

**Before the  
Federal Communications Commission  
Washington, DC 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 OPPOSITION TO THE INCUMBENT LECS’  
PETITION FOR A STAY PENDING JUDICIAL REVIEW**

**INTRODUCTION AND SUMMARY**

The United States Telecom Association and the nation’s four largest incumbent local exchange carriers (collectively “incumbents” or “ILECs”) have jointly moved for a stay pending appeal of the portions of the *Triennial Review Order* that maintained preexisting requirements that the incumbents provide access to loop, transport, and switching elements of the incumbents’ “traditional narrowband telephone networks,” both individually and combined in the UNE-Platform.<sup>1</sup> That the balance of equities strongly argues against such a stay is evident from the Commission’s decision to establish a transition period for elimination of unbundled network elements (“UNEs”) even *after* there has been a finding of non-impairment. It follows that a flash-cut elimination of unbundling requirements when there has been no such finding — indeed, when there has been a finding of impairment and when any requirements that are eliminated are

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<sup>1</sup> Joint Petition for Stay Pending Judicial Review, CC Docket Nos. 01-338, *et al.* (Sept. 4, 2003) (“ILEC Petition”).

likely to be restored after appeal — would recklessly unleash the very harms that the Commission’s transition period was intended to avoid. Moreover, the reality is that granting a stay would not give the incumbents the relief they seek. At most, it would lead to battles in every state about the meaning of change of law provisions in thousands of interconnection agreements, with decisions then likely superseded by the results on appeal. And, as the incumbents themselves have argued, a stay would not limit the ability of state commissions to mandate unbundling under either federal or state law.

Moreover, the unbundling requirements are not causing any cognizable harm to incumbents. Rather, their sole effect is to limit incumbent’s returns to those that they would earn in a competitive market (and to the same returns that they would receive if they were correct that multiple firms are or could competitively supply the elements in question). Indeed, it is nothing but a collateral attack on the Commission’s TELRIC pricing rules and has nothing to do with the Commission’s impairment analysis at issue here. More importantly, this claim, too, has been rejected by the Supreme Court. As the Commission has recognized and the Supreme Court has held, TELRIC rates are “just and reasonable,” properly compensate the incumbents’ for their forward-looking costs, and provide a “reasonable profit.” *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 507 (2002).

Conversely, if a stay eliminated the availability of UNEs, it would have devastating and irreparable consequences for competitive local exchange carriers (“CLECs”), consumers, and the public. It would end the existing competition has resulted in lower prices for consumers due both to the CLEC’s offerings and the incumbent’s price reductions to meet the competition. And it would mean that incumbents could extend local monopolies into the competitive long distance

market, contrary to the basis on which the FCC has authorized incumbents to offer long distance services under § 271 of the Act.

Turning to the likelihood of success on the merits, the incumbents' fundamental predicate is demonstrably false. They would have the Commission believe that the only lawful response to prior court decisions would have been to eliminate UNE-P. But no court that has addressed the issues has ever said anything of the sort. To the contrary, the United States Supreme Court expressly held that the Act clearly permits new entrants to access "all elements" of the incumbents' networks for the provision of service without owning or using any facilities of their own. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 392-93 (1999). At the same time, although the Court reversed the Commission's first impairment standard as insufficiently limiting, it directed the Commission merely to adopt "some limiting standard" consistent with the goals of the 1996 Act, and placed not a single additional restriction on the Commission's discretion. *Id.* at 388.

Three years later, the D.C. Circuit again reviewed the Commission's unbundling rules and again declined to identify any network elements or combination of network elements that could not be lawfully unbundled. *United States Telecom Ass'n v. FCC* ("USTA"), 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003). Instead, it found that the Commission failed to meet the necessary explanatory burdens given the "extraordinary complexity," *id.* at 421-22, of the task at hand. In remanding the matter to the discretion of the Commission the Court accordingly posed questions the Commission needed to address to carry that burden. Nothing in any of these decisions supports the incumbents' claim (or the feigned indignation with which they assert it) that the Commission's reasoned decision to permit UNE-P in any way

exceeds the scope of the Commission's discretion under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

**I. THE INCUMBENTS HAVE SHOWN NO LIKELIHOOD OF SUCCESS ON THE MERITS.**

The incumbents' claims on the merits should be rejected out of hand. They raise no new arguments, identify no arguments that the Commission allegedly overlooked, and offer no new evidence. Instead, they simply recycle the same arguments that were fully vetted before the Commission and which a majority (at times a unanimous majority) of the Commissioners squarely rejected.

