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Federal Communications Commission
Office of Secretary

Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98; and *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147

Dear Ms. Dortch:

Enclosed for filing on behalf of USTA, the Verizon telephone companies, SBC Communications Inc., BellSouth Corporation, and Qwest Communications International Inc. are copies of a letter delivered today to John Rogovin attaching a White Paper regarding interim and transitional unbundling rules. An additional copy is enclosed for each docket matter referenced above.

Please date-stamp and return the enclosed extra copy. Thank you for your assistance. If you have any questions, please call me at 202-326-7902.

Sincerely,

Michael Kellogg

Michael K. Kellogg

Enclosures

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July 9, 2004

John A. Rogovin
General Counsel
Office of the General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8-C750
Washington, D.C. 20554

Re: *United States Telecom Association, et al. v. FCC, et al.*

Dear John:

AT&T recently proposed that, in response to the D.C. Circuit's *USTA II* ruling, the Commission should reimplement the maximum unbundling rules the court vacated and keep those rules in effect during a "multi-year" transition period. AT&T claims that the Commission is authorized by sections 251 and 271 of the 1996 Act, as well as by conditions the Commission attached to the SBC/Ameritech and Bell Atlantic/GTE mergers, to once again perpetuate rules that the D.C. Circuit has expressly vacated.

In a white paper that I sent to you on June 24, 2004, USTA explained that section 251 of the Act, far from permitting the Commission to keep in place the rules the D.C. Circuit vacated, in fact requires a prompt transition to lawful rules that give full force and effect to the D.C. Circuit's mandate. On behalf of USTA, the Verizon telephone companies, SBC Communications Inc., BellSouth Corporation, and Qwest Communications International Inc., I attach a follow-up paper to explain why AT&T's reliance on section 271 and the merger conditions is equally misplaced. In addition, the paper shows that AT&T's contention that the Commission should reinstitute access to

high-capacity loops and transport in the wake of USTA II – and that it should expand access to EELs – rests on an aggressive misreading of the court's opinion.

Yours sincerely,

Michael Kellogg

Attachment

cc: The Hon. Michael K. Powell
The Hon. Kathleen Q. Abernathy
The Hon. Michael J. Copps
The Hon. Kevin J. Martin
The Hon. Jonathan S. Adelstein

Neither Section 271 nor the Commission's Merger Orders Authorize the Perpetuation of Maximum Unbundling

AT&T recently proposed that, in response to the D.C. Circuit's *USTA II* ruling,[1] the Commission should reimplement the maximum unbundling rules the court vacated and keep those rules in effect during a "multi-year" transition period.[2] AT&T defends that upside-down result — pursuant to which the Commission would once again perpetuate rules that the D.C. Circuit has expressly vacated — on the theory that it is authorized by sections 251 and 271 of the 1996 Act, as well as by conditions the Commission attached to the SBC/Ameritech and Bell Atlantic/GTE mergers. In our previous submissions, we have already explained that section 251, far from permitting the Commission to keep in place the rules the D.C. Circuit vacated, in fact requires a prompt transition to lawful rules that give full force and effect to the D.C. Circuit's mandate.[3] For the reasons explained below, AT&T's reliance on section 271 and the merger conditions is equally misplaced. In addition, AT&T's contention that the Commission should reinstitute access to high-capacity loops and transport in the wake of *USTA II* — and that it should *expand* access to EELs — rests on an overt misreading of the court's opinion.

1. AT&T argues that section 271(d)(6), together with the Commission's general rulemaking authority under section 201, authorizes the Commission to require BOCs "to provide access to combinations of switching and other elements at [TELRIC]-based rates."[4] That is wrong for at least three reasons.

