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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

EMERGENCY STAY PETITION

Pursuant to Rules 1.41 and 1.43 of the FCC's Rules, 47 C.F.R. §§ 1.41, 1.43, DSCI Corporation ("DSCI"), InfoHighway Communications Corporation ("InfoHighway") and Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications ("MetTel") (hereinafter "the Petitioners") hereby petition the FCC to stay certain portions of the *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (FCC 03-36) released in the above-captioned proceedings on August 21, 2003 (hereinafter "Triennial Review Order" or "TRO").[1]

In the TRO, the FCC significantly re-wrote the rules it first promulgated in 1996 to implement the path-breaking local telephone competition provisions in section 251 of the Telecommunications Act of 1996 ("1996 Act"), which, among other things, require incumbent

[1] InfoHighway and MetTel participated in the above-captioned agency proceedings. DSCI is a member of the Promoting Active Competition Everywhere (PACE) Coalition, which participated actively in these proceedings.

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local exchange carriers ("ILECs") to provide nondiscriminatory access to network elements on an unbundled basis where failure to provide such access would impair the ability of a competing carrier to provide the services it seeks to offer.[2] Under the 1996 Act, a successful entry strategy has been to provide innovative, high-quality services using the so-called Unbundled Network Element Platform ("UNE Platform"), which is a combination of network elements that competitors now use to serve over 13 million U.S. telephone lines.

In the TRO, the FCC prohibited all carriers who utilize the UNE Platform under section 251 from serving pre-existing or new "enterprise customers" (larger business subscribers with sufficient revenues to justify use of digital facilities). TRO at ¶¶451-58. Given the admittedly limited and incomplete empirical basis underlying this new rule, the FCC gave UNE Platform competitors 90 days from the TRO's effective date (*i.e.,* until December 31, 2003) to persuade state public utility commissions to petition the FCC for a waiver of the enterprise customer prohibition on a state-specific basis. TRO at ¶528.

After having created this critical 90-day safety valve procedure as a means to prepare and submit impairment data, the FCC then inexplicably blocked UNE Platform competitors from accessing this procedure by requiring the state commissions to support any such petitions based on specific customer and geographic market determinations that will not be finalized ***until six months after the 90-day period has expired.*** TRO at ¶¶455-58. Put simply, it is an incoherent procedure whereby UNE Platform carriers are given a severly limited window to present evidence showing impairment on a market-specific basis when the relevant markets will not be defined until six months after the window has closed. As such, the 90-day procedure

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2 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*FCC Local Competition Order*"). *See also* 47 U.S.C. §251.

poses an absurd Kafka-esque dilemma for UNE Platform competitors: they have a mere 90 days to attempt to persuade each state to save a significant customer segment but they are denied the critical customer and geographic market definitions for proving their case.

To make matters worse, even if alternative facilities to the UNE Platform were available, and they are not, it would be operationally, technically and economically impossible for Petitioners to transfer their existing enterprise customers from the UNE Platform to those alternative facilities. Indeed, it is for this same reason that the FCC established a three-year transition period for all non-enterprise customers. TRO at ¶¶528-32. Although the FCC did not identify any materially significant difference between transferring enterprise customers and all other customers from the UNE Platform, the FCC provided only 90 days to transfer enterprise customers without any justification and in spite of the FCC's recognition that there are no procedures in place today to perform hot cuts for enterprise customers using DS1 loops. TRO at ¶532. For this reason alone, failure to stay the enterprise customer prohibition would cause enormous and irreparable harm to the Petitioners and to the competitive local telephone marketplace.

