

**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
)	

**PETITION FOR RECONSIDERATION
OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

Robert S. Tongren
Ohio Consumers' Counsel
President, National Association of State
Utility Consumer Advocates

David C. Bergmann
Assistant Ohio Consumers' Counsel
Chair, NASUCA Telecommunications
Committee

Ohio Consumers' Counsel
10 West Broad Street, Suite 1800

Columbus, OH 43215-3485

NASUCA
8300 Colesville Road (Suite 101)
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

TABLE OF CONTENTS

I. Introduction..... 1

II. The “preference” in the Act for facilities-based competition is minimal. 3

III. The nine-month proceeding imposed on the states in the *Triennial Review Order* contradicts the Commission’s finding for mass market ULS. 6

IV. The Commission’s orders to “cure” impairment for ULS are *ultra vires*. 8

V. The Commission’s actions go well beyond the directives of the Supreme Court and the D.C. Circuit. 9

VI. Despite acknowledging that “impairment” is a lesser standard than “necessary,” the Commission adopted an impairment standard that is substantially similar to the necessary standard. 16

VII. Conclusion 17

**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
)	

**PETITION FOR RECONSIDERATION
OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

I. Introduction

Pursuant to 47 C.F.R. 1.429, NASUCA¹ hereby files this Petition for
Reconsideration of the aspects of the *Triennial Review Order*² described herein. In the

¹ NASUCA is an association of 43 consumer advocates in 41 states and the District of Columbia. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts.

² *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

Triennial Review Order, the Federal Communications Commission (“Commission”) responded to the remand by the Court of Appeals for the D.C. Circuit in *USTA*³ of the Commission’s interpretation of the impairment standard. That standard determines whether unbundled network elements (“UNEs”) must be made available by incumbent local exchange carriers (“ILECs”).⁴ *USTA* itself was an appeal from the Commission’s adoption of impairment rules on remand from the Supreme Court in *Iowa Utilities*.⁵

In the *Triennial Review Order*, the Commission responded to the *USTA* Court’s insistence on a more granular analysis for impairment, related to “specific markets or market categories.”⁶ The Commission did so primarily by examining services for the mass market and for the enterprise market separately, and by examining other services by capacity level. Based on the record before it, the Commission made national findings of impairment or non-impairment that significantly shorten the list of UNEs required to be made available, compared to the list reviewed in *USTA*.⁷

Rulemaking, FCC 03-36 (rel. August 21, 2003) (“*Triennial Review Order*”). The *Triennial Review Order* was published in the Federal Register on September 2, 2003, at 68 Fed. Reg. 52775-52306.

³ *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 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).

⁴ See 47 U.S.C. § 251(d)(2)(B).

⁵ *AT&T Corp. v Iowa Utils. Bd.*, 525 U.S. 366, 179 U.S. 721 (1999) (“*Iowa Utilities*”)

⁶ 290 F.3d at 426.

⁷ Compare *Triennial Review Order* ¶ 7 to 290 F.3d at 419-421.

Yet the Commission then went well beyond *USTA, Iowa Utilities* and the 1996 Telecommunications Act.⁸ With regard to unbundled local switching (“ULS”) -- *and only that UNE*⁹ -- the Commission took affirmative steps to limit and reverse its own finding and, in fact, took specific steps to require the states to “cure” the impairment for ULS.

The reasons for this action are neither clear nor explicitly stated.¹⁰ The Commission has apparently relied on what it interprets as an implied Congressional preference for facilities-based competition.¹¹ Yet this presumed preference is hardly an adequate basis for the extreme directives expressed in the *Triennial Review Order*. The Commission should reconsider these directives.

II. The “preference” in the Act for facilities-based competition is minimal.

The Commission acknowledges that “Congress intended to create a competitive landscape through resale, interconnection and facilities-based provision, and a combination of these modes of entry....”¹² “Facilities-based provision,” in this context,

⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (“96 Act”). The 96 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 96 Act, will be referred to as “the Act,” and all references to the Act will be to the Act as it is codified in the United States Code.

