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July 28, 2004

**Ex Parte**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

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

Dear Ms. Dortch:

Please place the attached on the record in the above proceedings.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Dee May".

Attachment

cc: Christopher Libertelli  
Jon Cody  
Sheryl Wilkerson  
Kathleen Abernathy  
Matthew Brill  
Michael Copps  
Jordan Goldstein  
Jessica Rosenworcel  
Kevin Martin  
Daniel Gonzalez

Samuel Feder  
Jonathan Adelstein  
Barry Ohlson  
Scott Bergmann  
Michelle Carey  
Thomas Navin  
William Maher  
Jeffrey Carlisle  
Bryan Tramont

## THE COMMISSION CANNOT LAWFULLY DELAY OR OTHERWISE AVOID IMPLEMENTATION OF THE MANDATE IN *USTA II*

In this proceeding, on remand from the D.C. Circuit's recent decision in *U.S. Telecom Ass'n v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004) ("*USTA I*"), some competitive local exchange carriers ("CLECs") have argued that they should be able indefinitely to delay giving effect to *USTA II*, as well as any interim or permanent rules the Commission may adopt to comply with that decision. They contend that these developments can be effectuated only pursuant to lengthy "change of law" proceedings at the state level to incorporate into interconnection agreements what they claim is a "change" in governing law. In the meantime, they say, incumbent local exchange carriers ("ILECs") must continue, long after the D.C. Circuit's mandate has gone into effect, to comply with rules that have been declared *unlawful*. They also have suggested that the Commission should reinstate, in the form of "interim" rules, the very requirements to provide certain UNEs that the D.C. Circuit vacated, on the theory that the Commission can simply order incumbents to continue providing the UNEs they previously supplied under their interconnection agreements that were negotiated before *USTA II*.

The Commission should reject these arguments and, instead, explicitly provide that any reduction in unbundling requirements pursuant to *USTA II* be effective immediately, without resort to lengthy negotiations at the state level. The Commission must do so for the reasons that follow.

*First*, many interconnection agreements specifically provide that in the event a given UNE no longer must be provided, either as the result of a court order or regulatory decision, the incumbent may cease such provisioning, subject only to a requirement of a specified amount of advance notice of intent to discontinue the UNE. Under these contracts, that is the end of the matter. No further process is or can be required, either at the federal or state level, before the incumbent is freed from the unlawful UNE provisioning requirement. Further, allowing these provisions to go into effect, as they should of their own force, promotes compliance with *USTA II* and, ultimately, Section 251.

*Second*, to the extent other interconnection agreements may contain generic "change of law" provisions that apply in the event of a "change" in the law governing UNEs, those clauses are not triggered in this context. This is so for a reason fundamental to the proper understanding of the judicial function: *USTA II* did not "change" the governing law, but rather announced that the FCC's rules did not comply with the law, as it has always existed. Nor could agency rules implementing that decision constitute a "change" in law, because agencies by definition possess only the power to further Congressional will, as expressed in statutory law. Under these circumstances, incumbents cannot be required to continue to provide UNEs based on the fact that they have historically supplied them, when that past conduct was a result of compulsion under the FCC's unlawful rules.

*Third*, even if *USTA II* and any implementing regulations effectuated a "change" in law, the FCC should make clear that any reduction in ILEC unbundling obligations flow through all contracts immediately. By making clear that no further "process" is necessary before incumbents may bring their business practices into conformity with the law, the Commission would properly correct its past errors of statutory interpretation and avoid months or years of potential delay in achieving compliance with the Act, as embodied by the decision in *USTA II*.

*Fourth*, to the extent the Commission attempts to rely on the existence of interconnection agreements based on the now-invalidated UNE requirements as a vehicle for perpetuating those unlawful requirements beyond the date of the D.C. Circuit's mandate, such action would be patently unlawful. Any effort by the agency to extend the life of the UNE rules that undergird these agreements would

constitute a direct evasion of the mandate in *USTA II*, and effectively confer upon the FCC the stay that both the D.C. Circuit and the Supreme Court have flatly denied it.