First, contrary to AT&T's understanding, the Commission may not under section 201 require that elements that must be unbundled under section 271 be made available at TELRIC rates. As an initial matter, the Commission has already made clear that the relevant standard for judging the reasonableness of a rate under section 271 is whether it is a "market" rate, such as where it is the product of arms-length commercial negotiations between the parties.[5] Indeed, the Commission has explained that, where an element is required to be made available only under section 271, "it would be *counterproductive* to mandate that the incumbent offer[] the element at [the TELRIC-based] prices" the Commission has interpreted section 251(d)(2) to require.[6] That insight is especially relevant now, moreover, in light of the Commission's recent and welcome emphasis on commercial negotiations, an emphasis that takes as a given the parties' freedom to

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[1] *See United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *petitions for cert. pending*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004).

[2] *See Ex Parte* Letter from Robert W. Quinn, Jr., AT&T, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, *et al.* (July 2, 2004) ("*AT&T Ex Parte*").

[3] *See* Letter from Michael K. Kellogg on behalf of United States Telecom Ass'n to John A. Rogovin, General Counsel, FCC (June 24, 2004); Opposition of BellSouth, Qwest, SBC, USTA, and Verizon to Emergency Motion for Stabilization Order, CC Docket Nos. 01-338, *et al.* (FCC filed July 6, 2004).

[4] *AT&T Ex Parte* at 4.

[5] *UNE Remand Order*, 15 FCC Rcd 3696, ¶ 473 (1999) (subsequent history omitted).

[6] *Id.* (emphasis added).

negotiate mutually agreeable rates and conditions for facilities that do not meet the impairment test.

Moreover, AT&T simply ignores the fact that, as the Commission held in reasoning upheld by the D.C. Circuit, the cost-based pricing standard set out in section 252 — pursuant to which the Commission created TELRIC — applies only "*where impairment is found to exist.*"[7] "Where there is no impairment under section 251," the Commission "look[s] . . . elsewhere in the Act to determine the proper [pricing] standard."[8] Indeed, the Commission's TELRIC pricing rules were upheld by the Supreme Court in large measure precisely because they apply *only* to "bottleneck" elements that meet the impairment standard in section 251(d)(2).[9] Thus, "look[ing] . . . elsewhere" for the "proper [pricing] standard" for elements that do *not* meet the impairment test does not allow the use of TELRIC through the back-door, as doing so would be to "gratuitously reimpose the very same requirements that another provision (section 251) has eliminated."[10]

AT&T's claim here also ignores the fact that, although section 201 may give the Commission authority to *review* rates to determine whether they are "just" and "reasonable," the Commission may not affirmatively *set* rates — or prescribe practices to be used in setting rates — unless it meets the specific requirements not of section 201, but rather of section 205.[11] Section 205 requires that, before the Commission may issue an "order . . . prescrib[ing] methods for computing charges," the Commission must "find," pursuant to hearing, "that existing charges are or will be unlawful."[12] Commission precedent squarely forecloses any finding that rates for elements that must be unbundled solely under section 271 are unlawful unless they are set based on TELRIC. On the contrary, as just explained, the Commission previously rejected this very claim, and correctly held that the relevant standard is whether a given rate is a "market" rate.

Second, AT&T is also wrong to contend that section 271 can be read to require "combinations" of elements required only pursuant to section 271 with those required pursuant

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[7] *See Triennial Review Order*, 18 FCC Rcd 16978, ¶ 656 (2003) (subsequent history omitted); *see USTA II*, 359 F.3d at 589 ("we see nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment").

[8] *Triennial Review Order* ¶ 656.

[9] *See Verizon Communications Inc. v. FCC*, 535 U.S. 467, 507 (2002); *see also id.* at 510 n.27 (noting that "competition as to 'unshared' elements may, in many cases, only be possible if incumbents simultaneously share with entrants some *costly-to-duplicate* elements") (emphasis added).

[10] *Triennial Review Order* ¶ 659.

[11] *See AT&T Co. v. FCC*, 449 F.2d 439, 450-51 & n.12 (2d Cir. 1971) ("[v]alid findings" as to section 205's requirements are "essential" where the "actual impact" of an order is to prescribe rates).