⁹ The Commission did allow states to challenge the national finding of impairment for certain types of dedicated transport, and did allow states to demonstrate impairment for enterprise switching contrary to the Commission’s national finding of nonimpairment. The Commission found that determinations for unbundled shared transport will depend on the state findings for ULS. *Triennial Review Order*, ¶ 534. With regard to these UNEs, unlike ULS, the Commission did not direct the states to actively work to cure the impairment.

¹⁰ That failure is, in itself, reason for reconsideration. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983) (“An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.”); *Telecomm. Research and Action Ctr. v. FCC*, 255 U.S. App. D.C. 287, 801 F.2d 501, 518 (D.C. Cir. 1986).

¹¹ See, e.g., *Triennial Review Order* at ¶ 233.

¹² *Triennial Review Order* at ¶ 3.

clearly includes the use of UNEs.¹³ Yet the Commission determined that “in practice, we have come to recognize more clearly the difficulties and limitations inherent in competition based on the shared use of infrastructure through network unbundling.”¹⁴ This “recognition” -- valid or not -- does not empower the Commission to go against the Congressional intent to allow competition through UNEs anywhere competitors are impaired.¹⁵

The Commission also cites the Preamble of the 1996 Act, which aimed to “encourage the rapid deployment of new telecommunications technologies,” and reiterates the finding in the *UNE Remand Order* that “facilities-based competition best serves the Act’s overall goals.”¹⁶ In this context, the Commission refers to competition via facilities built by competitors as “facilities-based,” not via facilities leased from the ILEC as UNEs. The Commission fails to explain its shifting definition of the term.

In a footnote, the Commission sets forth portions of the record that it contends are in support of its finding, concluding:

¹³ *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1934, as amended, To Provide In-Region, Inter-LATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-928 (rel. August 19, 1997), at ¶ 101 (leased UNEs are a carrier’s “own facilities” for purposes of approval to offer in-region, interLATA services pursuant to 47 U.S.C. 217(c)(1)(A)); *In the Matter of Federal State Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157 (rel. May 8, 1997), at ¶ 154 (leased UNEs are a carrier’s “own facilities” for purposes of receiving universal service support pursuant to 47 U.S.C. 214(e)(1)(A)).

¹⁴ *Triennial Review Order*, ¶ 3.

¹⁵ The Commission states that the *Triennial Review Order* “applies unbundling as Congress intended: with a recognition of the societal costs of unbundling.” *Triennial Review Order*, ¶ 7. The Commission does not cite to any indication of Congress’ recognition of such “societal costs.” As discussed below, the *USTA* Court relied on this doctrine without reference to the text of the Act.

¹⁶ *Triennial Review Order*, ¶ 70. The Commission cites ¶ 14 of the *UNE Remand Order* (*id.*, n. 233), which merely states, “[U]nbundling rules that are based on a preference for development of facilities-based competition in the long run will provide incentives for both incumbents and competitors to invest and innovate, and should allow the Commission to reduce regulation once true facilities-based competition develops.”

[W]e disagree with commenters that argue that the Act contains a “statutory mandate of equal treatment for all three options,” although we are aware that Congress created an unbundling vehicle because complete duplication of the incumbent LECs’ networks is not feasible.¹⁷

Yet as discussed below, a determination that this sort of facilities-based competition “better serves” the goals of the Act¹⁸ should not be viewed as a license to limit the other competitive opportunities under the Act.¹⁹ If Congress had intended the Commission to move aggressively to eliminate unbundling after finding impairment, Congress would have said so directly.

The Commission acknowledges that in *Verizon*, the Supreme Court rejected the claim that TELRIC is an unreasonable rate making methodology for UNEs because it does not produce facilities-based competition. The Court stated that it “had no idea whether a different pricing scheme would have generated even greater competitive investment than the entrants claim.” The Court, however, emphasized that “it suffices to say that a regulatory scheme that can boast such substantial competitive spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities.”²⁰

The current unbundling mechanism likewise cannot be easily described as an unreasonable way to promote competitive investment in facilities.