## **I. The Specific “Flow Through” Provisions Of Certain Interconnection Agreements Must Be Given Effect.**

Many interconnection agreements expressly anticipate that a judicial decision would invalidate the UNE regime underlying those agreements. These contracts thus provide that, subject only to a notice requirement set forth in the agreement, the incumbent may stop provisioning UNEs consistent with such a judicial decision. There is, therefore, no legitimate argument that a lengthy change of law process is required in order for an incumbent to align its commercial practices with the requirements of federal law – the “flow through” provisions, by their terms, allow this to occur immediately.

These “flow through” provisions were arrived at in what only can be described as an uneven bargaining process *favoring* the competitive carriers. In this process, both parties to the agreement specifically agreed to these provisions; the provisions thus evidence a meeting of the minds that nothing more than a certain number of days notice is necessary to permit the cessation of UNE provisioning, and that the agreed-upon time frame provides an adequate period for CLECs to make alternative arrangements or to negotiate commercial terms to continue to use ILEC networks. The provisions were then approved by state public utility commissions (“PUCs”) as part of the overall interconnection agreement, whether negotiated or compelled by arbitration. It bears emphasis that the parties to these interconnection agreements are not unsophisticated and cannot be said to have been unaware of these specific terms; there is thus nothing inequitable in holding the parties to the terms of these “flow through” provisions.

To the contrary, it would be highly inequitable *not* to allow these “flow through” provisions to take effect immediately. The ILECs have been required to provide UNEs for as many as eight years without any lawful finding of impairment by the Commission. CLECs, by contrast, have been the opportunistic beneficiaries of the Commission’s unlawful unbundling regime for that substantial period of time. All the while, however, they have known that their right to have access to UNEs was subject to serious legal challenge – a threat so real that the Commission’s unbundling rules have been vacated three times since passage of the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. (the “Act”). The CLECs, therefore, have no credible claim that they reasonably relied on the indefinite availability of any UNEs. *See Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1110 (D.C. Cir. 2001) (noting that “the agency orders on which [petitioners] claim to have relied not only had never been judicially confirmed, but were under unceasing challenge”). And given that the CLECs have been allowed to exploit the Commission’s unlawful unbundling rules for so long, the equities plainly lie in allowing the “flow through” provisions immediately to take effect.

For all these reasons, there is absolutely no need for any transition period or other drawn-out process to effectuate any reduction in ILEC unbundling obligations. Indeed, to attempt to block the enforcement of such provisions, which merely give effect to court decisions overturning the underlying unlawful rules themselves, is contrary to the D.C. Circuit’s mandate in *USTA II* and the Act itself. Allowing these provisions to go into effect, by contrast, *effectuates* the mandate in *USTA II* and, therefore, Congress’ will in enacting Section 251.

## II. Even Absent A “Flow Through” Provision, There Is No Legitimate Basis For The Commission To Delay Or Otherwise Avoid Implementation Of The D.C. Circuit’s Mandate By Requiring Continued Adherence To Interconnection Agreements That Conflict With That Decision.

Even where an interconnection agreement does not include a “flow through” provision, there is no legitimate basis for the Commission to delay or otherwise avoid implementation of the mandate in *USTA II* by requiring continued adherence to interconnection agreements that conflict with that decision until the conclusion of lengthy negotiations over “changes in law” at the state level. This is true regardless of whether the contracts contain a generic provision addressing a “change of law,” because *USTA II* simply does not trigger any such provision.