With respect to unbundled switching, the incumbents on the one hand attack the FCC's national impairment finding as insufficiently granular, and on the other attack the FCC's delegation to the states to conduct a more granular analysis as impermissible. Neither attack is justified. As for the national finding of impairment, this Commission merely applied to switching the general impairment analysis adopted unanimously by the Commission and applied similarly to all unbundled elements. In support of its finding of national impairment for mass market switching,<sup>2</sup> the Commission pointed principally to extensive empirical evidence showing that competitors are serving only insignificant numbers of mass market lines nationwide using their own switches and showing the barriers caused by inadequate hot cut processes.<sup>3</sup>

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<sup>2</sup> The term "mass market" as used here reflects the definition given that term by the Commission in the *Triennial Review Order. In re Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 03-36 (FCC rel. Aug. 21, 2003)

<sup>3</sup> Moreover, while Verizon continues to cite as fact its claim that competitors were serving 3 million residential lines on their own switches, which is less than 3 percent of residential voice lines, the Commission concluded that "much of the deployment relied upon by the incumbents in fact provides no evidence that competitors have successfully self-deployed switches as a means to access the incumbents' local loops." *Triennial Review Order* ¶¶ 438-440. The Commission also examined the existence of intermodal alternatives and found that there was very little use of  
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Petitioners' quarrels with that evidence are not likely to succeed in a court deferring to this Commission's evaluation of that evidence any more than they did at the FCC.

The incumbents' second attack — that the Commission lacked authority to delegate responsibility to the states and did so without sufficient guidance — is frivolous. Indeed, when the incumbents anticipated favorable results from the states in 1996 and 1999, they ardently advocated for an even broader delegation to the states with *no* guidance at all from the Commission. General authority provided to an agency to make appropriate rules and orders, which the FCC possesses (*see* 47 U.S.C. § 201(b)), is “an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld.”<sup>4</sup> Here, of course, Congress has already determined that states have independent authority to interpret and apply § 251(d)(2), *see* 47 U.S.C. §§ 252(c)(1), 261(b), and that states must inevitably share with the Commission the role of determining the scope of impairment, *see* 47 U.S.C. §§ 252(b), (e), (g). Moreover, the Commission carefully guided the states' application of the impairment test — assessing whether competitive entry would be uneconomic — in requiring the states to analyze empirical evidence and assess whether a given market *allows* competitive entry. It provides the states with explicit criteria for identifying mass markets, *Triennial Review Order* ¶¶ 421 n.1296, 497, 435, 441 & n.1354, and defining geographic markets. *See* Rule 51.319(d)(2)(i); *Triennial Review Order* ¶ 496-497.

The incumbents' challenges to the Commission's determinations with respect to loops, transport and EELs are equally devoid of merit. Specifically, the Commission dramatically *scaled back* the extent to which the incumbents must make high capacity loops and transport

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such alternatives to serve mass market customers. *Id.* ¶¶ 443-446.

available on an unbundled basis. Indeed, the Commission appears to be “guilty” of performing precisely the sort of granular analysis that the incumbents themselves demanded in *USTA*.

Finally, the Commission’s new service eligibility criteria for EELs do not (as the incumbents have suggested) provide access to unbundled loops and transport where there is no impairment; rather, they serve only to *preclude* access to UNEs *notwithstanding* a finding of impairment.

