

Before the
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
Unbundled Access to Network Elements)
)
Review of the Section 251 Unbundling)
Obligations of Incumbent Local Exchange)
Carriers)

WC Docket No. 04-313

CC Docket No. 01-338

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MCI COMMENTS

MCI, Inc. (“MCI”), by its attorneys, respectfully submits the following comments in response to the Notice of Proposed Rulemaking (“*NPRM*”)¹ issued by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.

I. INTRODUCTION AND OVERVIEW

To comply with the D.C. Circuit Court’s *USTA II* decision, this Commission must perform the granular impairment analyses that it had previously delegated to the states. When the Commission conducts that granular review, the evidence will show that the Commission’s vacated conclusions that competitors are impaired without access to unbundled local switching and high-capacity facilities below specified capacity thresholds in every market are solidly grounded in the relevant market-specific empirical evidence. The Commission should therefore *reinstate its impairment findings* with respect to these mass market switching and high-capacity facilities.

¹ *Unbundled Access to Network Elements*, WC Docket No. 04-313, Notice of Proposed Rulemaking, 18 FCC Rcd 16783 (2004) (FCC 04-179) (“*NPRM*”).

The Commission has announced its intention to complete its analysis by the end of this year. That is an extraordinarily short amount of time within which to perform the analysis that the D.C. Circuit Court requires. This constraint militates heavily toward limiting the task before the Commission to performing the work previously assigned the state commissions and addressing the few other matters remanded by the court. The Commission should decline invitations to reinvent the wheel and formulate new unbundling policies that radically depart from the basic principles that were set out in the *Triennial Review Order*, and that were left untouched by the reviewing court. Instead it should build on what the court affirmed and on the extensive data that were collected in the state impairment cases.

The incumbent local exchange carriers (“incumbent LECs” or “ILECs”) will treat the court’s remand instead as a directive for the Commission to throw in the towel. That is why they say, “[a]t the end of the day I think we’ll get the bulk of those [competitive local exchange carrier] customers back.”² But the D.C. Circuit required that unbundling judgments be based on a thorough granular examination of the evidence. The blanket non-impairment findings that the ILECs seek simply cannot be justified in the face of the economic and operational barriers to entry that continue to impair facilities-based competition in virtually every market in the country. Resolving this case in a manner that does away with unbundling and eliminates the competition that has developed would not

² Statement of BellSouth Chief Financial Officer Ron Dykes, at a Morgan Stanley investment conference in Washington, D.C. Justin Hyde, “Baby Bells See Rivals Taking Fewer Phone Lines,” *Reuters* (Sept. 9, 2004), available at: <<http://www.reuters.com/newsArticle.jhtml?type=topNews&storyID=6195451>>.

only be completely contrary to the evidence; it would represent a total failure of the Commission's regulatory responsibilities.

The analysis required by the *USTA* court leads inevitably to the conclusion that there is nationwide impairment for unbundled local switching and high-capacity loop and transmission facilities below specified capacity thresholds. Specifically, analysis of granular data of actual competitive deployment will establish that competitors are impaired *nationwide without access* to these facilities. Analysis of the operational and economic barriers facing competitors without access to these facilities will establish the same. The data will demonstrate that without unbundling of these bottleneck facilities, there will be no competition.

That is true in the residential markets, where even the possibility that the Commission will change policy has led the largest residential competitor, AT&T, to abandon the consumer market and has contributed to MCI's plan to downsize its consumer business efforts substantially. And it is equally true in enterprise markets, where billions of dollars of competitive networks will be stranded if competitors are denied access to the ILEC lines they need to connect those networks to their customers. If there ever were a case in which regulatory actions will have consequences, this is it. Here the Commission will either promote competition as the Act requires, or kill it off.

On the residential side, MCI will show that because loops and switches are connected in the ILECs' network, all the competitive local exchange carrier ("competitive LEC" or "CLEC") switches in the world mean nothing unless and until regulation forces the ILEC to provide an economical and effective "hot cut" to break the connection. We also show that even if the operational impairments related to the loop

provisioning process are remedied, in most locations economic facts make switch-based competitive service impossible. VoIP may make cable broadband competition possible in the near future for the minority of households that can afford a broadband connection. But a duopoly market is not a competitive market. In any event, for the majority, for now, it is either going to be UNE-P competition or no competition at all.

