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

- 8 2005

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

ORDER ON REMAND

Adopted: **December 15, 2004** **Released:** **February 4, 2005**

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements; Commissioner Martin issuing a separate statement at a later date; Commissioners Copps and Adelstein dissenting and issuing separate statements.

TABLE OF CONTENTS

Para.

I. INTRODUCTION 1

II. EXECUTIVE SUMMARY 5

III. BACKGROUND 6

IV. UNBUNDLING FRAMEWORK 20

A. REASONABLY EFFICIENT COMPETITOR 24
B. SERVICE CONSIDERATIONS 29
1. Background 30
2. Prohibition on Unbundling for Exclusive Service to Competitive Markets 34
C. REASONABLE INFERENCES 41
D. RELEVANCE OF TARIFFED ALTERNATIVES 46
1. Limited Scope of Inquiry 49
2. Statutory Concerns 50
3. Administrability 54
4. Risk of Abuse 59
5. Relevance of Current Use of Special Access 64

V. DEDICATED INTEROFFICE TRANSPORT 66

A. SUMMARY 66
B. BACKGROUND 67
C. IMPAIRMENT ANALYSIS – INTEROFFICE TRANSPORT 69
1. General Operational and Economic Characteristics of Transport 69
2. Proxy Approach to Impairment 78
3. Application to Record Evidence of Deployment 125

D. ENTRANCE FACILITIES 136
E. TRANSITION PLAN 142

VI. HIGH-CAPACITY LOOPS 146

A. SUMMARY 146
B. BACKGROUND 147
C. IMPAIRMENT ANALYSIS – HIGH-CAPACITY LOOPS 149
1. General Operational and Economic Characteristics of High-Capacity Loops 149
2. Appropriate Level of Granularity 155
3. Wire Center-Based Impairment Analysis 167
4. Dark Fiber Loops 182
5. Alternative Loop Unbundling Proposals 186
D. TRANSITION PLAN 195

VII. MASS MARKET LOCAL CIRCUIT SWITCHING 199

A. SUMMARY 199
B. BACKGROUND 200
C. MASS MARKET UNBUNDLING ANALYSIS 204
1. Scope of Geographic Markets Reached By Competitive Switches 205
2. Hot Cuts 210
3. Other Possible Sources of Impairment 222
D. TRANSITION PLAN 226

VIII. REMAINING ISSUES 229

A. CONVERSIONS 229
B. IMPLEMENTATION OF UNBUNDLING DETERMINATIONS 233

IX. PROCEDURAL MATTERS 235

A. EFFECTIVE DATE OF RULES 235
B. FINAL REGULATORY FLEXIBILITY ANALYSIS 237
C. PAPERWORK REDUCTION ACT ANALYSIS 238

X. ORDERING CLAUSES 239

APPENDIX A: LIST OF COMMENTERS
APPENDIX B: FINAL RULES
APPENDIX C: FINAL REGULATORY FLEXIBILITY ANALYSIS

I. INTRODUCTION

1. One of the major goals of Congress in enacting the Telecommunications Act of 1996 (1996 Act) was to open local telecommunications service markets to competition.[1] To that end, Congress imposed certain interconnection, resale, and network access requirements on incumbent local exchange carriers (LECs) through section 251 of the 1996 Act. Here, we focus on the market-opening provisions of section 251(c)(3), which require that incumbent LECs make elements of their networks available on an unbundled basis to new entrants at cost-based rates, pursuant to standards set out in section 251(d)(2).

[1] The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* We refer to these Acts collectively as the "Communications Act" or the "Act."

2. In our *Triennial Review Order*, we recognized the marketplace realities of robust broadband competition and increasing competition from intermodal sources, and thus eliminated most unbundling requirements for broadband architectures serving the mass market.[2] Our efforts there made it easier for companies to invest in equipment and deploy the high-speed services that consumers desire. The *Triennial Review Order* had the effect of limiting unbundled access to next-generation loops serving the mass market. In this Order, the Commission takes additional steps to encourage the innovation and investment that come from facilities-based competition.[3] By using our section 251 unbundling authority in a more targeted manner, this Order imposes unbundling obligations only in those situations where we find that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition. This approach satisfies the guidance of courts to weigh the costs of unbundling, and ensures that our rules provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition.[4]

3. This Order imposes unbundling obligations in a more targeted manner where requesting carriers have undertaken their own facilities-based investments and will be using UNEs in conjunction with self-provisioned facilities. By adopting this approach, we spread the benefits of facilities-based competition to all consumers, particularly small- and medium-sized enterprise customers. We believe that the

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[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, para. 278 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004).

[3] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3701, para. 7 (1999) (*UNE Remand Order*); *see also Triennial Review Order*, 18 FCC Rcd at 16984, para. 3 (discussing "the difficulties and limitations inherent in competition based on the shared use of infrastructure").