## II. THE BALANCE OF THE EQUITIES CLEARLY TIPS AGAINST A STAY.

The incumbents’ stay petition equally fails to make the fundamental showing required for a stay. The purpose of any stay pending judicial review is to maintain the status quo. *See Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1302-03 (Rehnquist, Circuit Justice 1993) (denying request for injunction pending judicial review seeking to “*alter* the legal status quo”) (emphasis in original); *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1099 (10th Cir. 1991) (injunction “that alters the status quo goes beyond the traditional purpose for preliminary injunctions, which is only to preserve the status quo until a trial on the merits may be had”); *National Treasury Employees Union v. FLRA*, 712 F.2d 699, 671 (D.C. Cir. 1983) (for stay pending judicial review, “sole purpose is to preserve the status quo while an appeal is in the offing or in progress”). Here, the status quo for the last seven years has been that the incumbents must provide CLECs with unbundled access to their switching capabilities and transport facilities. Indeed, the portions of the *Triennial Review Order* that the incumbents now seek to have stayed only narrowed the incumbents’ unbundling obligations. Under such circumstances, the immediate elimination of

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<sup>4</sup> *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947).

unbundling requirements for the first time ever, when there has never been a finding of no impairment, would alter the status quo and is wholly inappropriate.

Moreover, the relief requested by the incumbents does nothing to address the irreparable harm they allege. As the incumbents have been forced to admit, extant state commission orders, based on both federal and state law, often independently impose the existing unbundling requirements, and typically would be left in place until a conclusion of state proceedings, even if a stay were granted. Similarly, while the *Triennial Review Order* requires that state commissions conduct proceedings to apply the Commission's impairment criteria within individual markets, the same state commission proceedings would be required if the *Triennial Review Order* were to be stayed and if the consequence of that stay were (as the incumbents contend) to eliminate existing obligations to provide unbundled switching and transport. States then would have to determine whether unbundling was required without the guidance of Commission rules.

The incumbents' petition also fails to satisfy the traditional standards required for the issuance of a stay. On the one hand, if the incumbents were allowed to eliminate switching and transport as UNEs, that would inflict irreparable and severe harm on CLECs. It would eliminate altogether the prospects of meaningful competition for mass market customers and foreclose CLECs from competing for many large business customers as well. And there is no other hand. The only "harm" the incumbents can identify is the loss of monopoly profits. This is simply not a cognizable harm.

**A. The Stay Would Not Eliminate The Existing Obligation Of The Incumbents To Provide Unbundled Switching And Transport.**

The implicit premise of the incumbents' petition is that the *USTA* decision vacated the *UNE Remand Order*<sup>5</sup> and, therefore, a stay of the provisions of the *Triennial Review Order* mandating that the incumbents provide unbundled switching and transport would free the incumbents altogether from having to offer these elements on an unbundled basis. Every aspect of this argument is wrong.

Although *USTA* disapproved of the reasons the FCC gave for the *UNE Remand Order*'s unbundling rules, it did not vacate those rules. *USTA* merely “remand[ed]” the *UNE Remand Order* “for further consideration in accordance with the principles outlined above.”<sup>6</sup> *USTA*, 290 F.3d at 430 (emphasis added); see also Statement of FCC Chairman Michael Powell on the Decision by the Court of Appeals for the District of Columbia Regarding the Commission's Unbundling Rules, 2002 FCC LEXIS 2632 (rel. May 24, 2002) (“the current state of affairs for access to network elements remains intact”). Thus, all that a stay of the *Order* would do is restore the “current state of affairs” in which the incumbents are subject to the unbundling rules adopted in the *UNE Remand Order* – rules that impose even broader unbundling obligations with respect to switching and transport than those adopted in the *Triennial Review Order*. Compare *Triennial Review Order* ¶¶ 359-360, ¶¶ 419-420.

The incumbents are likewise wrong that even if there are “no FCC rules,” they would be free to charge any price they say fit for switching and transmission facilities. Under the 1996 Act, the concrete legal obligations of the incumbents to provide UNEs to CLECs are embodied

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<sup>5</sup> *In re Implementation of the Local Competition Provisions on the Telecommunications Act of 1996*, 15 F.C.C.R. 3696 (1999).