Since *Marbury v. Madison*, it has been clear that the judicial function is to “say what the law is.” 1 Cranch 137, 177 (1803). Thus, when judges “make law,” it is “as though they were ‘finding’ it – discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow be*.” *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (emphasis in original). In particular, judicial interpretations and constructions of statutory schemes do not “change” the law because “[a] judicial construction of a statute is an authoritative statement of what the statute meant *before* as well as after *the decision of the case giving rise to that construction*.” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added).<sup>1</sup>

Courts have recognized this basic principle in the administrative law context. When a court, carrying out its role as an interpreter of the law, strikes down an agency regulation, it is not *changing* the law but finding that the agency rule does not comply with the law. *See, e.g., AT&T v. FCC*, 978 F.2d 727, 736-37 (D.C. Cir. 1992) (rejecting argument that vacatur of the FCC’s permissive detariffing order changed the law retroactively and endorsing the proposition that an “*ultra vires* [agency order] is no real change in the law”). That is because “[t]he regulation constitutes only a step in the administrative process. It does not, and could not, alter the statute.” *Dixon v. U.S.*, 381 U.S. 68, 74-75 (1965) (quoting *Manhattan Gen. Equip. Co. v. Comm’r*, 297 U.S. 129, 135 (1936)) *see also Legal Envtl. Assistance Found. v. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997) (explaining that “if [an agency’s] regulations are inconsistent with the statute . . . , these regulations are void *ab initio*”). Thus courts, in construing statutes and their implementing regulations, do not alter the meaning of the statute; they announce the true meaning of the statute as it has always existed, and in some cases, as in *USTA II*, make clear that the agency misapprehended that meaning.

Here, *USTA II* makes clear that “after eight years” there still are not – and never have been – any valid unbundling rules for mass market circuit switching, high-capacity loops and transport, and dark fiber. *USTA II*, 359 F.3d at 595. In *USTA II*, the D.C. Circuit catalogued the Commission’s prior difficulties in navigating the straits of judicial review for its unbundling rules, noting that “[t]wice since [the Act became effective in 1996] the courts have faulted the Commission’s efforts to identify the elements to be unbundled.” *Id.* at 561. And, referring to the Commission’s most recent effort to fashion

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<sup>1</sup> *See also Rivers*, 511 U.S. at 313 n.12 (“[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law. In statutory cases the Court has no authority to depart from the congressional command setting the effective date of a law that it has enacted. Thus, it is not accurate to say that the Court’s decision in [a case on certiorari to the U.S. Court of Appeals for the Sixth Circuit] ‘changed’ the law that previously prevailed in the Sixth Circuit when this case was filed. Rather, given the structure of our judicial system, the . . . opinion finally decided what § 1981 had *always* meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress.”) (emphasis in original).

unbundling rules in its *Triennial Review Order*, the D.C. Circuit concluded that “regrettably, much of the [FCC’s] resulting work is unlawful.” *Id.*

In the wake of that decision, there has been no “change in law” in terms of ILEC obligations to provide certain UNEs, but rather “an authoritative statement [by the D.C. Circuit] of what [Section 251] meant *before* as well as after *the decision of the case giving rise to that construction.*” *Rivers*, 511 U.S. at 312-13 (emphasis added). And because the FCC’s now-vacated unbundling rules were found to be statutorily unauthorized and thus not to reflect the will of Congress, the D.C. Circuit’s decision is a declaration not only that no such unbundling obligations now exist but, further, that they never existed. That is, the UNE duties imposed by the FCC are a “mere nullity.” *Dixon*, 381 U.S. at 74-75.

Forcing the parties to go through a “change of law” renegotiation process would merely be a way of perpetuating the unlawful unbundling requirements for an additional period of time. By force of a federal regulatory order, an ILEC would purportedly be legally bound to continue providing its competitors with UNEs at TELRIC rates, during at least the pendency of the renegotiation and arbitration process, that the Court of Appeals has said it cannot lawfully be compelled to offer. That is no different in effect, if not in purpose, from simply carrying forward by rulemaking for the indefinite future the very UNE rules that the Court unceremoniously vacated. Likewise, it is no different, from the standpoint of the ILECs, from a scenario in which either the D.C. Circuit or the Supreme Court had granted the FCC’s request for a stay, which these courts rejected. As the Commission itself has acknowledged in this rulemaking, “it would be unreasonable and contrary to public policy to preserve [its] prior rules for months and even years pending [further proceedings].” *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket No. 01-338 et al., 18 FCC Rcd 16978, ¶ 700 (Aug. 21, 2003) (the “*Triennial Review Order*”), *vacated in part by USTA II*, 359 F.3d 554 (D.C. Cir. 2004); Errata, 18 FCC Rcd 19020 (Sept. 17, 2003).