The choices facing the Commission on the enterprise side are every bit as stark. Here there are vibrant competitive networks that were built during the period when line-of-business restrictions prevented Bell competition for interLATA services. But that competition depends upon last-mile (and next-to-last-mile) DS1 and DS3 transmission that is needed to connect these networks to the customer. In these comments we show that on most routes there is one and only one place to obtain these connections: the ILEC. And now that the ILECs are providing long-distance service, unless those connections are offered at cost-based rates, competition will not survive. This too we prove in what follows.

The Commission must accomplish this difficult task not only in the face of ILEC opposition, but while satisfying each of the explanatory burdens imposed on it by the D.C. Circuit. While the Commission has correctly acknowledged that the *USTA* decisions³ impose burdens that are not justified in terms of the 1996 Act or its animating purposes,⁴ the decisions are binding on the Commission and cannot be avoided.

³ *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"); *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

⁴ Brief of the United States in Opposition to Petition for Certiorari in No. 04-15, *AT&T Corp. v. United States Telecom. Ass'n* (filed Sept. 1, 2004) at 7-8.

Those decisions mandate that the Commission identify with precision the situations in which competitors are and are not impaired without access to ILEC facilities and unbundle accordingly. This is so because a decision to unbundle where unbundling is not necessary to promote competition is said to have harmful effects on both ILEC and CLEC investment and risks promoting a form of competition that is “synthetic” and disserves the public. On the other hand, a decision not to unbundle when competition requires unbundling will shut down the competition that it is the Act’s overarching purpose to promote. The Commission must explain the reasons it finds particular factors identified by the court – for example, universal service subsidy, the existence of ILEC special access services, and the presence of alternative facilities-based providers – either relevant or not relevant to its unbundling determinations.

At the same time, the *USTA* court made clear that the appropriate goal is practical rules of general application. Thus the *USTA* court observed that *any* rule is potentially over- or under-inclusive at the margins, but that does not mean that nationwide rules are inherently unlawful. Instead, the Commission need only explain why “more nuanced alternatives” are impractical or unnecessary.⁵ MCI offers rules here that fully satisfy these requirements, while accomplishing the larger goals of the Act.

Given the substantial challenges facing the Commission and the time constraints involved, any realistic prospect of success requires the Commission to build upon the work the Commission and state commissions have already accomplished. Notably, the court largely affirmed the Commission’s “impairment” standard. This is not the proceeding to fix what the remand court has determined is not broken. And, generally

⁵ *USTA II*, 359 F.3d at 570.

speaking, the Commission's market definitions (as well as the criteria the Commission adopted for the states to make market definitions) survived judicial scrutiny as well. Moreover, the state commissions have collected extraordinary amounts of data relating to the impairment faced by competitors in their states in the absence of ILEC switching, high-capacity loops and transport, based on an understanding of impairment that the court has largely accepted. Those data are highly relevant, and the Commission should make use of those data as it takes on the tasks it had previously assigned to the state commissions.

With these principles in mind, we urge the Commission to adopt the following rules and procedures, which further the pro-competitive policies of the Act, address the particular concerns and requirements raised in the court's remand, and as a practical matter can be implemented in this calendar year as the Commission requires.

The Impairment Standard. As the D.C. Circuit recognized in *USTA II*, the Commission's impairment standard fundamentally complies with the mandate in *USTA I*.⁶ Although the court raised minor issues regarding application of the standard which we address below, it left undisturbed the Commission's substantive holding that impairment turns on the presence of economic and other operational and technical impediments to competitive supply.⁷ Accordingly, there is no need for the Commission to alter the impairment standard adopted in the *Triennial Review Order*.

The Commission thus should reaffirm its findings as to the legal definition of impairment. And, it should affirm its conclusions regarding the economic and

⁶ *Id.* at 571-572.

⁷ *Id.*

operational factors that can give rise to impairment. Similarly, it should reconfirm that actual deployment is the best evidence of impairment or lack of impairment. Finally, as indicated above, the *USTA* court also required the Commission to explain in more detail the reasons its impairment judgments are not “over- [or] under-inclusive[.]”⁸

The Commission should respond to the *USTA II* court’s concern about the need to explain whether impairment should be evaluated as it applies to any particular carrier, to the average carrier, or some other way, by assessing whether sufficient entry has occurred or is likely to occur to result in workably competitive markets. And, it should respond to the *USTA II* court’s concern regarding below-cost retail rates by finding that concern to have been mooted by the explosion of products that bundle together local and long-distance service.