[4] In this Order on Remand, the Commission puts into place new rules applicable to incumbent LECs' unbundling obligations with regard to mass market local circuit switching, high-capacity loops, and dedicated interoffice transport. These new rules moot various petitions that asked the Commission to stay the application of certain rules adopted in the *Triennial Review Order*. Accordingly, we dismiss as moot the August 27, 2003, emergency joint petition for stay filed by the CHOICE Coalition; the September 4, 2003, joint petition for stay filed by BellSouth, Qwest, SBC, Verizon, and the United States Telecom Association; the September 22, 2003, emergency petition for stay filed by Sage Telecom; the emergency stay petition filed by DCSI Corporation *et al.* on September 22, 2003; the September 25, 2003, emergency petition for stay filed by NuVox; and the September 26, 2003, petition for emergency stay filed by Allegiance Telecom, Cbeyond, El Paso Global Networks, Focal, McLeodUSA, Mpower, and TDS Metrocom. *See* Coalition for High-Speed Online Internet Competition and Enterprise Emergency Joint Petition for Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Aug. 27, 2003); BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., the United States Telecom Association, and the Verizon Telephone companies, Joint Petition for Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 4, 2003); Sage Telecom, Inc. Emergency Petition for Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 22, 2003); DCSI Corporation, Emergency Stay Petition, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 22, 2003); NuVox Communications, Inc. Emergency Petition for Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 25, 2003); Allegiance Telecom, Inc., Cbeyond Communications, LLC, El Paso Global Networks, Focal Communications Corporation, McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp. and TDS Metrocom, LLC Petition for Emergency Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 26, 2003).

impairment framework we adopt is self-effectuating, forward-looking, and consistent with technology trends that are reshaping the industry. As we recognize below, the long distance and wireless markets are sufficiently competitive for the Commission to decline to unbundle network elements to serve those markets. Our unbundling rules are designed to remove unbundling obligations over time as carriers deploy their own networks and downstream local exchange markets exhibit the same robust competition that characterizes the long distance and wireless markets.

4. The approach that we take here was helped immensely by the efforts of our state colleagues to develop evidence concerning the state of development of facilities-based competition in their respective states. The state commissions' impressive efforts to carry out the tasks set out for them in our *Triennial Review Order* led to the development of significant evidence of competitive deployment that we used to guide our impairment analysis. The evidence filed with us from those state proceedings provided more detailed evidence of competitive deployment than we have had before us in many past proceedings, and enabled us to draw reasonable inferences from such facilities deployment, as instructed by the D.C. Circuit, in developing the unbundling rules we adopt today. Likewise, the efforts of state commissions, as well as incumbent and competitive LECs, in seeking to develop batch hot cut processes in response to the *Triennial Review Order* have had pro-competitive results relevant to our present analysis.

II. EXECUTIVE SUMMARY

5. The executive summary of this Order is as follows:

- **Unbundling Framework.** We clarify the impairment standard adopted in the *Triennial Review Order* in one respect and modify our application of the unbundling framework in three respects. *First*, we clarify that we evaluate impairment with regard to the capabilities of a *reasonably efficient* competitor. *Second*, we set aside the *Triennial Review Order*'s "qualifying service" interpretation of section 251(d)(2), but prohibit the use of UNEs exclusively for the provision of telecommunications services in the mobile wireless and long distance markets, which we previously have found to be competitive. *Third*, in applying our impairment test, we draw reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets. *Fourth*, we consider the appropriate role of tariffed incumbent LEC services in our unbundling framework, and determine that in the context of the local exchange markets, a general rule prohibiting access to UNEs whenever a requesting carrier is able to compete using an incumbent LEC's tariffed offering would be inappropriate.

- **Dedicated Interoffice Transport.** Competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines. Competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. Finally, competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's network in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity dedicated transport where they are not impaired, and an 18-month plan to govern transitions away from dark fiber transport. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled dedicated transport at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115 percent of the rate

the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

- **High-Capacity Loops.** Competitive LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are not impaired without access to dark fiber loops in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity loops where they are not impaired, and an 18-month plan to govern transitions away from dark fiber loops. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled facilities at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the unbundled loops on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

- **Mass Market Local Circuit Switching.** Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundled mass market local circuit switching. This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs. During the transition period, competitive carriers will retain access to the UNE platform (*i.e.*, the combination of an unbundled loop, unbundled local circuit switching, and shared transport) at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004, plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for this combination of elements, plus one dollar.

III. BACKGROUND

6. The Communications Act requires that incumbent LECs provide unbundled network elements (UNEs) to other telecommunications carriers. In particular, section 251(c)(3) requires incumbent LECs to provide requesting telecommunications carriers with "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and section 252."[5] Section 251(d)(2) authorizes the Commission to determine which elements are subject to unbundling, and directs the Commission to consider, "at a minimum," whether access to proprietary network elements is "necessary," and whether failure to provide a non-proprietary element on an unbundled basis would "impair" a requesting carrier's ability to provide service.[6] Section 252, in turn, requires that those network elements that must be offered pursuant to section 251(c)(3) be made available at cost-based rates.[7] The Commission has previously summarized the long and complex history of our

[5] 47 U.S.C. § 251(c)(3).