The need for a meaningful safety valve procedure at the state level is underscored by the deficiencies of the FCC's impairment holding. The FCC cited only three findings to support its decision that carriers are not impaired without access to the UNE Platform to serve enterprise customers: (1) The FCC relied principally upon ILEC claims that competing carriers have installed as many as 1300 switches, although many self-provided switches were installed by now-bankrupt CLECs during the telecommunications boom of the late 1990s rather than in today's more demanding capital markets (TRO at ¶451); (2) The FCC relied primarily upon a single record submission indicating that UNE Platform carriers may not experience the same

"hot cut" problems with enterprise customers as they do with mass market customers (TRO at ¶451 & nn. 1379-80); and (3) the FCC noted that enterprise customers may generate more significant revenue streams than mass market customers, sometimes under longer-term contracts, thereby enabling UNE Platform carriers to better cover the costs of providing service to these customers without access to a local switching UNE (TRO at ¶452). Even if these facts were all true, and they are not, they hardly justify a national finding of non-impairment with respect to enterprise customers.

The FCC admitted that it did not undertake a complete impairment analysis with respect to enterprise customers because the record in the proceeding was incomplete. TRO at ¶¶454-55. Indeed, the TRO does not contain any economic analysis of the enterprise customer market, and the entire discussion of the enterprise market consists of only 8 paragraphs, TRO at ¶¶451-58, as compared with the 60-paragraph discussion of the mass market, TRO at ¶¶459-527. The FCC also recognized that "a geographically specific analysis could possibly demonstrate that competitive carriers are impaired without access to unbundled incumbent LEC local circuit switching for DS1 customers." TRO at ¶455. The FCC's recognition that its finding of non-impairment is substantially overbroad entails a more meaningful state-by-state procedure whereby UNE Platform carriers can present the evidence necessary for a state commission to make a more granular determination.

The Petitioners will suffer several types of irreparable harm from the TRO, the overall effect of which will be catastrophic for Petitioners and many UNE Platform carriers.[3] *First*, the Petitioners stand to lose significant existing customers and revenue streams due to the enterprise customer prohibition and the ILECs can be expected to begin raiding the Petitioners'

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[3] The Petitioners have attached three affidavits to support their showing of irreparable harm and their request for relief.

existing enterprise customer base even before the 90-day period has ended. Put simply, the enterprise customers of the Petitioners that want to retain their existing service without risking service disruption will be forced to switch back to the ILEC absent a stay. These enterprise customers will not want to accept the risk of service interruption, and thus the Petitioners are in danger of losing their entire enterprise customer base. The revenues from enterprise customers constitute a significant portion – up to 40% in some cases[4] – of the current revenues received by UNE Platform competitors in certain states. The Petitioners will not have the ability to recover monetary compensation for losses caused by the enterprise customer prohibition from the FCC, the ILECs, or any other party. *Second*, the Petitioners' ability to gather and present evidence that they are impaired without access to unbundled local switching to serve enterprise customers in particular markets will be severely undermined if not eliminated. *Third*, denying UNE Platform carriers unbundled local switching to serve enterprise customers will adversely affect their ability to raise capital, expand the geographic scope of their operations, and invest in new facilities for years to come.

A stay is the only effective remedy for the Petitioners. In the event the 90-day period ends without the state commission filing a waiver petition, the Commission has specified (TRO at ¶532) that UNE Platform carriers will have only 90 days to remove all enterprise customers from the UNE Platform. TRO at ¶¶532.[5] It is no answer to suggest that UNE Platform carriers could wait until the end of the 90-day period and then seek a stay if the state commission decides not to file a waiver petition. It bears emphasis that the FCC "permit[ted]" but did not require a state commission to seek an FCC waiver. TRO at ¶455. Hence, a state

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4 *See* Declaration of Sean Dandley, DSCI Corporation, at 2.

5 A possible exception to the 90-day transition period is when the UNE Platform competitor has an interconnection agreement with the ILEC with applicable "change of law" provisions. TRO at ¶532.

commission is under no formal obligation to address this issue or, if it does so, to issue a final decision on whether to seek a waiver that could be subject to an appeal by the UNE Platform carriers.[6] Moreover, a stay of the state commission's refusal to file a waiver petition would not prevent the FCC's enterprise customer prohibition from taking effect as scheduled on December 31, 2003. Once the 90-day period terminates without the filing of a waiver petition, the enterprise customer prohibition automatically becomes effective and the customer migration phase begins. The only effective relief for the Petitioners is an immediate stay of the enterprise customer prohibition. Therefore, the FCC must remedy the situation by staying those portions of the TRO in which the FCC prohibits UNE Platform carriers from utilizing unbundled local switching to serve enterprise customers.