In short, because the FCC’s unbundling rules were never authorized by statute, and because an order vacating those rules by judicial decree does not constitute a “change of law,” effectuation of the Court of Appeals’ mandate is not – and cannot be – dependent upon the “change of law” provisions of particular interconnection agreements. To the contrary, the Court of Appeals’ ruling *trumps* existing interconnection agreements, which are creatures of an invalid regulatory regime; those agreements cannot themselves perpetuate the effectiveness of the unlawful regulations.<sup>2</sup>

### **III. The Commission Should Make Clear That Any Reduction In The Unbundling Obligations Required By *USTA II* Immediately Flow Through All Interconnection Agreements.**

The UNEs at issue were previously unbundled and proffered to competitors at regulated rates only because of the FCC’s unlawful unbundling rules that purportedly implemented Section 251(c)(3). Absent the compulsion of the FCC’s now-vacated regulations, ILECs would not of their own volition have entered into interconnection agreements on the specific unbundling terms and conditions required by the Commission. *See generally Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878, 880 (2004) (“The unbundled elements offered pursuant to § 251(c)(3) exist only deep within the bowels of [the ILEC]; they are brought out on compulsion of the 1996 Act and offered not to

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<sup>2</sup> Although some commenters have suggested just the opposite – *i.e.*, that all of the terms of existing interconnection agreements must prevail over the holding of *USTA II* – that cannot be the law. Although interconnection agreements are generally binding, they are not pure contracts but to a large extent a byproduct of federal law, and thus must not be interpreted to continue to impose obligations that are *contrary* to such law and thus *undermine* Congress’ goal in enacting Section 251.

consumers but to rivals, and at considerable expense and effort.”). Indeed, interconnection agreements are merely the tools through which the Commission put into operation its unlawful unbundling rules. These agreements serve as an enforcement mechanism for the Commission’s rules. *See BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003) (en banc) (“Interconnection agreements are tools through which the [Act is] enforced.”); *Triennial Review Order* ¶ 700 (“[U]nder the statutory construct of the Act, the unbundling provisions of section 251 are implemented to a large extent through interconnection agreements between individual carriers.”).

Consequently, in order faithfully and fully to execute the D.C. Circuit’s mandate in *USTA II* (and the will of Congress), the Commission must now undo the unlawful unbundling obligations that it erroneously imposed on ILECs through interconnection agreements. Specifically, the Commission must make clear that all reductions in unbundling obligation mandated by *USTA II* promptly flow through all interconnection agreements. Such action comports with *USTA II* and the judgment of Congress, and thus is entirely consistent with the Commission’s general duties under the Act.

Moreover, the FCC has broad remedial authority to correct for the effect of its own unlawful acts, such as its imposition of unlawful unbundling obligations through the mechanism of interconnection agreements. *See United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965) (“An agency, like a court, can undo what is wrongfully done by virtue of its order.”); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (1992) (reading *Callery* to stand for “the general principle of agency authority to implement judicial reversals”).<sup>3</sup> Neither the Commission, nor the proponents of delay, can credibly disclaim this basic authority.

In fact, the Commission itself in the *Triennial Review Order* exercised such authority in order to bring interconnection agreements into line with the rules it adopted there, proving that it can and has modified interconnection agreements. Specifically, in the *Triennial Review Order*, the Commission offered “additional guidance . . . to ensure that parties make the necessary changes to their interconnection agreements in response to this Order in a timely manner.” *Triennial Review Order* ¶ 702. The Commission overrode the plain terms of all interconnection agreements that were silent on change of law and/or transition time by: (1) requiring that they be amended pursuant to the default timetable of Section 252(b); and (2) deeming the effective date of the *Triennial Review Order* to be the “notification or request date for contract amendment negotiations” – notwithstanding that those contracts were, prior to the Commission’s action, absolutely silent on change of law or transition time. *Id.* ¶ 703. The Commission likewise read the Section 252 timetable into even those interconnection agreements where a change of law provisions already existed. *Id.* ¶ 704. Thus, despite its claim that it could not “interfer[e] with the contract process,” *id.* ¶ 701, the Commission actually exercised its authority to impose on all interconnection agreements new terms and requirements designed to initiate an amendment process to bring them into line with the Commission’s new rules.