[6] *See id.* § 251(d)(2).

unbundling regime since the 1996 Act's passage, in our *Triennial Review Order*.[8] Here, we offer only a brief review of this history, focusing on recent developments that have not been treated exhaustively in other contexts.

7. *1996 Act to USTA I.* The Commission first addressed the unbundling obligations of incumbent LECs in the *Local Competition Order*, which, among other things, adopted rules designed to implement the requirements of section 251 and established a list of seven UNEs that incumbent LECs were obligated to provide.[9] In 1997, the U.S. Court of Appeals for the Eighth Circuit affirmed some parts of the *Local Competition Order* and reversed others.[10] The Commission, MCI, AT&T, and various incumbent LECs appealed different portions of the Eighth Circuit decision. In January 1999, the Supreme Court (1) affirmed the Commission's general authority to adopt unbundling rules to implement the 1996 Act; (2) vacated the specific unbundling rules at issue; (3) instructed the Commission to revise the standards under which the unbundling obligation is determined; and (4) required the Commission to reevaluate which network elements should be subject to unbundling under the revised standard.[11]

8. In November 1999, the Commission responded to the Supreme Court's remand by issuing the *UNE Remand Order*, in which it reevaluated the unbundling obligations of incumbent LECs and promulgated new unbundling rules, pursuant to the Court's direction.[12] The United States Court of

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[7] *See id.* § 252(d)(1). In the *Local Competition Order*, the Commission established the pricing methodology that state commissions must use to determine what are permissible cost-based rates incumbent LECs may charge for UNEs. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15846-50, paras. 679-89 (1996) (*Local Competition Order*) (subsequent history omitted) (establishing the TELRIC methodology and asking the states to perform the necessary analysis under this methodology). The Supreme Court upheld this allocation of federal and state jurisdiction, *see AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 377-86 (1999), and upheld the TELRIC pricing methodology, *see Verizon Communications v. FCC*, 535 U.S. 467 (2002). The Commission has initiated a separate proceeding in which it is comprehensively reviewing TELRIC. *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Notice of Proposed Rulemaking, 18 FCC Rcd 18945 (2003) (*TELRIC NPRM*).

[8] *See Triennial Review Order*, 18 FCC Rcd 16992-17007, paras. 8-34; *see also Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783, 16785-87, paras. 3-7 (2004) (*Interim Order and NPRM*).

[9] The seven network elements set forth in the *Local Competition Order* were: (1) local loops; (2) network interface devices; (3) local and tandem switching; (4) interoffice transmission facilities; (5) signaling networks and call-related databases; (6) operations support systems; and (7) operator services and directory assistance. *Local Competition Order*, 11 FCC Rcd at 15616-775.

[10] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997).

[11] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). In reaching this conclusion, the Court held that the Commission had not adequately considered the "necessary" and "impair" standards of section 251(d)(2) in establishing the list of seven network elements. *Id.* at 387-92 (holding that the Commission erred in deciding that any increased cost to a requesting carrier, or decrease in its service quality, due to lack of access to a UNE established entitlement to that UNE, and that the Commission failed to consider the availability of elements outside the network under its necessary and impair standards).

[12] *UNE Remand Order*, 15 FCC Rcd 3696.

Appeals for the District of Columbia Circuit (D.C. Circuit) granted petitions for review, and, in *USTA I*, it vacated and remanded those portions of the *UNE Remand Order* interpreting the statute's "impair" standard and establishing a nationwide list of mandatory UNEs.[13] In support of its decision, the D.C. Circuit held that the Commission's impairment analysis was insufficiently "granular" because its analysis did not account for differences in particular markets and particular customer classes.[14] The court also ruled that the Commission, when analyzing impairment, had failed adequately to weigh the costs of unbundling and to examine whether the costs faced by competitive providers were due to natural monopoly characteristics or to the difficulties facing new entrants in all industries.[15] The court also vacated and remanded the Commission's line sharing requirements because the Commission had not considered the impact of intermodal competition before requiring unbundling.[16]

9. In December 2001, prior to the D.C. Circuit's issuance of *USTA I*, the Commission released the *Triennial Review NPRM*, seeking comment on how, if at all, the unbundling regime should be modified to reflect market developments since the issuance of the *UNE Remand Order*.[17] The *Triennial Review NPRM* sought comment on almost all aspects of the unbundling regime, including the "necessary" and "impair" standards, the "at a minimum" language of section 251(d)(2), whether and how the Commission's previously identified UNEs should be unbundled, and whether the Commission should conduct a more granular impairment analysis.[18] The Commission asked particular questions about crafting unbundling rules that would foster facilities investment by both incumbent LECs and new entrants, in particular investment in facilities needed to provide broadband services.[19] Following *USTA I*, the Commission issued a Public Notice asking commenters responding to the *Triennial Review NPRM* to address the issues raised in the *USTA I* decision.[20]

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[13] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA I*).