[12] Third Report and Order, *MTS and WATS Market Structure*, 93 F.C.C.2d 241, ¶ 44 (1983); *see* 47 U.S.C. § 205(a).

to section 251(c)(3) (including the UNE-P).[13] The Commission has expressly held — and the D.C. Circuit has affirmed — that elements that are required to be made available only under section 271 *are not required to be combined* with other elements.[14] In light of that determination, AT&T's contention that such a combination requirement could be enforced pursuant to section 271(d)(6) is obviously incorrect.

Third, and in all events, section 271(d)(6) does not, as AT&T appears to assume, contemplate nationwide proceedings to impose generic requirements that do not appear elsewhere in section 271 itself. On the contrary, that provision authorizes discrete, particular relief — an order to correct a specific deficiency, a penalty, or suspension or revocation of long-distance authority — and only where the Commission determines, "after notice and opportunity for a hearing," "that a [BOC] has ceased to meet any of the conditions required for [the Commission's prior] approval" of the BOC's section 271 application.[15] This provision thus authorizes the Commission only to review specific allegations of noncompliance with the requirements the BOC satisfied to gain entry into long distance in the first place, not to create (and then enforce) requirements that do not appear in section 271 itself.

Indeed, the Commission has effectively held as much. In the *Triennial Review* proceeding, Talk America argued — as AT&T does here — that the Commission should use section 271(d)(6) to require each BOC "to continue providing unbundled local switching (and UNE-P) at TELRIC prices in the event [they are] no longer required to do so under section 251," and it further contended that the Commission should require each BOC to seek Commission approval before it ceased providing UNE-P at TELRIC rates.[16] The Commission, however, specifically rejected this "extraordinary" proposal, reasoning that it would improperly penalize BOCs for their "*compliance with* federal unbundling rules" and "hold a BOC to a higher standard than under its initial section 271 application."[17] AT&T's equally extraordinary proposal is on all fours with Talk America's and is worthy of the same fate.

2. The SBC/Ameritech and Bell Atlantic/GTE merger conditions likewise provide no basis for continued unbundling. Even apart from the fact that both sets of merger conditions generally sunset three years after they took effect — a date which in each case has long since passed[18] — the specific paragraphs on which AT&T relies expired earlier on a *UNE-specific* basis upon "the date of a final, non-appealable judicial decision providing that the UNE or

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[13] *See AT&T Ex Parte* at 4.

[14] *See Triennial Review Order* ¶ 655 n.1990 (2003); *USTA II*, 359 F.3d at 589.

[15] 47 U.S.C. § 271(d)(6).

[16] *Triennial Review Order* ¶ 666.

[17] *Id.* ¶ 667.

[18] *See SBC/Ameritech Order*, 14 FCC Rcd 14712, App. C, ¶ 74 (1999) (subsequent history omitted); *Bell Atlantic/GTE Order*, 15 FCC Rcd 14032, App. D, ¶ 64 (2000). The SBC/Ameritech merger conditions took effect in October 1999 and generally sunset three years later. The Bell Atlantic/GTE merger conditions took effect in June 2000 and likewise generally sunset three years later.

combination of UNEs is not required to be provided by [the merged company] in the relevant geographic area."[19] The court's decision in *USTA I*,[20] which eliminated the unbundling obligations in the *UNE Remand Order* and the *Line Sharing Order*,[21] triggered this clause, as well as a subsequent clause indicating that the conditions became "null and void" on the date the Commission's *UNE Remand Order* and *Line Sharing Order* became "final and unappealable."[22] In the *Triennial Review Order*, the Commission expressly confirmed that the D.C. Circuit's decision in *USTA I* "vacated" the Commission's prior unbundling rules, and it further explained that, when that decision became "final and no longer subject to further review, . . . the legal obligation [to provide UNEs] upon which the existing interconnection agreements are based . . . no longer exist[ed]."[23] That determination — which no party challenged in the D.C. Circuit — confirms that the unbundling obligations imposed in the SBC/Ameritech and Bell Atlantic/GTE merger proceedings are no longer in effect.[24]