¹⁷ *Id.* (citation omitted).

¹⁸ *Id.*

¹⁹ See also *id.*, ¶ 448.

²⁰ *Triennial Review Order*, ¶ 29 (footnotes omitted), quoting *Verizon*, 535 U.S. at 517. This is one of the respects in which the *USTA* Court had a different view than the Supreme Court. See *USTA*, 290 F.3d at 425.

III. The nine-month proceeding imposed on the states in the *Triennial Review Order* contradicts the Commission’s finding for mass market ULS.

After a detailed examination of the record, the Commission found that the record supported a national finding of impairment for mass market ULS.²¹ Yet having made that national finding -- like the other national findings in the *Triennial Review Order*²² -- the Commission then *required* each of the states to examine ULS at a more granular level. Thus the directive is for the states *to contradict* the Commission’s national finding of impairment, and thereby eliminate ULS unbundling, in a proceeding that must be completed within nine months.²³ Although the Commission often phrases the task placed on the states as based on a Commission “request,”²⁴ it makes clear that these are orders,²⁵ and parties may apply to the Commission if the states fail to act on those orders.²⁶

²¹ *Triennial Review Order*, ¶ 419.

²² E.g., for mass market copper loops. *Triennial Review Order*, ¶ 211. Indeed, almost all of the Commission’s findings are made on the national level.

²³ The Commission also requires state-level analyses to challenge the Commission’s national impairment findings for enterprise market high capacity loops (*Triennial Review Order*, ¶ 328) and dedicated transport. *Id.*, ¶ 394. Neither of these analyses is as replete with detailed instructions as that required for unbundled mass market switching. The Commission also allows the states to challenge its national finding of *nonimpairment* for enterprise switching (*id.*, ¶ 451), but allows them only 90 days to do so. In *ex parte* filings dated December 13, 2002 and February 13, 2003, NASUCA recognized the importance of the UNE-P and supported a key role for the states in the “granular” analysis directed by the *USTA* court, based upon reports that the Commission intended to make a national finding of *nonimpairment* for mass market ULS. Because the FCC was able to make a national finding of impairment for mass market ULS, however, the state-level analysis is unnecessary.

²⁴ See, e.g., *Triennial Review Order*, ¶¶ 423, 424, 425.

²⁵ See, e.g., *id.* at ¶ 424 (“states *shall* apply specific triggers”); (states “*must* consider whether this impairment could be addressed”) (emphasis added).

²⁶ *Id.* at ¶ 527.

Having made the national finding of impairment, the Commission fails to explain the source of its authority to force the states to contradict that national finding.²⁷ Further, the Commission also requires states to continue looking at mass market ULS in the apparent hope that eventually a state will find no impairment.²⁸

Indeed, the Commission's entire direction here appears to be designed to eliminate the unbundling of mass market local switching, having already found no impairment for enterprise switching.²⁹ First there are the "triggers" that will be examined. If the triggers are not met, the state commissions must then seek out every nook and cranny of every market in the state in order to justify continuing an element for which the Commission found impairment on a national level.³⁰ As discussed below, this goes far beyond the directives of the statute and the rulings of the Supreme Court.

Upon reconsideration, the Commission must explain the source of its authority to require the states to challenge its national finding, and must explain why it has undertaken this detailed action for this one subset of one UNE.³¹ Further, the Commission

²⁷ Indeed, as explained in the next section, the Commission has also required the states to cure the impairment they find for mass market ULS.

²⁸ *Triennial Review Order*, ¶ 526.

²⁹ *Triennial Review Order*, ¶ 451.

³⁰ As discussed below, the states must then also address batch hot cuts and the rolling use of unbundled local switching.