[14] *Id.* at 422.

[15] The D.C. Circuit in *USTA I* stressed that new entrants in any industry face higher costs than incumbent LECs and that the Commission had not sufficiently linked impairment "to cost differentials based on characteristics that would make genuinely competitive provision of an element's function wasteful," such as is the case in a natural monopoly. *Id.* at 427. As the court noted in *USTA II*, "the statutory structure [of the Act] suggests that 'impair' must reach a bit beyond natural monopoly." *USTA II*, 359 F.3d at 572.

[16] *USTA I*, 290 F.3d at 428-30; *see also USTA II*, 359 F.3d at 572-73 (reaffirming that the Commission may not ignore intermodal alternatives).

[17] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001) (*Triennial Review NPRM*).

[18] *Id.* at 22790, 22791, 22803-13, 22797-802, paras. 18, 21, 47-70, 34-44.

[19] *Id.* at 22793-96, paras. 24-30.

[20] *See Wireline Competition Bureau Extends Reply Comment Deadline for the Triennial Review Proceedings*, CC Docket No. 01-338, Public Notice, 17 FCC Rcd 10512 (WCB 2002). In 2002, after the Commission released the *Triennial Review NPRM*, the Supreme Court issued the *Verizon* decision mentioned above, which upheld the Commission's UNE pricing methodology. *See supra* note 7. The Court also upheld the Commission's rules requiring that incumbent LECs combine UNEs in certain circumstances even if they are not combined in the incumbent's network. The Court stated that these rules "reflect a reasonable reading of the statute, meant to remove (continued....)

10. *Triennial Review Order*. In August 2003, the Commission released the *Triennial Review Order*, in which it reinterpreted the "impair" standard of section 251(d)(2) and revised the list of UNEs that incumbent LECs must provide to requesting carriers.[21] Under its reinterpretation of section 251(d)(2), the Commission held that a requesting carrier is impaired "when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic."[22] The Commission's impairment analysis set forth in the *Triennial Review Order* accounts for intermodal alternatives,[23] self-provisioning of network elements, and the potential ability of a requesting carrier to obtain similar facilities from a third party.[24] In an attempt to help ensure that incumbent LEC and competitive LEC cost disparities are linked to natural monopoly characteristics, as required by *USTA I*, the Commission, in the *Triennial Review Order*, limited the types of operational and economic barriers that are relevant to its impairment analysis. The relevant structural barriers the Commission discussed were: (1) economies of scale; (2) sunk costs; (3) first-mover advantages; (4) absolute cost advantages; and (5) barriers within the control of the incumbent.[25]

11. To develop a nuanced approach to unbundling, the Commission took into consideration factors that might impact impairment, such as customer class, geography, the nature of the service provided, and the types and capacities of the facilities involved in a requesting carrier's service offering. The Commission's aim was to bring competition to markets faster than it might develop in the absence of the market-opening requirements of the 1996 Act, while also taking into account the extent to which unbundling requirements might undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.[26] Based on these and other considerations, the Commission adopted a set of tests and triggers designed to implement and enforce the Act's market-opening requirements. For switching, high-capacity loops, and dedicated transport, the Commission

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practical barriers to competitive entry into local-exchange markets while avoiding serious interference with incumbent network operations." *Verizon Communications v. FCC*, 535 U.S. 467, 535 (2002).

[21] The *Triennial Review Order* summarizes those network elements that incumbent LECs must provide to requesting carriers. *Triennial Review Order*, 18 FCC Rcd at 16988-91.

[22] *Id.* at 17035, para. 84.

[23] *See, e.g., id.* at 17044-45, paras. 97-98.

[24] *See, e.g., id.* at 17035, para. 84.

[25] *Id.* at 17037-41, paras. 87-91.

[26] To achieve these objectives, the Commission in part relied on its authority pursuant to the "at a minimum" language in section 251(d)(2) to consider factors other than impairment when evaluating unbundling obligations for non-proprietary network elements. Section 251(d)(2) provides that "[i]n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, *at a minimum*, whether . . . (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2) (emphasis added). Specifically, citing section 706 of the Act, the Commission declined to order unbundling of packet switching, and imposed only limited unbundling obligations on incumbent LECs' fiber-to-the-home loops and hybrid loops, despite the possibility of some level of impairment. *See Triennial Review Order*, 18 FCC Rcd at 17145, 17152, 17323, paras. 278, 293, 541. Section 706 directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using regulatory measures that "promote competition in the local telecommunications market" and "remove barriers to infrastructure investment." 47 U.S.C. § 157 nt.