Each of the Petitioners relies heavily on the UNE Platform as a market entry strategy to offer innovative services to their customers. DSCI provides integrated communications solutions for its customers, with one bill and one source for all their telecommunications needs. DSCI utilizes the UNE Platform to provide service to commercial, non-profit and governmental organizations, as well as to numerous enterprise customers, and today it operates in Massachusetts, New Hampshire, New York and Rhode Island.[7] InfoHighway is a leading Integrated Communications Provider ("ICP") offering end-to-end solutions including voice and data telecommunications and Internet services primarily to businesses in New York, New Jersey, Massachusetts, Pennsylvania, Delaware, Maryland, Washington, D.C., Virginia, Maine, New Hampshire, Vermont, Rhode Island, Connecticut and

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6 Nor is it an answer to suggest that UNE Platform carriers ask the FCC to step into the shoes of a state commission that refuses to conduct a 90-day proceeding. *See* TRO at ¶190 & n.606. The enterprise customer prohibition will already have taken effect and been implemented before FCC has completed its own 90-day proceeding.

7 *See* Declaration of Sean Dandley, DSCI Corporation at 2.

Texas. The Company offers "one-stop shopping" bundled options for local and long distance telephone services; high-speed data and Internet services, principally utilizing Digital Subscriber Line technology; web services, including web hosting; and network design and wiring services. InfoHighway offers unique and innovative solutions to small- to medium-sized businesses in combination with its voice services, such as state-of-the-art Voice Mail service with Unified Messaging capabilities. MetTel is a competitive local exchange carrier that serves small and medium businesses, residential subscribers and PSPs. MetTel has a broadband network in Manhattan, a significant UNE Platform customer base in Florida, Georgia, Massachusetts, New Jersey, New York, Pennsylvania and Texas, and operations in approximately 10 other states.

The Petitioners are seeking this stay on an emergency basis pending appeal of the TRO. The Petitioners will hold off on filing their appeals for five business days in order to give the FCC sufficient time to consider and act on this petition. In the event the FCC denies or does not act upon this petition, the Petitioners plan to file their appeals and seek appropriate relief from the Court.

I. INTRODUCTION AND BACKGROUND

A. The Unbundled Network Element Regime Under the 1996 Act.

Several key provisions in the 1996 Act require ILECs to share their monopoly local exchange networks with new entrants and other competing telecommunications carriers. Sections 251(c)(3) and 252(d)(1) entitle any requesting telecommunications carrier, such as the Petitioners, to obtain the individual facilities and functionalities of the ILECs' local exchange networks as unbundled network elements ("UNEs") at rates that reflect the ILECs' forward-

looking economic costs.[8] Congress imposed this obligation on ILECs because it was unrealistic to expect new entrants to build-out a ubiquitous local exchange network from scratch as a condition precedent to entering the local telephone market to compete against an incumbent monopolist. New entrants need more achievable alternatives for entering the local telephone market, such as UNEs, so they could build a brand name and establish a customer base and revenue stream while building-out their own facilities where and when it becomes cost-effective to do so.

Congress took great pains to establish an accessible regime of unbundled network elements in the 1996 Act. Congress defined the term "network element" to include any "facility or equipment used in the provision of a telecommunications service," and the definition broadly extends to all "features, functions, and capabilities that are provided by means of such facility or equipment." 47 U.S.C. § 153(29). Since the 1996 Act was adopted, the FCC has identified numerous network elements that exist today within the ILECs' local exchange networks. Some of the more important network elements include: (1) local loops (mostly copper, but sometimes fiber) that link a subscriber to the first point of switching in the ILEC's network; (2) local switching whereby the ILEC transfers telephone calls between a subscriber's loop and the telephone network at large; and (3) the circuits necessary to transport calls from the ILEC's switch to other aggregation and hand-off points within the ILEC's local telephone network. These three network elements – often known as loops, switching and shared transport – are codified in the FCC's rules at 47 C.F.R §§ 51.319(a)(1), (c)(1) & (d)(1)(iii).