³¹ The situation would, of course, have been different if the Commission had found the record inadequate to support a national finding and had deferred development of a ruling to the states' more granular analysis. The situation might also have been different if the Commission had made a national finding but had *allowed* -- rather than required -- the states to challenge the national finding for their particular localities, as the Commission did with regard to the national finding of nonimpairment for enterprise ULS.

must explain the basis for requiring this state action to be completed within nine months.³²

IV. The Commission’s orders to “cure” impairment for ULS are *ultra vires*.

The Act requires the Commission to base requirements for unbundling on findings of impairment. The Act *does not* require or authorize the Commission to “cure” the impairment and thereby eliminate unbundling. Despite this lack of authority, the Commission has ordered the states to develop -- within nine months -- a “batch hot cut” process, in order to remove what appears to be a nationally-pervasive source of impairment.³³ The Commission has not adopted a requirement to cure impairment for any other UNE.

In addition, the Commission has required states to adopt a “rolling use of unbundled switching” practice, where “transactional access to unbundled switching would *cure* any impairment that would otherwise undermine competition if requesting carriers were denied access to unbundled local switching....”³⁴ Nowhere does the Commission set forth the source of its authority to, or the need to, “cure” impairment for unbundled local switching. Indeed, this action on ULS is in direct contradiction to the Commission’s determination that with regard to switching and transport, “the Commission is not obligated to establish a wholesale market”³⁵ that will obviate the need

³² There is also no basis in the record for the ninety-day one-time opportunity for states to challenge the finding of nonimpairment for enterprise local switching.

³³ *Triennial Review Order*, ¶ 487-488.

³⁴ *Id.*, ¶ 521 (emphasis added).

³⁵ *Id.*, n.1627.

for unbundling. Yet the Commission apparently believes it is compelled to eliminate the need for unbundling for mass market switching.³⁶

The Commission declined to find a lack of impairment for UNEs where CLECs can use ILEC resold or retail services to provide the CLECs' retail services. The Commission stated,

We conclude that it would be inconsistent with the Act if we permitted the incumbent LEC to avoid all unbundling merely by providing resold or tariffed services as an alternative. ... Because the Act contains three modes of entry, we cannot find an approach that would so easily remove one mode from the Act to be a reasonable reading of Congress's intent.³⁷

Yet the Commission itself, in attempting to cure impairment for ULS, is seeking to remove unbundling of the incumbents' facilities from the Act.

V. The Commission's actions impermissibly go far beyond the directives of the Supreme Court and the D.C. Circuit.

As mentioned above, the *Triennial Review Order* is the culmination (to date) of the deliberative process that began with the *First Report and Order*, which led to the Supreme Court's rulings in *Iowa Utilities*. That decision addressed a wide variety of attacks on the *First Report and Order*.³⁸ With regard to 47 U.S.C. § 251(d)(2)(B), which sets forth impairment as the basis for requiring unbundled access to network elements, the Supreme Court found that "the Act requires the FCC to apply *some* limiting standard,

³⁶ The measures adopted by the Commission are not "temporary transition mechanism[s] to help complete all of the steps toward the pro-competitive goals of the 1996." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, 15 FCC Rcd 1760, 1763 (1999), quoted in the *Triennial Review Order* at ¶ 24.

³⁷ *Triennial Review Order*, ¶ 102 (footnotes omitted).

³⁸ See 525 U.S. at 374-376.

rationality related to the goals of the Act, which it has simply failed to do.”³⁹ This finding rejected the impairment standard adopted in the *First Report and Order*, which found impairment if lack of access to a UNE merely decreased the quality or increased costs to competitors, compared to use of other UNEs, “which means that comparison with self-provision, or with purchasing from another provider, is excluded.”⁴⁰ The Court also stated that

the Commission’s assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element “necessary,” and causes the failure to provide that element to “impair” the entrant’s ability to furnish its desired services, is simply not in accord with the ordinary and fair meaning of those terms.⁴¹

The Court vacated the Commission’s impairment rule.⁴²

The most recent pronouncement from the Supreme Court on the Act was *Verizon*. In that case, the Supreme Court addressed -- and rejected -- the ILECs’ claims that the Commission’s setting of UNE prices using the total element long run incremental cost (“TELRIC”) standard was a disincentive to investment.⁴³ The rejection was based on the law -- because the Act allows some disincentives to investment -- and the facts -- that “actual investment in competing facilities since the effective date of the Act simply belies the no-stimulation argument’s conclusion.”⁴⁴ The Supreme Court’s rejection of the

³⁹ 525 U.S. at 388 (emphasis in original).