asked the states to apply the Commission's triggers as a way of determining actual deployment and to conduct a potential deployment analysis under the Commission's network unbundling rules.[27]

12. *USTA II.* Various parties appealed the *Triennial Review Order*, and, on March 2, 2004, the D.C. Circuit decided *USTA II*.[28] *USTA II* upheld the *Triennial Review Order* in part, but remanded and vacated several components of it. The D.C. Circuit expressly upheld the Commission's network modification requirements; its determinations regarding section 271 access, pricing, and combination obligations; its EEL eligibility criteria; its determination, with certain exceptions, not to require unbundling of FTTH loops,[29] broadband hybrid loops,[30] enterprise switching, and most incumbent LEC databases; and its decision not to unbundle the high frequency portion of the loop (HFPL).[31] The court also took a favorable view of certain aspects of the Commission's impairment standard. For instance, regarding the Commission's structural analysis of possible barriers to market entry, the D.C. Circuit stated that, for the most part, the Commission's impairment test now "explicitly and plausibly connects factors to consider in the impairment inquiry to the natural monopoly characteristics . . . [or] to other structural impediments to competitive supply."[32] The *USTA II* court also broadly upheld the Commission's authority to take costs into account in its unbundling analysis either in the impairment standard itself or in a separate analysis conducted pursuant to the "at a minimum" language of section 251(d)(2).[33]

13. The *USTA II* court vacated the Commission's "subdelegation" of authority to state commissions to engage in further granular impairment analyses[34] and vacated and remanded the nationwide impairment findings for mass market switching and dedicated transport.[35] The D.C. Circuit also

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[27] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17095-98, paras. 186-90 (state delegation generally); 17227, para. 400 (adopting transport triggers for states to apply); *id.* at 17232, para. 410 (directing states to consider certain economic characteristics to determine whether potential competition exists along a particular route); 47 C.F.R. § 51.319(d) (interoffice transport unbundling rules).

[28] *USTA II*, 359 F.3d at 564-76.

[29] In the *Triennial Review Order*, the Commission required unbundling of the narrowband portion of fiber loop in overbuild situations where the incumbent LEC elects to retire existing copper loops. *Triennial Review Order*, 18 FCC Rcd at 17142, para. 273.

[30] Under the Commission's rules, incumbent LECs must continue to provide unbundled access to the TDM features, functions, and capabilities of their hybrid loops, or to provide a homerun copper loop alternative. *Id.* at 17154, para. 296.

[31] *USTA II*, 359 F.3d at 578 (network modification requirements), 589-90 (section 271 obligations), 592-93 (EEL eligibility criteria), 583-84 (FTTH loops), 582 (hybrid loops), 587 (enterprise switching), 587 (incumbent LEC databases), 585 (line sharing).

[32] *Id.* at 571-72.

[33] *See id.* at 572 (holding that "there is no statutory offense in the Commission's decision to adopt a standard that treats impairment as a continuous rather than as a dichotomous variable, and potentially reaches beyond natural monopoly, but then to examine the full context before ordering unbundling").

[34] *Id.* at 565-68, 573-74, 594.

[35] The court noted "the inevitability of *some* over- and under-inclusiveness in the Commission's unbundling rules" but maintained that the Commission nevertheless may not "proceed by very broad national categories where there is (continued....)

remanded, but did not vacate, the Commission's distinction between "qualifying" and "non-qualifying" services,[36] and the exclusion of entrance facilities from an impairment analysis.[37] While the text of the court's decision did not explicitly reach our enterprise market loop unbundling rules, in order to account for changes we are adopting today to our unbundling framework and to remove any uncertainty regarding these rules, we take this opportunity to reevaluate our enterprise market loop unbundling rules.[38] The court's discussion also called into question other aspects of the Commission's unbundling framework.[39]

14. First, the court held that the Commission had not adequately explained what level of efficiency it ascribes to requesting carriers when analyzing whether that carrier's lack of access to an incumbent LEC network element is likely to make entry into a market uneconomic. As the court described its concern, the Commission's "touchstone" of impairment – uneconomic entry – was excessively vague because it did not answer the question: "Uneconomic by whom?"[40]

15. Second, the court rejected the Commission's interpretation of section 251(d)(2), which directs the Commission to determine whether impairment exists for a "telecommunications carrier seeking access [to UNEs] to provide the services it seeks to offer."[41] The Commission interpreted "services" in this provision as being those services a requesting carrier seeks to provide "in direct competition with the incumbent LECs' core services" (*e.g.*, local exchange telephone service).[42] Although the court rejected the Commission's statutory interpretation, and thus by implication rejected the Commission's "qualifying services" test, it nevertheless observed that competitive carriers probably should not be entitled to rely on

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evidence that markets vary decisively (by reference to its impairment criteria), at least not without exploring the possibility of more nuanced alternatives and reasonably rejecting them." *Id.* at 568-71, 574-75, 594.