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8 47 U.S.C. §§ 251(c)(3), 252(d)(2). The methodology prescribed by the FCC for establishing UNE rates is known as Total Element Long-Run Incremental Costs (TELRIC).

The 1996 Act contemplates not only that requesting carriers should be able to obtain individual network elements from ILECs at cost-based rates, but that requesting carriers should be able to obtain combinations of two or more network elements. Section 251(c)(3) states that an ILEC must provide unbundled network elements to competing carriers "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3). The FCC codified this requirement at 47 C.F.R. § 51.315, and it made clear that the ILECs themselves must combine network elements upon request rather than insisting that the requesting carrier itself combine separately-provided network elements. The U.S. Supreme Court has twice upheld the FCC's implementation of the UNE combination requirement. *See Verizon v. FCC*, 535 U.S. 467 (2002); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 393-95 (1999) (affirming FCC Rule 315, 47 C.F.R. §315).

The ability to obtain a combination of network elements is critical for the so-called UNE Platform carriers. These providers use essentially three network elements – loops, switching and shared transport – to act as the network "platform" upon which they provide local telephone services in competition with ILECs. The UNE Platform is a versatile tool for new entrants to provide widespread local telephone services in competition with the ILECs. According to reports, UNE Platform carriers today serve nearly 13 million telephone lines in the United States, including more than two million lines in New York State alone.[9] Further, the UNE Platform is used to provide competing local services in all U.S. geographic regions, including suburban and rural areas. For many customers in several parts of the United States, competition from UNE Platform carriers is the only significant new entry that has occurred in the

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9 *See* "The UNE-P Fact Report: July 2003," prepared by the PACE (Promoting Active Competition Everywhere) Coalition (copy attached). The Petitioners are members of the PACE Coalition. The report also can be accessed at www.pacecoalition.org.

local telephone market in the last seven years under the 1996 Act. Indeed, the UNE Platform is now the fastest growing market entry strategy.

Section 251 of the Act does not automatically require each ILEC to make every network element available to requesting carriers on an unbundled basis. Rather, Congress directed the FCC to "determin[e] what network elements should be made available" by ILECs to requesting carriers. 47 U.S.C. § 251(d)(2). In making that determination for a non-proprietary network element, the FCC must consider whether denying a requesting carrier access to the network element "would impair the ability of the telecommunications carrier . . . to provide the services that it seeks to offer." *Id* , § 251(d)(2)(B). Hence, an ILEC normally is required to provide a network element to a local competitor on an unbundled basis at cost-based rates if this so-called "impair standard" is satisfied. Congress did not mean to require ILECs to supply network elements to other carriers under the statutory pricing standard if those carriers are able to self-supply the network element or obtain it from third-party suppliers without impairing their ability to provide competitive services. The impair test requires the application of considerable expertise based on the collection of significant amounts of data, and it should be no surprise that the question whether the FCC has properly applied this standard has been the subject of several lawsuits. *Compare AT&T Corp. v Iowa Utilities Board*, 525 U.S. 366, 387-92 (1999) (vacating FCC Rule 319, 47 C.F.R. §319), *with United States Telecom Association v. FCC*, 290 F.3d 415, 421-28 (DC Cir. 2002) (holding that FCC's impair analysis was not sufficiently granular).