<sup>6</sup> By contrast, the *USTA* decision expressly vacated the *Line Sharing Order*. See *USTA*, 290 F.3d (continued . . .)

in interconnection agreements (or “ICAs”). *See* 47 U.S.C. §§ 252(a), (b). Those ICAs generally obligate the incumbents to provide unbundled switching, loops and transport facilities consistent with the scope of unbundling mandated by the *UNE Remand Order*, and generally forbid the incumbents from engaging “self-help” even should the court issue a stay. Further, as the *Triennial Review Order* recognizes, these ICAs generally provide that the parties initially will renegotiate, and if they are unable to agree on appropriate changes, either party may petition the relevant state commission for a determination of the modifications, if any, to the ICA that are appropriate in light of the purported change in law. *Triennial Review Order* ¶ 700.

The status quo that a stay would preserve, in other words, is comprised of a web of contract obligations, state law rules, and federal statutory obligations that petitioners are not free simply to ignore. And, in most cases, the process for implementing changes to contracts or rules would leave the parties before state commissions, who would have to adjudicate the parties’ competing claims. Further, in reviewing disputes regarding the incumbents’ obligations under ICAs, the state commissions would have to consider claims that the incumbents should continue to provide unbundled switching at rates set in accordance with TELRIC methodology. 47 U.S.C. § 252(c)(1); *see also id.* § 261(b). Similarly, in the absence of any binding FCC rules, there can be no claim that the states would be preempted from ordering that switching and transport be unbundled under state law. *Compare* 47 U.S.C. § 252(e)(3); *id.* § 261(b); *id.* § 251(d)(3). That is why courts have consistently upheld interconnection agreements in which state commissions imposed requirements involving local switching that exceeded the requirements of the Act or any FCC order. *See, e.g., Southwestern Bell Tel. Co. v. Waller Creek Communications, Inc.*, 221

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at 429.

F.3d 812, 820 (5th Cir. 2000); *MCI Telecomms. Corp. v. US WEST Communications*, 204 F.3d 1262, 1268-69 (9th Cir. 2000).

Under these circumstances, there is no reason to believe that a status quo injunction will promptly provide the incumbents the relief they seek, and there is every reason to believe that it will not. Indeed, in its recent mandamus filing with the D.C. Circuit, Verizon made just this point, arguing that “[e]ven if the Court stays the Order, the states would seek to force incumbents to provide the same elements pursuant to their asserted authority under the 1996 Act and state law” and, for that reason, a “stay” would not “stem the[ir] irreparable harm”). Verizon Mandamus Pet., *USTA*, No. 00-1012 at 30 (D.C. Cir. filed Aug. 28, 2003). And the other incumbent petitioners likewise argued in the proceedings below that state commissions have independent authority to order unbundling and that many state commissions would exercise that authority to provide for unbundled loops, transport and switching in the absence of any contrary federal rules.

A stay would not eliminate the prospect of state commission proceedings regarding what unbundling rules should apply in a given state. Rather, all that a stay would do is ensure that those expensive proceedings are conducted without any uniform ground rules with regard to the timing of the proceedings and the standards used to determine whether switching and transport should remain unbundled, that such proceedings are further delayed with disputes over the status of existing interconnection agreements, and that state proceedings held in accordance with the Commission’s impairment standard are delayed until after the stay is lifted.

**B. The Requested Stay Fails To Satisfy The Traditional Prerequisites For Injunctive Relief.**

**1. The Incumbents' Alleged Harm Is Overstated.**

To the extent that a stay would help the incumbents, the balance of interests would not favor a stay. The incumbents' say that they suffer "irreparable harm" because they are forced to provide unbundled switching and transport at rates that they characterize as too low.<sup>7</sup> Stay Pet. at 25. Thus, it is clear that the incumbents are *not* claiming that they are harmed by the *Triennial Review Order*'s mandate that they unbundle switching and transport, but instead that they are harmed by other regulations (not at issue in this proceeding) that in their view unfairly restrict the prices that they may charge for the elements. Stay Pet. at 27 (claiming that the purported harm to the incumbents will be alleviated if CLECs retain access to unbundled switching and transport but pay higher rates); *see also* Ex Parte Letter James C. Smith, SBC to Michael Powell, Chairman, FCC of 01/14/03; Ex Parte Letter from Michael Glover and Susanne Guyer, Verizon to William F. Maher, Chief, Wireline Competition Bureau, of 1/14/03; Ex Parte Letter from R. Steven Davis, Qwest to Michael K. Powell, Chairman, FCC of 1/30/03 (offering to provide unbundled switching at "market-based" rates).