[36] *Id.* at 591-92, 594.

[37] *Id.* at 585-86, 594.

[38] Accordingly, we need not reach and do not decide the question whether the D.C. Circuit vacated these rules. *See Interim Order and NPRM*, 19 FCC Rcd at 16783, para. 1 n.4 (assuming *arguendo* that the D.C. Circuit vacated the Commission's enterprise market loop unbundling rules in light of arguments by some carriers that the court vacated those rules in the absence of any formal pronouncement by the court regarding the status of the Commission's findings regarding enterprise market loops).

[39] In addition to the issues discussed in the text above, the court raised questions regarding how the Commission's impairment analysis should take account of state universal service cross-subsidies, and found that the Commission had not adequately examined the implications of requiring unbundling where cross-subsidies of this type are present. *USTA II*, 359 F.3d at 573. The court also stated that the Commission had not connected how regulated "below-cost" retail rates, to the extent they form an impairment barrier, are linked either to structural features that would make competitive supply wasteful or to other goals of the Act. *Id.*

[40] *Id.* at 572 ("Uneconomic by whom? By *any* CLEC, no matter how inefficient? By an 'average' or 'representative' CLEC? By the most efficient existing CLEC? By a hypothetical CLEC that used 'the most efficient telecommunications technology currently available,' the standard that is built into TELRIC?").

[41] 47 U.S.C. § 251(d)(2) (emphasis added).

[42] *See Triennial Review Order*, 18 FCC Rcd at 17070, paras. 139-40. The Commission called those services offered in direct competition with the incumbent LECs' core services "qualifying services" – in the sense they would qualify the competitive carrier for access to UNEs – while it designated the remainder of services offered by the carrier "non-qualifying services." *Id.*

UNEs exclusively to provide service in competitive downstream markets such as the commercial mobile wireless service market and the long distance service market.[43]

16. Third, the court held that the Commission did not properly make inferences relating to the possibility of competitive deployment of facilities in one market from evidence of actual deployment of facilities in similar geographic markets.[44] In *USTA I*, the court had suggested that competitive carriers are not impaired in a particular market, despite not having alternatives to the incumbent LEC's facilities, if, in similarly situated markets, competitive carriers had been able to construct their own facilities.[45]

17. Fourth, the court directed the Commission to reconsider whether an incumbent LEC's tariffed special access services should be relevant to the impairment inquiry and rejected certain arguments the Commission made to the contrary.[46] The court noted that carriers in certain robustly competitive downstream markets use special access services instead of UNEs as inputs for their service offerings. From this observation, the court inferred that the presence of special access alternatives is not irrelevant to impairment. While the court rejected the Commission's arguments for dismissing special access services as a substitute for UNEs, it noted that the "Commission [is] free to take into account such factors as administrability, risk of ILEC abuse, and the like."[47] The court also endorsed and underscored the importance of considering facilities-based competition when evaluating impairment.[48]

18. *Interim Order and NPRM.* Because the *USTA II* decision vacated and remanded significant portions of the Commission's unbundling rules, the Commission took several steps to avoid excessive disruption of the local telecommunications market while it wrote new rules.[49] Among these steps was the

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[43] *USTA II*, 359 F.3d at 576, 592.

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

[45] *See USTA I*, 290 F.3d at 422 (doubting whether impairment could exist in markets "where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis," citing interoffice dedicated transport as a specific example).

[46] *USTA II*, 359 F.3d at 576-77.

[47] *Id.* at 577.

[48] *See id.* at 576 (stating that the purpose of the Act is to "stimulate competition – preferably genuine, facilities-based competition"); *id.* at 579 ("Section 706(a) identifies one of the Act's goals beyond fostering competition piggy-backed on ILEC facilities, namely, removing barriers to infrastructure investment."); *id.* at 573 (suggesting that the Commission through its unbundling rules had been seeking, in part, to foster "synthetic" competition); *see also, e.g.*, *USTA I*, 290 F.3d at 424 (same).

[49] In addition to the actions discussed in the *Interim Order and NPRM*, the Commission has continued to refine its unbundling rules in other ways. On July 13, 2004, the Commission released an order that replaced the so-called "pick-and-choose rule" with a new "all-or-nothing rule" designed to facilitate commercial agreements between incumbent LECs and competitive LECs. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, 19 FCC Rcd 13494 (2004). The Commission also granted, in part, petitions seeking reconsideration of the *Triennial Review Order* filed by BellSouth and SureWest. On August 9, 2004, the Commission held that fiber loops deployed at least to the minimum point of entry (MPOE) of multiple dwelling units (MDUs) that are predominantly residential should be treated as fiber-to-the-home loops (FTTH) for unbundling purposes, irrespective of the ownership of the inside wiring. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering* (continued....)