Applying this test, we then demonstrate that national findings of impairment are appropriate for switching and high-capacity loops and transport below the capacity thresholds, because with only the rarest exceptions, competitors are uniformly impaired without access to these facilities in every market across the country. Alternatively, if the Commission believes that those exceptional cases should be identified, in these comments we demonstrate how that analysis could be accomplished in an administratively practical and reliable manner. Our analysis proceeds in the following manner:

Unbundled Local Switching. In the *Triennial Review Order*, the Commission correctly concluded that operational and economic barriers to entry support the conclusion that competitive carriers are impaired without access to unbundled switching.

⁸ *Id.* at 570.

Because actual deployment is the best evidence of impairment or non-impairment, MCI here addresses evidence of lack of actual deployment to serve mass market customers.

Market Definitions. As the Commission previously concluded, the relevant product market for purposes of assessing impairment for mass market switching is the bundle of telecommunications services, including local service, offered to residential and small business customers. The relevant geographic market is the wire center.

The evaluation of barriers to entry, as well as the assessment of actual deployment, must therefore be conducted on a wire center-by-wire center basis. That analysis shows that for certain operational barriers to entry, *e.g.*, manual hot cuts, there is little or no geographic variation – manual hot cuts impede entry everywhere in the country. Other operational barriers, such as the penetration of integrated digital loop carrier (“IDLC”) loops, vary by wire center but nonetheless preclude entry in many wire centers. Economic barriers also vary by wire center, but are sufficiently large in almost all wire centers to preclude entry. Thus, in each case, a granular analysis supports the same conclusion – that in the vast majority of wire centers in the country, competitive LECs cannot serve mass market customers without unbundled switching, and a nationwide finding of impairment is therefore appropriate.

Operational Barriers. The most significant operational barrier to entry in the absence of unbundled switching is the requirement that the loop be physically disconnected from the ILEC switch and connected to the competitive switch through a process known as a “hot cut.” Today, the ILEC hot cut processes are highly manual, and the provisioning associated with the hot cut is exclusively manual, as the ILECs have eschewed any efforts at automated or electronic provisioning. As a result, hot cuts are

labor-intensive, expensive, cumbersome, prone to error, and capacity-limited. They cannot accommodate mass market volumes.

The hot cut problem is exacerbated by the widespread use by ILECs of IDLC loops. ILECs maintain that they cannot unbundle IDLC loops and connect them to competitive switching. This significantly increases the complexity of the provisioning process for IDLC loops, introduces further delay into the process, and often results in the substitution of inferior loops.

Economic Barriers. Even if these operational barriers were addressed, CLECs face economic barriers to entry that independently support a finding of impairment on a nationwide basis. To enter a particular market, a competitive LEC must conclude that it has a reasonable prospect of obtaining sufficient revenue from its customers both to defray its operating expenses and recover any investments that it must make to enter the market. MCI submits a model that it utilized in the state cases that examines the costs and revenues associated with UNE-L-based local service to residential customers. The model shows that under any reasonable set of input assumptions, it is not profitable for competitive LECs to serve residential customers in the overwhelming majority of wire centers in the absence of unbundled switching.

Actual Deployment. The evidence of operational and economic barriers to entry is powerfully corroborated by the empirical evidence. There is very little actual deployment of competitive switches used to serve residential customers.

While the reviewing court has made clear its view that a sufficient number of facilities-based alternatives would make unbundling unwarranted, we demonstrate that consumers do not now have such alternatives. Since before the 1996 Act was passed, the

ILECs have been asserting that competition from cable, wireless and other modalities is just around the corner. And notable technological development has occurred, with VoIP-based services apparently poised to offer alternatives in the near future for consumers who have broadband connections, and with steady improvements in wireless technology. But an actual deployment analysis must be based on the market as it is today – predictions about future developments have no place in an actual deployment analysis. And today, the ILEC loop and the switch to which it is connected retain a near-monopoly on the residential market.

In the *Triennial Review Order*, to measure actual deployment, the Commission adopted a local switching “trigger” analysis. Experience with the switching trigger in the state proceedings revealed that rational application of the switching trigger is not a ministerial task, but requires a series of critical judgments to assure that evidence is properly evaluated.