Beginning in 1996, the FCC has determined on several occasions that the network elements embodying the UNE Platform satisfy the impair standard and, hence, must be made available to requesting carriers both as individual UNEs and as UNE combinations. *See FCC Local Competition Order*, 11 FCC Rcd at 15647-48; *Implementation of the Local Competition*

Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 3696, 3908-10 (1999) (decision on remand from *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999)). Based on the 1996 Act and these FCC decisions, the Petitioners and numerous other carriers have invested hundreds of millions of dollars to enter the local telephone market to use the UNE Platform to provide competing local services against Verizon and other ILECs.

As the success of the UNE Platform has grown, the ILECs have launched an intensive campaign at the FCC, in Congress, and in courts to eliminate the UNE Platform as a vehicle for the provision of innovative local telephone services to subscribers across the United States. In particular, the ILECs have asked the FCC to determine that one or more of the network elements comprising the UNE Platform do not satisfy the impair standard and, hence, need not be provided by ILECs to requesting carriers at cost-based rates. The ILECs know that if even one of the network elements underlying the UNE Platform is removed from the list of network elements that ILECs must provide under the 1996 Act, this will effectively "unplug" the UNE Platform, and the subscribers who take service from UNE Platform carriers will face paying higher rates to receive less innovative services from their local telephone service.

B. <u>The Enterprise Customer Prohibition in the TRO.</u>

The ILECs' attack on the UNE Platform has centered on the local switching network element, which is a core component of the UNE Platform. The ILECs have argued that new entrants can self-supply the necessary local switching functionality by purchasing and installing their own switches. The UNE Platform carriers have responded by showing that there are numerous significant impediments to self-providing (or obtaining from a third party) the switching functionality necessary for providing local telephone services. In the TRO, the FCC attempted to resolve this dispute by splitting the UNE Platform market into two parts. For mass

market customers, the FCC held that UNE Platform carriers are impaired without access to ILEC-supplied local switching and, therefore, UNE Platform carriers are entitled to obtain local switching as a UNE from the ILEC under the 1996 Act. TRO at ¶¶459-532. For enterprise customers, the FCC held that UNE Platform carriers are not impaired without access to ILEC-supplied local switching and, therefore, UNE Platform carriers are not entitled to obtain local switching as a UNE from the ILEC under the 1996 Act. TRO at ¶¶451-58. In each case, the FCC created a procedure whereby a party disagreeing with the FCC's determination can (in theory) seek to persuade a state commission to establish (or, with respect to enterprise customers, seek to establish) a different rule on a state-specific basis. *See* TRO at ¶¶ 455-58, ¶¶460-526.

1. Mass Market Customers.

The TRO holds that new entrants require access to local switching as an unbundled network element supplied by the ILEC when providing local telephone service to mass market customers across the United States. TRO at ¶¶ 459-532. The FCC defined mass market customers as "residential and very small business customers" who are normally served by one or more standard DS0 loops. TRO at ¶459 & n.1402. The FCC based this determination on several factors, including a finding that most self-deployed CLEC switches today are not used or readily usable for mass market customers. One reason is the delays, costs and burdens of the so-called "hot cut" process whereby a UNE Platform carrier seeking to use its own switch to serve a subscriber requires the ILEC to implement a manual, physical transfer of the subscriber's telephone connections from the ILEC to the UNE Platform carrier.

Although the FCC made a national finding of impairment for using ILEC-supplied local switching to serve mass market customers, the FCC established a procedure whereby state commissions will conduct a more "granular" inquiry based on an extensive, state-

specific factual record. TRO at ¶¶460-526. Such a proceeding is mandatory, not voluntary, for state commissions, and the FCC held that state commissions must finish this proceeding within nine months after the effective date of the TRO (*i e.*, by June 27, 2004). *See, e.g.*, TRO at ¶460. As part of this proceeding, the FCC required state commissions to define the relevant market from both a geographic and a customer perspective. As to the former, the state commissions must define the relevant geographic market to be smaller than the entire state. TRO at ¶495. As to the latter, the state commissions must identify separate market segments for "mass market" and "enterprise" UNE Platform customers. TRO at ¶497. Based on these market determinations, and in the event the state commission makes a finding of non-impairment, thereby reversing the FCC's national impairment finding, the FCC has mandated a three-year transition period for UNE Platform carriers to migrate customers away from the UNE Platform. TRO at ¶532.