release, on August 20, 2004, of the *Interim Order and NPRM*.[50] In the *Interim Order and NPRM*, the Commission required carriers, for a limited period of time, to adhere to the commitments they made in their interconnection agreements, applicable statements of generally available terms (SGATs) and relevant state tariffs that were in effect on June 15, 2004.[51] The Commission also set forth and sought comment on a transition plan under which, for the subsequent six months, if no final unbundling rules had been issued, the same commitments to provide network elements would apply to existing customers, but not new customers, at modestly higher rates than those available on June 15, 2004.[52] Several parties

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Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration , 19 FCC Rcd 15856 (2004) (*MDU Reconsideration Order*). On October 18, 2004, the Commission determined that FTTC deployments should be treated in the same manner as FTTH deployments for unbundling purposes so long as the fiber deployment is not farther than 500 feet from each customer premises reached from the serving area interface. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration , 19 FCC Rcd 20293 (2004) (*FTTC Reconsideration Order*). The *FTTC Reconsideration Order* clarified that incumbent LECs are not required to build TDM capability into new packet-based networks or into existing packet-based networks that never had TDM capability. *See id.* at paras. 20-21. And on October 27, 2004, the Commission released an order granting the four Bell Operating Companies forbearance relief from the requirements of section 271 with regard to broadband elements to the same extent that unbundling relief was granted under section 251. *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) (*Broadband 271 Forbearance Order*).

[50] *See Interim Order and NPRM*, 19 FCC Rcd 16783. Because this Order modifies our unbundling framework and adopts new rules applicable to unbundled local switching, we dismiss as moot the petition for reconsideration filed on October 2, 2003, by NASUCA, which asked the Commission to reconsider various aspects of the impairment standard and unbundled local switching rules adopted in the *Triennial Review Order*. *See* National Association of State Utility Consumer Advocates Petition for Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147 (filed Oct. 2, 2003). Similarly, we dismiss as moot a petition for rulemaking filed by Qwest, because both this Order and the *Interim Order and NPRM* address the proposed set of interim rules set forth in Qwest's petition. *See* Qwest Communications International, Inc. Petition for Rulemaking, CC Docket No. 01-338 (filed March 29, 2004).

[51] *See Interim Order and NPRM*, 19 FCC Rcd at 16798, para. 29 (providing that such commitments must be honored until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of the *Interim Order and NPRM*, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) with respect to rates only, a state public utility commission order raising the rates for network elements).

[52] *Id.* at 16799, para. 29. Because the interim requirements set out in the Commission's *Interim Order and NPRM* will expire upon the effective date of this Order, and because the transition plans set forth in this Order – not those proposed in the *Interim Order and NPRM* – will govern incumbent LECs' obligations following the effective date of this Order, we dismiss as moot the Association for Local Telecommunications Services *et al.*'s (ALTS) petition for emergency clarification and/or errata filed in CC Docket No. 01-338 and WC Docket No. 04-313. That petition asked us to clarify that (1) change of law proceedings implementing "no unbundling" determinations could not proceed until the expiration of the "interim period" described in the *Interim Order and NPRM*, and (2) that UNE rates for high-capacity loops, dedicated transport, and mass market switching during both the interim period and the proposed transition period could reflect state-ordered decreases as well as increases. *See* ALTS, Alpheus Communications, LP, Cbeyond Communications, LLC, Conversent Communications, LLC, GlobalCom, Inc., (continued....)

challenged the Commission's interim requirements before the D.C. Circuit. The court is holding that challenge in abeyance and ordered the parties to provide status updates on January 4, 2005.[53]

19. In the *Interim Order and NPRM*, the Commission also sought comment on how to respond to the D.C. Circuit's *USTA II* decision.[54] Our decision today is based on comments filed in response to this NPRM and focuses on those issues that were remanded to us.[55]

IV. UNBUNDLING FRAMEWORK

20. As described above, the *USTA II* court upheld the general impairment framework we established in the *Triennial Review Order*, but sought several clarifications and, in several cases, criticized the manner in which the Commission applied that framework to particular elements. In this section, we address those concerns that relate generally to the standard itself, to the extent that such concerns apply to more than one element. In the sections that follow, we revisit the unbundling obligations associated with several elements in a manner consistent with the *USTA II* decision and other controlling precedents.

21. In the *Triennial Review Order*, the Commission found that a requesting carrier is impaired "when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic."[56] The Commission also utilized its authority, under section 251(d)(2)'s "at a minimum" language, to give effect to factors other than impairment when making unbundling determinations. Specifically, the Commission relied on section 706 of the Act, which directs the Commission to encourage the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis, to consider investment incentives when weighing incumbent LECs' unbundling obligations with regard to facilities used to provide broadband service to mass market customers.[57]

22. In this Order, we retain the unbundling framework we adopted in the *Triennial Review Order*, but clarify the impairment standard in one respect and modify our unbundling framework in three

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Mpower Communications Corp., New Edge Networks, Inc., OneEighty Communications, Inc. and TDS Metrocom, LLC Petition for Emergency Clarification and/or Errata, WC Docket No. 04-313, CC Docket No. 01-338 (filed Aug. 27, 2004).