3. Finally, AT&T contends that the Commission may, consistent with *USTA II*, reinstitute "interim and permanent access to high capacity loops and transport facilities, both individually and in combined form."[25] That is so, the theory goes, because *USTA II* (i) "upheld the Commission's [high-capacity loop] rules"; (ii) "did not disturb" the factual findings that supported the Commission's determination to unbundle high-capacity transport; and (iii) supports removal of all EELs eligibility criteria by virtue of its rejection of the qualifying/non-qualifying distinction "upon which these [criteria] were based."[26] AT&T is wrong on each point.

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[19] *See SBC/Ameritech Order*, App. C, ¶ 53; *Bell Atlantic/GTE Order*, App. D, ¶ 39.

[20] *See United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003).

[21] *Line Sharing Order*, 14 FCC Rcd 20912 (1999) (subsequent history omitted).

[22] *See SBC/Ameritech Order*, App. C, ¶ 53 (SBC/Ameritech's obligation to continue to provide the UNEs it was providing as of January 24, 1999, "shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable Commission order in the UNE remand proceeding"); *Bell Atlantic/GTE Order*, App. D, ¶ 39 ("The provisions of this paragraph shall become null and void and impose no further obligation on Bell Atlantic/GTE after the effective date of final and non-appealable Commission orders in the UNE Remand and Line Sharing proceedings, respectively.").

[23] *Triennial Review Order* ¶ 705.

[24] This reading is confirmed by a letter ruling from the Common Carrier Bureau, which makes clear that the obligations on which AT&T relies remained in effect only "until the date of any final and non-appealable judicial decision concluding the litigation concerning [the *UNE Remand* and *Line Sharing* rules] by invalidating them." Letter from Dorothy T. Attwood, Chief, Common Carrier Bureau, FCC, to Michael Glover, Senior Vice President and Deputy General Counsel, Verizon Communications, Inc., 15 FCC Rcd 18327, 18328 (Sept. 22, 2000) (footnote and internal quotation marks omitted).

[25] *AT&T Ex Parte* at 9.

[26] *Id.* at 9-10.

First, USTA II unquestionably vacated the Commission's high-capacity loop rules. The court expressly vacated "those portions of the Order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements,"[27] a statement that plainly encompasses the Commission's treatment of both high-capacity loops and transport.[28] Moreover, the D.C. Circuit specifically referred to the vacatur of the Commission's "transport" rules, and it made clear that this term included "transmission facilities dedicated to a single customer" — that is, what the Commission defines as a "loop."[29] The court's unified treatment of high-capacity loops and transport was also consistent with the manner in which the ILEC petitioners briefed the issue, by addressing both loops and transport simultaneously, and the two substantive flaws the court identified with respect to the Commission's analysis of high-capacity facilities — considering impairment on a route-specific basis and the failure to consider the availability of special access[30] — apply equally to the Commission's determinations as to both loops and transport.[31]

Second, far from leaving the Commission's nationwide impairment finding as to high-capacity facilities undisturbed, the court expressly stated that it found the Commission's determinations to be lacking. In particular, in rejecting the Commission's point-to-point market definition for assessing impairment, the court pointedly stated that "[w]e do not see how the Commission can simply ignore facilities deployment along similar routes when assessing impairment."[32] Furthermore, the court reaffirmed its *USTA I* holding that the critical inquiry is not whether CLECs have already deployed their own facilities in a given market, as the *Triennial Review Order* erroneously held, but rather whether they are *capable of competing — i.e.*, whether "competition is possible" — without UNEs in that market.[33] And the court left no doubt that, where CLECs can compete using their own facilities and/or special access purchased from the ILEC — which they do every day[34] — that is proof-positive that competition *is* possible

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[27] *USTA II*, 359 F.3d at 568.