⁴⁰ 525 U.S. at 389.

⁴¹ 525 U.S. at 389-390 (emphasis in original). The Court also found that the Commission’s expansive definition of impairment was driven by the Commission’s incorrect interpretation of 47 U.S.C. § 251(c), which requires access to UNEs “at any technically feasible point.” 525 U.S. at 391.

⁴² 525 U.S. at 392.

⁴³ 535 U.S. at 503-504.

⁴⁴ 535 U.S. at 504.

ILECs' disincentive arguments on TELRIC cannot be reconciled with the Commission's acceptance of that argument in the unbundling context.

The key consideration in the Commission's deliberations here was, as discussed above, its preference for competition from carriers that build their own facilities. And the Commission's determination to limit unbundling clearly arises from its concern that unbundling creates a disincentive for such facilities investment.⁴⁵ The Commission frequently refers to Justice Breyer's opinion in *Verizon* in support of its concern over investment.⁴⁶ Yet the majority opinion in *Verizon* **explicitly dismissed** Justice Breyer's concern.⁴⁷

After the Supreme Court vacated the impairment rule in *Iowa Utilities*, the Commission reexamined the issue and, in the *UNE Remand Order*, altered the definition of impairment. In the *UNE Remand Order*, the Commission adopted a rule that found impairment if

taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element *materially* diminishes a requesting carrier's ability to provide the services it seeks to offer.⁴⁸

The new rule addressed the Supreme Court's concerns from *Iowa Utilities* over the original rule's failure to consider self-provisioning or third-party suppliers, and the consideration of *any* cost differential as a basis for impairment.

⁴⁵ See, e.g., *Triennial review Order*, at ¶ 448.

⁴⁶ See, e.g., *Triennial Review Order*, ¶ 64.

⁴⁷ *Verizon*, 535 U.S. 517, n.33.

⁴⁸ *UNE Remand Order*, ¶ 51 (emphasis added); see former 47 C.F.R. § 51.317(b)(1).

Yet on appeal the D.C. Circuit found the standard to be inadequate, despite acknowledging “the extraordinary complexity of the Commission’s task.”⁴⁹ The *USTA* Court found fault with the *UNE Remand Order* on impairment in the following areas:

- *Uniform scope*⁵⁰

The Court objected to a national finding of impairment, because this allowed unbundling where ILEC service is priced below cost.⁵¹ Yet the Court also objected to the national finding of impairment because it allowed unbundling where ILEC service is priced above cost to support the below-cost areas.⁵²

- *Commission’s reasons for national scope*⁵³

The Court briefly disposed of three out of four of the Commission’s reasons for adopting rules of national scope.⁵⁴ Notably, it appears that the Commission had not argued, and the Court never considered, whether the record supported national findings of impairment.⁵⁵

⁴⁹ *USTA*, 290 F.3d at 421.

⁵⁰ As noted above, most of the *Triennial Review Order*’s findings are national in scope.

⁵¹ 290 F.3d at 422. The *USTA* Court’s emphasis on the proposition that there are areas where service is priced below cost is the result of the Commission’s failure to respond to statements to that effect in the appellants’ briefs. *Id.* The issue has now been put to rest by the Commission’s extensive discussion of “implicit support flows.” *Triennial Review Order*, ¶ 154-169. The Commission states, “The existence of ‘below-cost’ residential local exchange service rates does not mean that such customers are ‘unprofitable’ to serve.” *Id.*, ¶ 157. (Although NASUCA does not deny that there are locations in the nation that have basic local exchange service rates priced below cost, this by no means implies that residential local service as a whole -- which is the proper basis for comparison -- is priced below relevant measures of cost.)