2. *Enterprise Customers*

The TRO holds that UNE Platform carriers are not impaired in their provision of local telephone service to enterprise customers without access to ILEC-supplied local switching. TRO at ¶¶451-458. The FCC defined enterprise customers to be those customers for which it is "economically feasible" for a UNE Platform carrier to provide voice service using a DS1 or above loop (compared to the DS0 loops used to serve mass market customers).[10] This definition includes all subscribers who today are being served by a DS1 loop, as well as those subscribers who are considered to be "potential enterprise customers" because they are using some number

[10] The "DS" designation for a loop is a short-hand reference to the amount of bandwidth available over the loop. A DS0 is a single, standard 64 KBPS telephone circuit, while a DS1 has the equivalent capacity of 24 DS0 circuits. The FCC left it to the state commission to determine the specific "DS0 cutoff" at which a subscriber ordering multiple DS0 loops will be considered an enterprise customer rather than a mass market customer.

of DS0 loops today. TRO at ¶451 n.1376. The FCC did not define the number of DS0 loops (known as the "DS0 cutoff") that will place a subscriber in the category of enterprise customers, but rather required the state commissions to perform this task as part of its 9-month mass market proceeding.

Although the record contained limited and incomplete data as to whether UNE Platform competitors are impaired with respect to enterprise customers, the FCC made a national finding of non-impairment. TRO at ¶451. The FCC relied principally upon ILEC claims that competing carriers have installed as many as 1300 switches, although many self-provided switches were installed by now-bankrupt CLECs during the telecommunications boom of the late 1990s rather than in today's more demanding capital markets. TRO at ¶451. The FCC also relied primarily upon a single record submission indicating that UNE Platform carriers may not experience the same "hot cut" problems with enterprise customers as they do with mass market customers. TRO at ¶451 & nn. 1379-80. Finally, the FCC noted that enterprise customers can generate more significant revenue streams than mass market customers, sometimes under longer-term contracts, thereby enabling UNE Platform carriers to better cover the costs of providing service to these customers without access to a local switching UNE. TRO at ¶452.

The FCC freely concedes that its non-impairment finding may be incorrect, at least for certain market segments. The FCC stated that "we recognize that a geographically specific analysis could possibly demonstrate that competitive carriers are impaired without access to unbundled incumbent LEC local circuit switching for DS1 enterprise customers in a particular market." TRO at ¶454. The FCC also recognized that UNE Platform carriers could suffer specific "cost and operational disadvantages" that could make it economic to serve enterprise customers only through ILEC-supplied local switching in certain market segments. *Id.*

The FCC identified "rural areas" as market segments where its finding of non-impairment is particularly vulnerable. *Id*

The FCC created a procedural mechanism whereby UNE Platform carriers can present data to individual state commissions showing that they are impaired without access to ILEC-supplied local switching. TRO at ¶¶454-58. However, this mechanism is markedly inferior to the procedural mechanism the FCC created for ILECs to show non-impairment for mass market customers. TRO at ¶¶460-526.

- The FCC held that state commissions are "permit[ted]" but not required to conduct a more granular analysis to determine whether impairment exists for enterprise customers. TRO at ¶455. By contrast, the FCC required state commissions to conduct an impairment proceeding for mass market customers. TRO at ¶460-63.

- The FCC required state commissions that opt to conduct an analysis of the enterprise market to conclude the proceeding within 90 days after the effective date of the TRO. TRO at ¶455. The FCC gave state commissions nine months to conclude the mandated impairment proceeding for mass market customers. TRO at ¶¶460-63.

- Should a state commission determine that UNE Platform carriers are impaired without access to ILEC-supplied local switching for enterprise customers, the state commission must file a waiver petition with the FCC, and the FCC will then decide whether to modify its national impairment finding. TRO at ¶455. For mass market customers, a state commission's impairment decision will be implemented without the need for filing a waiver petition with the FCC. TRO at ¶ 455, n.394 (recognizing disparate treatment vis-à-vis petition requirement between mass market and enterprise customers).