Accordingly, if the Commission continues to wish to apply a trigger-based analysis of the current competitive environment, the analysis must be conducted in a manner that assures that it is serving its purpose of identifying markets in which competitors actually use their own switches to provide service to the mass market. To “count,” a CLEC must serve residential customers through a combination of the ILEC’s loop plant and its own switching facilities. A qualifying CLEC must have more than a *de minimis* market share and must be actively soliciting and adding customers. And the CLEC must be unaffiliated with an ILEC or a competitive LEC that has already been counted. Applying the triggers in such a manner will ensure that any “triggering” CLEC is actively providing service and likely to continue to do so in a given market, and that

the presence of three such carriers in a market indicates that economic and operational barriers have been overcome.

During the state impairment proceedings, MCI applied these criteria to the “triggering” companies identified by the ILECs and found that there are at most a handful of wire centers in which three or more unaffiliated carriers are actively providing service to both residential as well as business customers. This finding is consistent with the evidence about practical and economic barriers to entry, and with MCI’s own experience. Despite the fact that MCI has local switches in place all over the United States, and that it has been a pioneer in developing mass market offerings, MCI has not been able to use its switches to serve residential customers.

In sum, the Commission should conclude that competitors are impaired on a nationwide basis without access to unbundled switching. To allow for the possibility that circumstances may change in the future, the Commission should establish a process for continuing review that permits ILECs to petition for a finding of non-impairment in a given market based on removal of operational and economic barriers. The task of evaluating such petitions could be delegated to the Wireline Competition Bureau. In the event that at some point in the future the Commission finds that carriers are not impaired without access to unbundled switching, it should provide for a transition period sufficient to avoid customer disruption. Carriers must be given sufficient time after any finding of non-impairment to respond to such a finding, and assess whether and how they will continue to serve the market. In addition, competitive and incumbent LECs must have adequate time to address customer-affecting issues such as access to customer service records and number portability. Therefore, existing customers should be migrated over

time, beginning 14 months after any finding of non-impairment, and UNE-P should continue to be available for new customers for 20 months after any finding of non-impairment.

High-Capacity Loop and Transport. High-capacity loop and transmission facilities are critical inputs to MCI and other competitors' enterprise market services. High-capacity transmission services are also critical inputs to mass market services. MCI is one of the two largest carriers providing competition in these markets, and it also is the nation's largest facilities-based carrier – its facilities footprint extends farther than any other CLEC. But even MCI is almost entirely dependent upon ILEC high-capacity loop and transmission facilities to reach its customers. Its own extensive fiber networks reach less than 10% of its enterprise customers, and its extensive long-haul network simply does not include the inter-office transmission facilities necessary to provide services to residential customers. And while there is a mature competitive retail market for access-type services, the fact remains that along most routes, and for most customer locations, the ILEC continues to be the only source of transmission facilities. Access to ILEC loop and transmission facilities at rates that permit competition to continue and develop is absolutely critical to competition in all telecommunications markets.

In the *Triennial Review Order* the Commission made two critical conclusions that, for the most part, were not overturned by the reviewing court. First, the Commission determined that the relevant market for transport is route-by-route, and that the particular characteristics that made one route competitive while another was not were highly route-specific. Thus, the competitive nature of the route depended upon the length

of the route and the density of traffic that could potentially be served off of the route, characteristics that vary unpredictably even on adjacent routes.

Second, the Commission concluded that impairment for high-capacity transmission facilities depended upon bandwidth or capacity. There either is or potentially could be competition when very high-capacity circuits are required. On the other hand, generally speaking there is little competition, and little prospect of competition, for lower-capacity circuits such as DS1. For transport, the Commission determined the appropriate cut-off to be 12 DS3 circuits, and for loops to be 2 DS3 circuits. It gave ILECs the opportunity in the state cases to identify specific instances in which there was in fact competition or potential competition below the 12 DS3 level (for transport) or the 2 DS3 level (for loops). Critically, for the most part the ILECs did not even suggest that there were other than a very few routes and locations in which the FCC's cut-off did not accurately capture both actual and potential deployment of competitive transmission and loop facilities.

The court required a remand here principally because it held that the state commissions could not be delegated the authority to address the exceptional case that did not conform to the cut-off. In what follows, we show that given what was demonstrated in the state cases, the FCC may properly rely on the capacity thresholds as a way conclusively to distinguish routes that are competitive from those that are not. There simply are not a sufficient number of exceptional cases to make any formal process to identify those few exceptional cases necessary, given the inherent over- and under-inclusiveness of any administrable rule.