The incumbents, of course, are not being required to provide unbundled switching and transport for free or to subsidize unfairly their competitors. To the contrary, they are able to charge rates set by the Commission's TELRIC pricing standard that is intended to allow the incumbents to recover the full costs of the facilities that they use to provide unbundled elements, including a competitive return on capital. *Verizon*, 535 U.S. at 494-97. Further, as the Supreme

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<sup>7</sup> Notably, while the incumbents claim that they suffer irreparable harm from providing unbundled transport, they make no attempt to provide any factual support for that claim, inserting only that the FCC's rules cost them "billions" in revenues.

Court explained, the 1996 Act “ratesetting” scheme is intended “not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities’ monopolies vulnerable to interlopers.” *Id.* at 489. Thus, the incumbents’ alleged harm is, at bottom, that they are denied the ability to earn monopoly profits and can earn only competitive returns. And as such, this “harm” simply cannot support the issuance of a stay. *See Cable TV Fund 14-A, Ltd. v. Property Owners Ass’n Chesapeake Ranch Estates, Inc.*, 706 F. Supp. 422, 433 (D. Md. 1989) (rejecting irreparable harm argument because “the only threatened harm” was the prospect that litigant would “lose [its] monopoly” in the face of “competition for cable service”). *Accord, Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1260 (D.C. Cir. 1993) (reiterating that rates that “ensured creamy returns on book equity” were not “just and reasonable”); *Houston Lighting & Power Co. v. United States*, 606 F.2d 1131, 1149 (D.C. Cir. 1979) (noting that rates yielding “monopoly profits” are not “just and reasonable”). *Cf. Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.3 (D.C. Cir. 1977) (“The mere existence of competition is not irreparable harm . . . .”); *Cities of Anaheim and Riverside v. FERC*, 692 F.2d 773, 779 (D.C. Cir. 1982) (same). This is particularly true here given that the remedy the incumbents seek to quickly end this “harm” is a request that the Commission eliminate unbundled access to elements. Such a remedy would destroy competition, result in higher prices for consumers and lower innovation, and allow the incumbents to leverage their market power into long distance and other competitive downstream markets.

Indeed, because the pricing standard used to set rates for UNEs seeks to “replicate” the rates that would prevail in competitive markets, *Local Competition Order*<sup>8</sup> ¶ 679, the incumbents’ entire theory of harm is fundamentally inconsistent with their argument that they will prevail on the merits. To succeed in their claim that switching and transport need not be provided as an UNE, the incumbents must show that CLECs are not “impaired” without access to switching and transport and that these elements are suitable for self-supply by multiple carriers. If that were true, however, then the existing regime that allows them to charge TELRIC-based prices for unbundled switching could not possibly harm the incumbents, because those prices are, if anything, *higher* than the prices that would prevail in the market that would emerge were there multiple facilities-based provider of local services, *Verizon*, 535 U.S. at 504-05 — as the incumbents claim there will be if switching and transport are eliminated as UNEs. Likewise, to the extent that the incumbents are correct that competitive carriers could easily deploy their own switches to serve mass market customers and dedicated transport facilities, the incumbents would be much better off having competitive carriers lease access to their switches and transport facilities at TELRIC-based rates (where the incumbents still would recover 40% of the revenue on every leased line, ILEC Pet. at 25) than they would be if CLECs self-deployed their own switches and transport facilities and bypassed the incumbents’ network altogether (where the incumbents would recover *none* of their investment for every line lost to a competitor).<sup>9</sup>

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<sup>8</sup> *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (1996).