- In cases where a state commission fails to file a waiver petition with the FCC, UNE Platform carriers will normally have 90 days to transition their current DS1 customers from the UNE Platform. TRO at ¶532. In cases where the state commission issues a non-impairment finding for mass market customers, UNE Platform carriers will have a three-year period in which to phase-in the required customer migration. TRO at ¶532.

- The FCC indicated that UNE Platform carriers serving enterprise customers will get "one bite at the apple" to preserve their enterprise customers through the 90-day proceeding by limiting the state commission's ability to revisit the issue at a later date. TRO at ¶455. For mass market customers, once the nine-month

> deadline expires, state commissions must adopt procedures that permit continued review of the impairment finding and are not limited to situations where circumstances have changed. TRO at ¶463.

One of the obstacles facing the UNE Platform carriers who serve enterprise customers is the FCC's requirement that any impairment findings made by a state commission must relate to specific geographic and customer markets. TRO at ¶¶ 456-57. As related above, the customer and geographic market determinations must be made by the state commission in the mandatory nine-month proceeding for mass market UNE Platform customers. The FCC stated that due to "the expected difficulties and detailed information needed in conducting the [customer and geographic market] inquiry, we allow the states nine months to make this identification." TRO at ¶451 n.1376. The FCC further stated that it expected the state commissions to make these determinations in the same nine-month proceeding invoked by the ILECs to challenge the impairment finding for mass market customers. *Id.* **In effect, the FCC required UNE Platform carriers to provide data for specific customer and geographic markets six months before the relevant market definitions are to be established.** At no time did the FCC explain how a UNE Platform carrier could be reasonably expected to present evidence to persuade a state commission to make an impairment finding for enterprise customers when the critical customer and geographic market definitions -- which the FCC itself has required UNE Platform carriers to use when proving their case – will not be finalized until six months after the 90-period has closed.

The TRO appeared in the Federal Register on September 2, 2003. 68 Fed. Reg. 52,276 (Sept. 2, 2003). As a result, the 90-day clock will begin ticking on October 2, 2003, and the 90-day period will end on December 31, 2003. The critical customer and geographic market definitions necessary to support a waiver petition by a state commission for enterprise customers

likely will not be finalized in any state until on or about June 27, 2004. By that date, the enterprise customer prohibition will have been in effect for six months, and all current enterprise customers will have been migrated off of the UNE Platform.

II. STANDARD OF REVIEW

In determining whether grant of a stay is warranted, the FCC considers the following four factors: "the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing a stay if one is issued, and the public interest."[11] The Commission balances these four criteria in order to fashion a response on a case-by-case basis, and there is no requirement that there be a showing as to each factor: if "there is a particularly overwhelming showing in at least one of the factors, [the FCC] may find that a stay is warranted notwithstanding the absence of another one of the factors."[12] The Petitioners meet all four elements of the standard.

III. ARGUMENT

A. There Is A Strong Likelihood Of Success On The Merits

At the outset, the Petitioners wish to clarify that they are not, in this Petition, seeking to stay the enterprise customer prohibition on the ground that the FCC's national finding

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11 *See Mohammed v Reno*, 309 F.3d 95 (2nd Cir. 2002) (discussing standards for granting motion for stay).

12 *Biennial Regulatory Review – Amendment of Parts 0, 1, 12, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in Wireless Telecommunications Services,* 14 FCC Rcd 9305, 9307 (1999), *quoting AT&T v. Ameritech*, 13 FCC Rcd 14508, ¶43 (1998). *See also Mohammed,* 309 F.3d at 101, *citing Washington Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (explaining that Courts may grant "a stay pending appeal where the likelihood of success is not high but the balance of hardships favors the applicant" or "where the probability of success is 'high' and 'some injury' has been shown").