If the Commission nevertheless concludes that it would rather create a formal process to deal with the few exceptional cases, it would be a relatively straightforward matter to have the Wireline Competition Bureau, rather than the state commissions, apply the trigger analysis for high-capacity loops and transport that has proven to be administrable at the state level. Given that the ILECs proposed relatively few routes where this test would be satisfied, there is every reason to think that the task could be handled promptly and efficiently by the Bureau.

If a still simpler test is desired for transport, MCI offers yet another solution that is responsive to the record evidence and practical to administer. The test, which is similar to the test proposed by ILECs in state cases, is that whenever there are four or more fiber-based collocators on both end-points of a route, the Commission can conclude that competition for high-capacity transport traffic either exists, or could potentially exist, along that route. ILECs have this information readily at hand, and it would be a straightforward matter for them to present that information to the Wireline Competition Bureau in a truncated proceeding. Competitors in that proceeding would then have the right to provide any evidence that would show that for particular reasons there nevertheless is impairment on that route.

The Treatment of Special Access Services. The D.C. Circuit required the FCC to consider whether ILEC special access services provide an alternative that prevented those CLECs from being impaired in the absence of UNEs. In asking the FCC to consider that alternative, the court made clear that issues of price-squeeze, administrability, or the potential for ILEC abuse might well make it impossible for the FCC to consider special access as an alternative. In what follows, MCI demonstrates that the Commission should

conclude that the availability of ILEC special access services cannot be used to establish a lack of impairment for high-capacity loop and transmission facilities.

First, the statute precludes a contrary result. It requires that the Commission consider whether CLECs are impaired if denied access to ILEC facilities. Special access is a service that makes use of ILEC facilities. Thus its availability is irrelevant to the required statutory analysis.

Second, the high cost of special access permits the ILEC to engage in a classic cost-price squeeze – charging so much for its wholesale input that competition at the retail level becomes impossible.

Third, just as the D.C. Circuit suspected, consideration of special access would create insuperable administrative difficulties. It is as a practical matter impossible for the Commission to engage in the tens of thousands of discrete price-squeeze analyses that would be necessary to determine if there are particular routes where the cost of special access is not so high that competition is foreclosed. Special access rates vary too much in terms of mileage, and of available term and volume discounts, to make any such analysis possible. Moreover, as the reviewing court also acknowledged, even if the Commission could engage in such analysis, the ILECs have substantial flexibility in setting special access rates, and they could quickly respond to “no impairment” findings by tactically raising rates. For this reason as well, special access is simply no substitute for cost-based loop and transport UNEs.

Finally, while the ILECs point to empirical evidence of the use of special access by CLECs, much of that evidence reflects practices that evolved before the ILECs were competing with the CLECs in interLATA markets. Before that time, price squeeze was

not a competitive problem, as high input rates were simply passed along to end-user customers. The ILEC data thus fail to capture the changing dynamics of the interLATA marketplace. Moreover, the data reveal many markets in which CLECs have been unable to compete using special access as an input.

Qualifying Service Restriction. The court of appeals properly remanded to the Commission its “qualifying service restriction.” The Commission’s eligibility criteria for use of loop-transport combinations that depends upon that unlawful qualifying service restriction necessarily must fall as well. The Commission should not try to put anything in its place. The restriction was based on the Commission’s instinct that the long-distance market was competitive, and so no unbundling was appropriate for long-distance services. But the Act provides that its terms apply to all telecommunications services. It is the Act’s “impairment” inquiry, and not extra-statutory considerations that are little more than short-cuts for the impairment inquiry, that should govern unbundling. In any event, the Commission had used the qualifying service restriction not to prevent unbundling of long-haul networks that are in fact competitive (and as to which there could be no claim of impairment), but to limit the unbundling of local access facilities that are classic ILEC bottleneck facilities often used as an input to provide interLATA services. Not even a court strongly predisposed against unbundling regulation could countenance such an irrational rule.

Commercially-Negotiated Agreements. Finally, MCI shows that the Commission should find that commercially negotiated agreements for access to network elements are subject to the filing and other requirements of section 252, whether or not the agreement covers in part or in whole facilities not required to be unbundled pursuant

to section 251(c)(3). As the Commission has held, the statutory filing requirement is the strongest protection in the Act against discrimination by the ILEC against its competitors. The rule prohibiting such discrimination is one of the central requirements of the Act that must be maintained if competition is to develop.