[28] *See Triennial Review Order* ¶¶ 328, 394.

[29] *USTA II*, 359 F.3d at 573; 47 C.F.R. § 51.319(a) (defining "loop").

[30] *See USTA II*, 359 F.3d at 575, 577.

[31] *See Triennial Review Order* ¶¶ 102, 332, 341, 401, 407.

[32] *USTA II*, 359 F.3d at 575.

[33] *Id.*

[34] As USTA previously noted, Time Warner Telecom, one of the top 10 CLECs in revenue, *see CLEC Report 2004*, Ch. 4 at Table 23 (18th ed. 2004), recently stressed that it relies on special access, not UNEs, to compete: "In instances where we need services from ILECs to connect our remote customers to our vast fiber network, we purchase those under special access tariffs or under agreements with the ILECs." News Release, *Time Warner Telecom Not Impacted By UNE Ruling* (June 10, 2004) (internal quotation marks omitted). ALTS likewise has noted that "those CLECs that rely primarily on old-fashioned special access (instead of unbundled network elements) have logged impressive growth." ALTS, *The State of Local Competition 2003*, at 5 (Apr. 2003).

without UNEs, thus foreclosing the Commission from "impos[ing] the costs of mandatory unbundling."[35]

Indeed, it was precisely on account of these severe deficiencies in the Commission's reasoning that the court *vacated* the Commission's high-capacity loop and transport rules, rather than remanding them for additional fact-finding or explanation. Under the D.C. Circuit's precedent, vacatur was warranted only because of "the seriousness of the order's deficiencies" and "the extent of [the court's] doubt" over whether the Commission can reach a similar result on remand.[36] The Commission has before it abundant evidence establishing that competitors overwhelmingly rely on their own facilities — complemented by special access circuits where necessary — to meet their high-capacity transmission needs, and that competition is thriving as a result.[37] AT&T's contention that the Commission may simply turn a blind eye to this evidence and reinstitute the vacated rules is directly contrary to the court's considered decision to vacate those rules and to require the Commission to come up with new rules that adhere to the court's directives.

Third, AT&T's claim that the Commission should remove all EELs eligibility requirements — based on the court's rejection of the qualifying/non-qualifying service distinction — ignores the relevant portion of the court's decision. The court specifically stated that its decision on qualifying/non-qualifying services "does *not* . . . necessarily invalidate the Commission's effort to prevent the use of EELs for long distance service."[38] Rather, the court stressed that AT&T and its supporters "ha[d] pointed to no evidence suggesting that they are impaired with respect to the provision of [such] services," nor did they "deny that they have been able to purchase use of EELs as 'special access.'"[39] Indeed, the court cast serious doubt on whether competitors could *ever* be considered impaired in *any* respect without access to EELs, stressing that "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic."[40] The court therefore emphasized that, where carriers have competed

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[35] *USTA II*, 359 F.3d at 576; *see id.* at 593 (discussing relevance of special access in EELs context).

[36] *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks omitted).

[37] *See, e.g.*, *Competing Providers are Successfully Providing High-Capacity Services to Customers Without Using Unbundled Elements*, attached to *Ex Parte* Letter from Michael E. Glover, Senior Vice President and Deputy General Counsel, Verizon, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, *et al.* (July 2, 2004) ("*Competition in High-Capacity Transmission*") (demonstrating, among other things, that competitors have deployed an average of *twenty* fiber networks in the top 50 MSAs, and that more than *90%* of the DS-1 loops carriers purchase from Verizon are purchased in the form of special access, not UNEs).

[38] *USTA II*, 359 F.3d at 592 (emphasis added).

