications industry as a whole.[23] Just as clearly, CLECs have been using those UNEs -- whether the UNE-P or other combinations or, indeed, single UNEs -- to bring competition to millions of consumers nationwide. This includes not only the residential and small business customers that the Commission

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[21] *AT&T Corp. v Iowa Utils. Bd.*, 525 U.S. 366, 392-393, 179 U.S. 721 (1999) ("*Iowa Utilities*").

[22] 290 F.3d at 428. This is in contrast to the line-sharing portions of the *UNE Remand Order*, which were explicitly vacated. 290 F.3d at 429.

[23] Petition at 25-26.

lumped together as "mass market," but also the larger business customers that the Commission classified as "enterprise"

If a stay of the *Triennial Review Order* eliminated the unbundling obligations established by the Commission, it would amount to a finding that in all markets across the country, for all UNEs, there is no impairment whatsoever. This "relief" is far more than is necessary under the *USTA* Court's holding that the Commission's definition of impairment in the *UNE Remand Order* was too broad.

Therefore, if the Commission were to stay the narrowband portions of the *Triennial Review Order*, a stay would not wipe out the entirety of the ILECs' unbundling obligations, as the Petitioners imply. A stay would, instead, leave intact the unbundling regime in effect prior to the *Triennial Review Order*, pending judicial review of that order.[24]

On the other hand, a stay would forestall implementation of the procedural requirements that the *Triennial Review Order* has imposed upon the states in furtherance of the more granular analysis -- focused on markets and market categories -- directed by *USTA*.[25] The *Triennial Review Order* essentially requires the opening of proceedings in all fifty states, portions of which are to be completed within ninety days from the effective date of the *Triennial Review Order*, other portions to be completed within nine months from the effective date, and other portions to be ongoing.[26]

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[24] Which is not to say that a Court's – rather than the Commission's – grant of a stay of the Order would necessarily be constrained. Yet even the judiciary would have to realize the tragic disruption that eliminating the unbundling requirements -- as requested by the Petitioners -- would have on millions of consumers and hundreds of CLECs across the country.

[25] 290 F.3d at 426.

[26] *Triennial Review Order*, ¶¶ 283, 418, 488, 527.

If, in fact, the Order ends up being overturned in the courts, then it will have been a tremendous waste of state commission, ILEC, CLEC and consumer advocate resources to have engaged in this time-constrained exercise in futility. If the *Triennial Review Order* is eventually upheld -- whether by a Circuit Court of Appeals or, more likely, by the United States Supreme Court -- then the state proceedings will be able to be completed with that determination behind them, rather than in front of them.

A stay of the *Triennial Review Order* will also forestall the risk of fifty-one separate appeals of the state commission determinations in fifty-one jurisdictions, especially where the appeals might reach fifty-one different results. Such appeals will also consume unnecessary amounts of state commission, ILEC, CLEC and consumer advocate resources.

Thus despite the rampant errors in the Petition, the Commission may well be taking the wiser course to stay the effective date of the *Triennial Review Order* pending judicial review. This will be true, however, only if the Commission explicitly continues the current unbundling regime pending that review, rather than -- as the RBOCS would have it -- eliminating unbundling and thereby eliminating virtually all of the residential competition that currently exists.[27]

The rampant errors of argument in the Petition are best left to other objectors who can address them in detail. NASUCA would point out, however, that no matter how the RBOCs characterize it, the Petition's argument that the Commission's finding on circuit switching is unlawful is based entirely on disputes over the record of the *Triennial*

[27] Cite to comments on Verizon forbearance petition.

Review proceeding, not the law.[28] This greatly diminishes the prospects that the Petitioner will prevail on appeal.[29]

Further, the Petitioners' challenge to the *Triennial Review Order* on the grounds that the Commission's delegation to the states went beyond that allowed by 47 U.S.C. § 251(d)(2) -- Petition at 6-12 -- in effect leads to the conclusion that the Commission could not defer *any* decision to the states. In other words, the Petitioners assume that the *USTA* Court required the Commission to make the entire judgment on whether competitors were impaired without access to each UNE *in each separate market and market segment* throughout the country. The Commission determined that -- insofar as unbundled local switching *alone* was concerned -- it could not make such a judgment on the record before it. So it deferred the necessary fact-finding to the states.[30]

The Petitioners' arguments are based on contentions that the first part of the Commission's test for local switching is not "objective,"[31] and that the Commission failed to impose any "meaningful" constraints on the states.[32] These are, of course, questions of interpretation of the record. The Petitioners' argument that the terms of the test themselves are contrary to the *USTA* Court's requirements[33] ignores the fact that the *USTA* Court, of necessity, based its decision on the record before the Commission in the

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[28] See Petition at 2, 3, 4, 5, 6.

[29] *Id*. at 2.

[30] Even if the Commission was required to retain essentially appellate review over the state commission decisions -- *id*. at 11-12 -- this does not undercut the Commission's findings on the unbundling of local switching, and is no grounds for a stay.

[31] Petition at 7.

[32] *Id*.

[33] *Id*. at 8-11.

UNE Remand Order. The *Triennial Review Order* is based on a far more extensive, more up-to-date record.

That record includes the very allegations of harm that the Petitioners use to bolster their claim that the balance of equities favors their request for a stay.[34] Those allegations of harm were implicitly rejected by the Commission when it adopted the *Triennial Review Order*.

If it considers the reasons raised by the Petitioners, the Commission should reject the request for a stay. Yet the overall public interest may be better served with a stay pending a determination by the courts of the legality of the *Triennial Review Order*.

Respectfully submitted,

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[34] *Id*. at 25-26.