⁵² 290 F.3d at 422-423.

⁵³ 290 F.3d at 423-426.

⁵⁴ 290 F.3d at 423-424.

⁵⁵ Unlike the Commission’s detailed review of the record in the *Triennial Review Order*. See, e.g., *Triennial Review Order* at n. 1370.

The Court then focused its attack on “the more substantive justifications -- the ideas that universal rules would promote the goals of the Act by leading to rapid introduction of competition.”⁵⁶ The Court noted that

[u]sing certain definitions ... more rapid introduction of competition -- indeed follows automatically. If competition performed with ubiquitously provided ILEC facilities counts, the more unbundling there is, the more competition.⁵⁷

The Court then grudgingly notes that the Commission never made this argument, being “unwilling to embrace the idea that such completely synthetic competition would fulfill Congress’s purposes.”⁵⁸

The Court then states:

In the end, then, the entire argument about expanding competition and investment boils down to the Commission’s expression of its belief that in this area more unbundling is better. But Congress did not authorize so open-ended a judgment. It made “impairment” the touchstone.⁵⁹

In the *Triennial Review Order*, the Commission has based its national findings not on a policy to promote competition, but a granular review of impairment for UNEs in “specific markets or market categories.”⁶⁰

⁵⁶ 290 F.3d at 424.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 290 F.3d at 425.

⁶⁰ 290 F.3d at 426.

- *Kinds of cost disparities*⁶¹

The *USTA* Court asserts that “the Commission’s order does reflect an open-ended notion of what kinds of cost disparity are relevant” in determining impairment.⁶² The Court’s dismissal of the Commission’s “open-ended” view is stated as follows:

Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating the disincentive to invest in innovation and creating complex issues of managing shared facilities. At the same time -- the plus that the Commission focuses on single-mindedly -- a broad mandate can facilitate competition by eliminating the need for separate construction of facilities where such construction would be wasteful. Justice Breyer therefore concluded that fulfillment of the Act’s purposes therefore calls for “balance” between these competing concerns. *A cost disparity approach that links “impairment” to universal characteristics, rather than ones linked (in some degree) to natural monopoly, can hardly be said to strike such a balance.* The Local Competition Order reflects little Commission effort to pin “impairment” to cost differentials based on characteristics that would make genuinely competitive provision of an element’s function wasteful.⁶³

What is remarkable about this passage is first, that its entire and exclusive citation to authority is Justice Breyer’s *dissenting* opinion in *Iowa Utilities*. As noted above, a later expression of Justice Breyer’s views was dismissed by the majority of the Supreme Court in *Verizon*.

Second, the *USTA* Court’s determination that a finding of “impairment” based on universal cost characteristics -- rather than ones linked to natural monopoly -- cannot be said to strike a balance between the “costs” of unbundling and the benefits of competition, reads far more into the Act than the words voted on by Congress. This is

⁶¹ 290 F.3d at 426-428.

⁶² 290 F.3d at 426.

⁶³ 290 F.3d at 427 (internal citations omitted) (emphasis added).

especially true because the Supreme Court in *Verizon* in effect dismissed the claim that unbundling had *in fact* provided a disincentive to the construction of facilities.⁶⁴

Congress did not say that impairment could be found only where cost disparities exist that are linked to natural monopoly. Admittedly, Congress also did not explicitly say that impairment could be found where cost disparities exist, whether or not linked to natural monopoly. Yet it should be clear that the latter is closer to being “in accord with the ordinary and fair meaning” of the term⁶⁵ than the view adopted by the *USTA* Court.

The *USTA* Court concluded that “[b]ecause the Commission’s concept of ‘impairing’ cost disparities is so broad and so unrooted in the competing values at stake in implementation of the Act,” it was required to reject even the Commission’s non-national impairment findings.⁶⁶ The Court’s description of those “competing values” is not based on legislative history *or* the specific language of the Act. Instead it is based on the Court’s take on abstruse economic theory,⁶⁷ which is clearly not a legitimate basis for overruling the Commission’s findings in the *UNE Remand Order*.