<sup>9</sup> In all events, the incumbents fail to support their hyperbole. The only data the incumbents discuss in their petition is the July 12, 2002 *Industry Update* of J.P. Morgan Securities which stated that for every line lost to a CLEC, the incumbent loses 60% of its revenue on that line, while retaining most of the costs. Stay Pet. at 25. Those data can be given no weight. The

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**2. The Irreparable Harm Suffered By CLECs If They Are Deprived Of Unbundled Switching Would Far Exceed Any Harm Suffered By The Incumbents In Providing Such Switching.**

To whatever extent a stay could eliminate the incumbents' obligation to provide unbundled switching at TELRIC-based rates, such a stay would be improper, because the harm that CLECs would suffer from such a stay would far outweigh any harm that the incumbents would suffer from the absence of such a stay. *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003) (holding that no stay should issue if it would cause "substantial harm" to another party) (internal quotation marks omitted); *see also, e.g., Washington Metropolitan Area Transit Comm'n*, 559 F.2d at 843 (weighing against a stay the "harm [to] other parties interested in the proceedings").

If the incumbents are relieved of their obligation to provide unbundled switching at regulated rates, competition in residential local phone service will end in most communities. Few, if any, CLECs would attempt to invest the hundreds of millions of dollars necessary to self-deploy switching to serve existing mass market customers should the incumbents be able to eliminate that element. The reason, as the *Triennial Review Order* found, is that such investment would be economically irrational and ultimately wasted. Even where CLECs have deployed switches to serve large business enterprise customers, the FCC found that costs and operational problems associated with "hot cuts" for mass market customers make it virtually impossible for CLECs to use their own local switches to offer viable mass market local services. *Triennial Review Order* ¶¶ 464-471. Further, CLECs seeking to use their own switches to serve mass

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incumbents, of course, have precise knowledge of how much it costs them to provide unbundled switching. That the incumbents would instead rely on a third party analyst's report rather than provide sworn testimony as to their costs is powerful evidence that the analyst's estimates are grossly overstated.

market services face a host of additional costs that the incumbents do not incur, creating a classic barrier to entry into this market. *Id.* ¶¶ 476-485. Similarly, dedicated transport is a classic natural monopoly facility most efficiently provided by a single carrier at most capacity levels. It is characterized by huge economies of scale and scope and sunk costs. *Id.* ¶¶ 380-393. And even if such self-deployment of these elements were potentially feasible, the “flash cut” elimination of unbundled switching and transport would cause irreparable harm to CLECs because it takes months, if not years, to deploy these facilities even where it is potentially economic to do so. That is why the Commission determined that even where a state finds that competitors would not be impaired in a particular market without unbundled switching, a transition period is necessary before unbundled switching can be eliminated. It follows *a fortiori* from the Commission’s adoption of such a transition period that a flash cut elimination of UNE-P is undesirable in an interim period while the Commission’s rules are being challenged in court and applied in the states.

It is no answer to say that CLECs could re-enter the market after they ultimately prevail on the merits in this action. Once a CLEC stops providing service to a customer in this fashion, it is unlikely that the carrier can later win back that customer. Having, in their view, been abandoned by the CLEC, these customers would be unlikely to purchase service from the CLEC again in the future. Further, CLECs will have lost the opportunity to win new customers while excluded from the market. Even if CLECs ultimately prevail, therefore, they are not likely to recover fully from an order denying them access to unbundled switching. The cumulative effect on the reputation and goodwill of competitive carriers that abandon many customers would be particularly devastating to CLECs that provide long distance services. Their reputation with

customers would be so tainted that even their long distance business would likely suffer, in part because many of the same local customers also purchase long distance service from them.

Losses such as these from a temporary exclusion from any market or business almost always give rise to irreparable harm, because although they may be substantial, they are inherently unquantifiable. In *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546 (4th Cir. 1994), for example, Adelphia obtained a preliminary injunction to prevent an apartment landlord and a rival cable company from entering into an exclusive arrangement terminating Adelphia's ability to sell cable services to residents of the landlord. The Court held that "the threat of a permanent loss of customers and the potential loss of goodwill ... support a finding of irreparable harm." *Id.*<sup>10</sup>