Here, the Commission should exercise that same authority to make clear that all reductions of unbundling obligations required by *USTA II* should take effect *immediately* in *all* outstanding interconnection agreements. That is so because, once the D.C. Circuit issued its mandate and lifted the

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<sup>3</sup> The Commission also has authority under the *Mobile-Sierra* doctrine to override the provisions of interconnection agreements that would impede the implementation of the mandate in *USTA II*. *See Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (“For all contracts filed with the FCC, it is well-established that ‘the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest.’”) (quoting *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987)); *see also FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956); *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956).

temporary stay of its vacatur of the unbundling rules, the ILECs' unbundling obligations ceased to exist. See *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases) (April 13, 2004) (order granting stay of mandate through June 15, 2004); *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases) (June 4, 2004) (order denying further stay of mandate). Therefore, as explained above, any attempt by the Commission to breathe new life into its now-vacated unbundling rules – either by adopting temporary rules that do not give effect to the D.C. Circuit's mandate or by imposing (or allowing) a drawn-out change of law process – would be unlawful. In order faithfully and fully to execute the mandate in *USTA II*, the Commission should act affirmatively to make plain that the relief offered by *USTA II* is immediately available to all affected parties. The Commission has not just the authority promptly and fully to correct the adverse effects of its unlawful rules on regulated entities but, indeed, the *duty* to do so.

The Commission's own experience in similar circumstances underscores the need for prompt, decisive rejection of efforts to place the UNE regime on indefinite life support. Shortly following the effective date of the Act, some CLECs and ISPs invented a means of gaming the Act's reciprocal compensation provision to generate hundreds of millions of dollars in payments from ILECs. In 2001, the Commission decided to phase out the ISP reciprocal compensation practices, adopting a transition period of three years or the date of final Commission action, whichever occurred later, and establishing interim rates for ISP-bound traffic.<sup>4</sup> Since then, the CLECs have stymied the Commission's decisions in the 2001 Order to move away from reciprocal compensation arbitrage and to institute interim rates by successfully convincing state PUCs that extensive renegotiation, arbitration and other "process" was required before ILECs could implement the FCC's new rates.<sup>5</sup> The Commission should not again permit the CLECs to abuse state negotiation and arbitration processes in order to insulate themselves temporally from the effect of legitimate Commission decisions that ensure compliance with federal law.

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<sup>4</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 F.C.C. Rcd 9151 (2001) ("*Remand Order*"), remanded for further proceedings, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

<sup>5</sup> In Maryland, for example, the Public Service Commission ("PSC") at the CLECs' urging required Verizon to renegotiate existing interconnection agreements, instead of allowing it to implement the interim rates for ISP-bound traffic. See Letter Order from Felecia L. Greer, Executive Secretary, Maryland PSC, to Michael B. Hazzard, Kelley Drye & Warren, LLC, and David A. Hill, Vice President and General Counsel, Verizon Maryland, Inc. (June 13, 2001) (rejecting contention that FCC's interim reciprocal compensation regime must be implemented immediately and directing Verizon to negotiate amendments to existing interconnection agreements). Inevitably, CLECs used this "renegotiation" process to forestall the actual effectiveness of those rates, as the PSC itself later recognized. See Order of Maryland PSC, No. 77578, Case No. 8914, at 6 (Feb. 28, 2002) (holding "that the issue of reciprocal compensation for ISP calls has dragged on far too long" and directing CLECs to respond to Verizon's proposed amendment to interconnection agreements within seven days); Letter Order from Felecia L. Greer, Executive Secretary, Maryland PSC, to Darius B. Withers, Kelley Drye & Warren, LLC, and David A. Hill, Vice President and General Counsel, Verizon Maryland, Inc., at 3 (Dec. 13, 2001) (agreeing "with Verizon that attempts to negotiate an amendment to this and other interconnection agreements [by CLECs] have simply continued for far too long"). To date, many Maryland CLECs *still* have not signed an interconnection agreement amendment, notwithstanding the fact that the Commission's interim rates went into effect on June 14, 2001. See *Remand Order*, 16 FCC Rcd at ¶ 112 (rules effective 30 days after publication in Federal Register); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 66 Fed. Reg. 26,800 (May 15, 2001) (publishing *Remand Order* and providing that "[t]he amendments to 47 CFR part 51 are effective June 14, 2001").