The Supreme Court has previously overturned similar expressions of judicial activism by Courts of Appeals with regard to the Act. In 1997, the U.S. Court of Appeals for the Eighth Circuit vacated the Commission’s “pick-and-choose” rule, cautioning that ILECs would be “reluctant” to make best offers “for fear” that the same terms would

⁶⁴ *Verizon*, 535 U.S. 517, n.33.

⁶⁵ *Iowa Utilities*, 525 U.S. at 389-390 (emphasis in original). The Court also found that the Commission’s expansive definition of impairment was driven by the Commission’s incorrect interpretation of 47 U.S.C. § 251(c), which requires access to UNEs “at any technically feasible point.” 525 U.S. at 391.

⁶⁶ 290 F.3d at 428.

⁶⁷ See, e.g., 290 F.3d at 426, n.3.

have to be granted to other “opting-in” parties who would not make responsive return offers similar to those provided by the original CLEC contracting party.⁶⁸ On appeal, the Supreme Court reversed the Eighth Circuit, stating that the Commission’s interpretation was the “most readily apparent” reading of the statute.⁶⁹ The *USTA* Court did not merely interpret the statute; the Court tortured the statute to fit its economic theories.

VI. Despite acknowledging that “impairment” is a lesser standard than “necessary,” the Commission adopted an impairment standard that is substantially similar to the necessary standard.

In contrast to the impairment standard in 47 U.S.C. § 251(d)(2)(B) applicable to most UNEs, the Act requires unbundling of proprietary elements only where unbundling is “necessary.” 47 U.S.C. 251(d)(2)(A). From the beginning in the *First Report and Order*,⁷⁰ to the *UNE Remand Order*,⁷¹ to the *Triennial Review Order*,⁷² the Commission has found that “necessary” is a stricter standard than “impair.” In *USTA*, the D.C. Circuit left the stricter “necessary” standard intact.⁷³

The Commission says that access to a proprietary network element is “necessary” if

lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.⁷⁴

⁶⁸ *Iowa Utilities Board v. FCC*, 120 F.3d at 801.

⁶⁹ *Iowa Utilities*, 525 U.S. at 396.

⁷⁰ *First Report and Order* at ¶

⁷¹ *UNE Remand Order* at ¶ 46.

⁷² *Triennial Review Order*, ¶¶ 71, 171.

⁷³ *USTA*, 290 F.3d at 415.

⁷⁴ *Triennial Review Order*, ¶ 170 (emphasis in original).

On the other hand, as defined in the *Triennial Review Order*, a carrier is

impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.⁷⁵

see ¶¶ 71-72. In the real world, conditions that would make entry into a market uneconomic would preclude entry into that market. And -- under the competitive paradigm created by the Act -- it is difficult to imagine conditions that would preclude entry into a market that would *not* also make entry into that market uneconomic. Thus in attempting to satisfy the dictates of *USTA*, the Commission has essentially caused the “necessary” standard and the “impairment” standard to be equivalent. The Commission failed to explain this change, as it is required to do.

VII. Conclusion

The Commission’s actions requiring states to examine ULS -- and to cure impairment of that element -- contradict the Commission’s national finding of impairment, and go far beyond the demands of Congress as set forth in the Act. These Commission orders result from what the Commission interprets as an implied Congressional preference for “facilities-based competition” -- however that might be defined. The Commission’s actions also result from excessive deference to a decision of the D.C. Circuit Court of Appeals that attempted to make law that the Supreme Court would not -- and will not -- approve. The Commission should reconsider the aspects of the *Triennial Review Order* discussed herein.

⁷⁵ *Id.*, ¶ 84.

Respectfully submitted,

Robert S. Tongren
Ohio Consumers' Counsel
President, National Association of State Utility Consumer
Advocates

David C. Bergmann
Assistant Ohio Consumers' Counsel
Chair, NASUCA Telecommunications Committee

Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485

NASUCA
8300 Colesville Road (Suite 101)
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380