### **3. A Stay Would Be Contrary To The Public Interest.**

The final factor that must be considered before granting the stay is whether the stay would serve the public interest. *See, e.g., Washington Metropolitan Area Transit Comm'n*, 559 F.2d at 843. This inquiry "compels [this Court] to look beyond the immediate interests of the named litigants and to consider the situation of the consumers . . ." *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 626 (5th Cir. 1985). Further, the public interest is informed by the purpose of the 1996 Act to end the "longstanding regime of state-sanctioned monopolies" that had prevailed in the nation's local telephone service markets for almost a century, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999), and to replace that

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<sup>10</sup> *See also, e.g., United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 741-42 (8th Cir. 2002) (holding that loss to reputation constituted irreparable harm for preliminary injunction); *Cordis Corp. v. Medtronic, Inc.*, 835 F.2d 859, 863-64 (Fed. Cir. 1987); *Hypertherm, Inc. v. Precision Prods., Inc.*, 832 F.2d 697, 700 (1st Cir. 1987) ("The threat of substantial damage to . . . hard-won business and reputation made out a sufficient showing of irreparable harm . . ."); *Gateway Eastern Ry. Co. v. Terminal R.R. Ass'n. of St. Louis*, 35 F.3d 1134, 1140 (7th Cir. 1994) (loss of customer goodwill constitutes irreparable injury).

regime with vibrant competitive markets designed to bring lower prices and better service to consumers “as quickly as possible.” H.R. Rep. No. 104-204, at 49 (1995).

The reasons why consumers are the ultimate beneficiary of the FCC’s decision to unbundle local switching — and would be harmed by a decision to the extent that it allowed the incumbents to eliminate that element — are straightforward and obvious. CLECs use the switching services they currently purchase from the incumbents in order to offer local telephone services in competition with the incumbents. This has enabled — for the first time in history — residential telephone customers to choose between competing providers, and there are millions of customers who have switched to a CLEC that provides local services using unbundled switching. Notably, CLECs are not just serving “high-end” end customers, but are seeking to bring choice to all classes of customers. As a result, the incumbents have — for the first time — been forced to respond with lower local rates for their services. Ex Parte Letter from Joan Marsh to Marlene Dortch (Oct. 16, 2002). Overall, studies have estimated that consumers could potentially save over \$9 billion a year in local telephone bills from competition facilitated by unbundled switching.<sup>11</sup> On the other hand, if the incumbents were permitted to stop providing unbundled switching and thereby kill this competition, the pressure to reduce prices would be relieved, and the “vital public interest . . . in protecting . . . consumers . . . against the harmful effect of overcharges” would be undermined. *Mississippi Power & Light*, 760 F.2d at 626; see also *Verizon Communications*, 535 U.S. at 512 (explaining that the “upshot” of less unbundling and higher rates for access is “higher retail prices consumers would have to pay”).

Further, the benefits that flow to consumers from competition go beyond lower bills; the availability of unbundled local switching has also enabled competitive carriers to offer new,

innovative services. For example, AT&T and MCI use the “platform” of UNEs (“UNE-P”) to provide a combined unlimited local and long-distance offer in numerous states. Of course, these innovations have stimulated the incumbents to innovate as well and otherwise to improve the quality of their service so as to compete more effectively. Again, without the competition that unbundled switching at TELRIC-based rates permits, the pressure to innovate and improve quality would also be relieved.

Equally important, UNE-P protects competition in downstream markets such as the long distance market. Without a vehicle by which competitors can profitably provide local service to mass market customers, the incumbents will be the only companies able to offer bundled local and long distance products. Approximately 90% of households ordering new service order a bundled product. MCI Reply Comments, Huyard Reply Dec. ¶ 18. If the incumbent is the only company that can offer such a product, long distance competition will quickly disappear. The incumbents candidly state that “bundling is the lifeblood of how we’ll grow our business in the residential market.”<sup>12</sup> Further, if long distance carriers cannot obtain local exchange facilities at their economic cost and are required to pay inflated access charges, their long distances services will become subject to price squeezes. For these reasons, the D.C. Court of Appeals had held before the 1996 Act was passed that when incumbents “enjoyed a monopoly on local calls” they will “ineluctably leverage that bottleneck control in the interexchange (long distance) market” if they are free to offer long distance services. *United States v. Western Elec. Co.*, 969 F.2d 1231, 1238 (D.C. Cir. 1992). And that is why in the 1996 Act “Congress chose to maintain . . . the

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( . . . continued)

<sup>11</sup> See [http://www.comptel.org/press/jan7\\_2003.html](http://www.comptel.org/press/jan7_2003.html).