**IV. Any Effort To Use Existing Interconnection Agreements As A Means To Require Incumbents To Continue To Provide Now-Invalidated UNEs Would Run Afoul Of Well-Established Precedent Regarding The Duty To Comply With Judicial Mandates.**

As explained above, if the Commission were to rely upon existing interconnection agreements as a vehicle for requiring continued adherence to unbundling obligations that have now been declared unlawful, such action would be tantamount to simply reinstating the thrice-vacated UNE rules themselves for the relevant period of time. This course would, in turn, violate a well-established body of caselaw regarding compliance with judicial mandates.

We have previously demonstrated, in this proceeding, that an agency may not reestablish rules that are substantially the same as rules that have been invalidated by the Court.<sup>6</sup> By such action, the FCC would simply be granting itself the very stay that both the D.C. Circuit and the Supreme Court have denied it, thus flouting those court orders.<sup>7</sup> Furthermore, any effort by the agency to delay or otherwise avoid the import of *USTA II* would clearly violate its basic legal duty to implement both the “letter [and] spirit of the mandate.”<sup>8</sup>

Given the frustration that the D.C. Circuit has openly expressed with the Commission’s “failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings,” *USTA II*, 359 F.3d at 595, this “option” of dragging out compliance with *USTA II* by requiring renegotiation of all contracts under the state process – and thus adherence to invalid UNE obligations in the indefinite interim – is no option at all. Instead, the Commission should move, as quickly as possible, to a lawful UNE regime by making clear that the benefits of the decision in *USTA II* are available immediately to free regulated entities from the unlawful obligations imposed on them via interconnection agreements.

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<sup>6</sup> See *Opposition of BellSouth, Qwest, SBC, USTA, and Verizon to Emergency Motion for Stabilization Order*, CC Dockets Nos. 01-338, 96-98, 98-147, at 2 (July 6, 2004) (“CompTel Opp.”) (citing *Radio-Television News Directors Ass’n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000); *Int’l Ladies’ Garment Workers’ Union v. Donovan*, 733 F.2d 920 (D.C. Cir. 1984) (per curiam)); see also Letter from Michael Kellogg, Kellogg, Huber, Hansen, Todd & Evans, to John A. Rogovin, FCC General Counsel, CC Docket No. 01-338 (June 24, 2004) (attaching White Paper entitled “Lawful Interim Unbundling Rules Must Be Calculated to Address the Deficiencies Identified by the Federal Courts”).

<sup>7</sup> CompTel Opp. at 2.

<sup>8</sup> *Coal Employment Project v. Dole*, 900 F.2d 367, 368 (D.C. Cir. 1990) (per curiam) (quoting *Mid-Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1130 (D.C. Cir. 1987)); see also *City of Cleveland v. FPC*, 561 F.2d 344, 346-48 (D.C. Cir. 1977) (Court of Appeals has broad authority to enforce its mandate, which encompasses “‘everything decided, either expressly or by necessary implication’”) (quoting *Munro v. Post*, 102 F.2d 686, 688 (2d. Cir. 1939)).