The requirement that these voluntary agreements be filed is clear and unambiguous. Under section 252, voluntary agreements do not need to meet the requirements of the Commission's regulations, but do have to be filed nevertheless. Moreover, even if section 252 did not require the filing and review of these agreements – which it plainly does – sections 203 and 211(a) of the Act would in any event mandate the same result. For this reason as well, the Commission should make clear that voluntary agreements covering interconnection, resale, or access to ILEC facilities must be filed and are subject to review to assure against discrimination.

II. IMPAIRMENT STANDARD

As MCI discusses in detail in this section, the Commission's previous holdings regarding the impairment standard, and the framework for implementing that standard, were largely untouched by *USTA II*. The Commission therefore should proceed as follows.

- The Commission should reaffirm its findings as to the legal definition of impairment.
- The Commission must conduct a granular, market-by-market analysis before reaching conclusions regarding impairment or lack of impairment.
- The Commission should affirm its conclusions regarding the economic and operational factors that can give rise to impairment.

- The Commission should reconfirm that actual deployment is the best evidence of impairment or lack of impairment.
- The Commission should respond to the *USTA II* court's "Uneconomic by whom?" inquiry by assessing whether sufficient entry has occurred or is likely to occur to result in workably competitive downstream markets.
- The Commission should respond to the *USTA II* court's concern regarding below-cost retail rates by finding that concern to have been mooted by the explosion of products that bundle together local and long-distance service.

The Commission found in the *Triennial Review Order* that a requesting carrier is impaired pursuant to section 251(d)(2) of the Act "when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic. . . . taking into account available revenues and any countervailing advantages that a requesting carrier may have."⁹ As the D.C. Circuit recognized in *USTA II*, the Commission's impairment standard fundamentally accommodates the court's decision in *USTA I*.¹⁰ Although the court expressed minor concerns regarding application of the standard, it left undisturbed the Commission's substantive holding that impairment turns on the presence of economic

⁹ *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, 18 FCC Rcd 16978, as modified by Errata, 18 FCC Rcd 19020, ¶¶ 84-85 (2003) ("*Triennial Review Order*").

¹⁰ *USTA II*, 359 F.3d at 571-72.

and other operational and technical impediments to competitive supply.¹¹ Accordingly, there is no need for the Commission to alter that impairment standard.

A. Need for Granular Analysis

In *USTA I*, the court directed the Commission to apply its impairment standard in a “nuanced” fashion by, for example, taking into consideration specific geographic markets and market segments.¹² In response, in the *Triennial Review Order*, the Commission adopted an analytical framework that takes into account differences among service offerings, customer classes, and geographical areas, as well as, where applicable, the type and capacity of facilities at issue.¹³ *USTA II* affirmed the need to conduct such a granular analysis, noting that “the Commission cannot proceed by very broad national categories where there is evidence that markets vary decisively.”¹⁴ Consistent with those decisions, the Commission on remand may not make nationwide impairment (or lack of impairment) findings where the evidentiary record shows “market-specific variations in competitive impairment.”¹⁵ Rather, the Commission must undertake a granular impairment analysis that considers differences among customer classes and geographical

¹¹ *Id.* Specifically, the court made clear that its “observations” with respect to the FCC’s impairment analysis related to the concrete application of that standard, rather than to its substance. *Id.* at 572 (“[T]his is not the occasion for any review of the Commission’s impairment standard as a general matter; it finds concrete meaning only in its application, and only in that context is it readily justiciable.”); *see also id.* at 577 (finding that the FCC had failed adequately to consider the availability of special access services when assessing impairment for dedicated transport).

¹² *USTA I*, 290 F.3d at 426.

¹³ *Triennial Review Order* ¶ 118.

¹⁴ *USTA II*, 359 F.3d at 570 (citing *USTA I*, 290 F.3d at 425-26).

¹⁵ *USTA I*, 290 F.3d at 422; *see also USTA II*, 359 F.3d at 569 (“[T]he Commission may not ‘loftily abstract[] away from all specific markets,’ but must instead implement a ‘more nuanced concept of impairment.’”) (quoting *USTA I*, 290 F.3d at 423, 426).