<sup>12</sup> See [http://news.findlaw.com/ap\\_stories/high\\_tech/1700/11-17-2002/20021117120015\\_59.html](http://news.findlaw.com/ap_stories/high_tech/1700/11-17-2002/20021117120015_59.html) (statement of Verizon spokesman Bill Kula).

MFJ's [long distance] restrictions . . . until the incumbents open their local markets to competition." *Qwest Teaming Order*<sup>13</sup> ¶ 5.

It is precisely for these reasons that the entities charged with promoting the interests of local telephone consumers — state regulatory commissions — opposed the immediate elimination of unbundled switching. See *Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985) (noting that the opinions of state and county bodies, as well as those of federal agencies, constitute the “sense by which the public interest should be gauged”). These entities concluded that the availability of unbundled switching generally “would best and most rapidly provide significant public interest benefits for all types of consumers.” National Association of Regulatory Commissions, Resolution Concerning the UNE Platform (Adopted in Convention November 14, 2001). Likewise, consumer groups advocated that switching should be unbundled because of the sizeable benefits that flow to consumers from competition enabled by unbundled switching. Ex Parte Letter from Robert S. Tongren, National Association of State Utility Consumer Advocates to Michael K. Powell, Chairman, FCC of 1/17/03, at 1 (“Any movement to make the UNE-P unavailable, or to limit its availability, will harm the nascent mass market competition now being seen in many areas throughout the nation.”).

There is nothing on the other side of the ledger. The incumbents suggest that the availability of unbundled switching decreases the incentive of the incumbents and of CLECs to deploy facilities. This argument has been twice rejected. In *Verizon*, the Supreme Court held that it is “commonsense” that the competition facilitated by unbundling gives the ILECs incentives to upgrade their facilities. *Verizon Communications*, 535 U.S. at 517 n.33. And in the *Order*, the FCC carefully evaluated the evidence tendered by the incumbents that purported

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<sup>13</sup> *In re AT&T Corp. v. Ameritech Corp.*, 13 F.C.C.R. 21438 (1998).

to show the negative impact of unbundling on facilities-investment and found that this evidence was “flaw[ed]” and based on improper statistical techniques. *Triennial Review Order* ¶ 178.

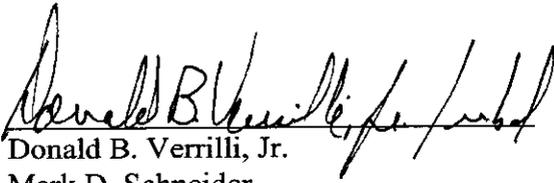
Indeed, the FCC observed that it was un rebutted that simply duplicating the incumbents’ analysis but using more accurate and representative data showed “that there is no depression of investment.” *Id.* ¶ 178 n.575.

In any event, all of the incumbent arguments about the public interest are general arguments against unbundled switching – not arguments about whether a flash cut elimination of UNE-P is desirable while the incumbents make their legal challenges to the Order. Because competitors serve millions of customers on UNE-P, the flash cut elimination of UNE-P would be strongly contrary to the public interest even if there were only a reasonable possibility that the Commission’s Order would ultimately be upheld on appeal. Given the very high likelihood of such a result, the incumbents’ stay request must be rejected.

### **CONCLUSION**

For the reasons stated above, the petitions for a stay pending judicial review should be denied.

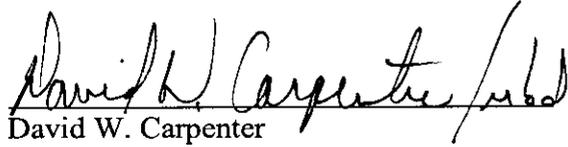
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I hereby certify that, on this 11th day of September 2003, I caused copies of the foregoing Opposition to Joint Petition for Stay to be served upon the parties below via first-class mail, postage prepaid.



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