[39] *Id.*

[40] *Id.*

successfully using special access services purchased from the ILECs, the Act "*precludes*" a finding that they would be impaired if they could not "convert" those circuits to UNEs.[41] And the court further emphasized that "if history showed that lack of access to EELs had not impaired CLECs in the past, that would be evidence that similarly situated firms would be equally unimpaired going forward."[42]

Thus, the court made clear that it anticipated that the Commission would, on remand, "turn to the issue of impairment," and, with respect to long distance in particular, fully expected that the Commission "may well find none."[43] The court therefore specifically and intentionally left in place the eligibility requirements that AT&T would now have the Commission remove.[44] And, more generally, the court made clear that there can be no impairment finding where, as is true for high capacity facilities in general and EELs in particular, other carriers already are competing successfully using special access services.[45]

Indeed, there is no small irony to AT&T's contention in this regard. The D.C. Circuit left the Commission's EELs eligibility requirements in place specifically because it believes the Commission can justify them on remand. By contrast, it vacated the Commission's mass-market switching and high-capacity loops and transport rules because, in its own words, it "doubts" the Commission can justify them on remand.[46] AT&T, however, would have the Commission reinstitute the rules the court vacated, and remove the rules it left in place. The D.C. Circuit has already harshly criticized the Commission for "its apparent unwillingness to adhere to prior judicial rulings."[47] AT&T's proposed response to the court's ruling is completely at odds with the court's decision and would invite a severe judicial tongue-lashing.

4. Apart from the section 251 claims USTA previously refuted, AT&T insists that, even assuming that purported hot cut concerns can be regulated directly, that would mean only that impairment would be alleviated in the future, such that the Commission could still order blanket access to UNE-P nationwide for the next "several years."[48] The D.C. Circuit has already made clear, however, that the exact same supposed hot cut concerns that AT&T relies upon here

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[41] *Id.* at 593 (emphasis added).

[42] *Id.*

[43] *Id.* at 592.

[44] *Id.* at 592-93, 594.

[45] *See, e.g.*, *Competition in High-Capacity Transmission* at 29 (noting that 95% of DS-1 loop/transport combinations purchased from Verizon are purchased as special access, and that even those carriers that have purchased these facilities as UNEs used special access for a period of years before converting those circuits to lower-priced EELs).

[46] *USTA II*, 359 F.3d at 569, 574.

[47] *Id.* at 595.

[48] *AT&T Ex Parte* at 2, 5.

do not warrant a finding of impairment *today*.[49] And, to the extent AT&T contends that the "at a minimum" clause in section 251(d)(2) allows the Commission to order unbundling in the absence of such an impairment finding,[50] it is mistaken. As we have explained previously, Congress made impairment the "touchstone" of unbundling,[51] and the Commission accordingly may not order unbundling without impairment.[52]

* * *

For eight years this Commission has credited AT&T's claims that the 1996 Act authorizes maximum unbundling rules and that such rules are necessary for local competition. AT&T has been proven wrong on both counts. The Commission has adopted AT&T's view of the Act on three occasions, and each time the courts have roundly rejected the resulting rules. Meanwhile, real competitors — including cable, wireless, and VoIP providers — have brought consumers real competition, inhibited only by the threat that they will be undercut by subsidy-laden carriers like AT&T that bring nothing of their own to the table. The industry has suffered enough. AT&T's success in convincing this Commission to perpetuate maximum unbundling has stymied investment and resulted in three consecutive judicial vacaturs. A fourth time would be no different. The Commission should move promptly to lawful rules that give full effect to the D.C. Circuit's and the Supreme Court's binding judgments and that will permit meaningful competition to thrive.

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[49] *See USTA II*, 359 F.3d at 569 ("we doubt that the record supports a national impairment for mass market switches").

[50] *See AT&T Ex Parte* at 5.

[51] *USTA I*, 290 F.3d at 425.

[52] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388-89, 391-92, 397 (1999) (finding that the Commission "was wrong" in concluding that impairment inquiry was discretionary) (subsequent history omitted); *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 16 (2000) (Commission determines "impairment" "before imposing additional unbundling obligations on incumbent LECs") (subsequent history omitted).