[53] *USTA v. FCC*, D.C. Cir. No. 00-1012 (order issued Oct. 6, 2004).

[54] *See supra* note 8.

[55] Comments in response to the *Interim Order and NPRM* were due by October 4, 2004, and reply comments were due by October 19, 2004. *Pleading Cycle Established for Comments Regarding Final Unbundling Rules*, CC Docket No. 01-338, WC Docket No. 04-313, Public Notice, 19 FCC Rcd 18077 (WCB 2004). The *Interim Order and NPRM* also incorporated the records of certain other pending proceedings. *Interim Order and NPRM*, 19 FCC Rcd at 16789-91, paras. 11-15. We address in this Order those issues remanded to us, as well as certain ancillary issues raised in the NPRM. We will address other outstanding issues in subsequent orders.

[56] *Triennial Review Order*, 18 FCC Rcd at 17035, para. 84.

[57] *See, e.g., id.* at 17145, 17152, 17323, paras. 278, 293, 541; *see also* 47 U.S.C. § 157 nt.

respects.[58] *First*, we clarify that when evaluating whether lack of access to an incumbent LEC network element "poses a barrier or barriers to entry . . . that are likely to make entry into a market uneconomic," we make that determination with regard to a reasonably efficient competitor.[59] *Second*, in response to the *USTA II* court's directive, we modify our approach regarding carriers' unbundled access to incumbent LECs' network elements for provision of certain services, setting aside the *Triennial Review Order*'s "qualifying service" interpretation of section 251(d)(2), but nevertheless prohibiting the use of unbundled elements exclusively for the provision of telecommunications services in sufficiently competitive markets.[60] *Third*, to the extent that we evaluate whether requesting carriers can compete without unbundled access to particular network elements, we endeavor, as instructed by the D.C. Circuit, to draw reasonable inferences regarding the prospects for competition in one geographic market from the state of competition in other, similar markets.[61] *Fourth*, as directed by *USTA II*, we consider the appropriate role of tariffed incumbent LEC services in our unbundling framework.[62] We determine that in the context of the local exchange markets,[63] a rule prohibiting access to UNEs when a requesting carrier is able to compete using an incumbent's tariffed offering would be inappropriate.

23. We also take this opportunity to emphasize that neither the impairment inquiry nor the other aspects of the unbundling framework should be distorted to compensate for alleged failings in related but distinct areas of the Commission's regulatory regime. For example, competitors cite purportedly excessive special access rates[64] and scarce collocation space[65] to justify continued unbundling, whereas incumbent LECs cite allegedly confiscatory UNE rates to support expansive relief.[66] We disagree with such arguments to the extent that they suggest that the Commission should depart from the statutory test for unbundling and require or limit unbundling as an alternative to correcting other perceived deficiencies in our rules. If rules other than those implementing section 251(d)(2) are impeding the development of competition – either by preventing competitive entry or by fostering excessive reliance

[58] In several cases, our response to the *USTA II* holdings is more appropriately addressed in the context of specific elements than in a discussion of our overarching framework. Where that is true, we address the issues raised by the court in our discussion of specific network elements, below.

[59] *See Triennial Review Order*, 18 FCC Rcd at 17035, para. 84.

[60] *See USTA II*, 359 F.3d at 591-92.

[61] *See id.* at 575.

[62] *See id.* at 576-77.

[63] In this Order, we use the term "local exchange markets" to refer to the markets for the services provided by local exchange carriers, which include telephone exchange service and exchange access. 47 U.S.C. § 153(26).

[64] *See, e.g.*, McLeod Reply at 26-31; MCI Reply at 109-117, ATX Reply at iii, 6-13; Covad Reply at 29-33; Loop and Transport Coalition Reply at 53-56; Eschelon Reply at 12-16; Letter from Jonathan Lee, Sr. Vice President Regulatory Affairs, CompTel/ASCENT, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 (filed Nov. 23, 2004) (CompTel/ASCENT Nov. 23, 2004 *Ex Parte* Letter).

[65] *See* MCI Reply at 92-104.

[66] *See, e.g.*, SBC Comments at 39.

on UNEs – parties should seek redress of the problematic rules themselves, rather than attempt to tilt the unbundling framework to account for the asserted deficiency.[67]

A. Reasonably Efficient Competitor

24. We clarify that, in assessing impairment pursuant to the standard set forth in the *Triennial Review Order*, we presume a reasonably efficient competitor. In the *Triennial Review Order*, the Commission concluded that a requesting carrier was impaired "when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic."[68] The *USTA II* court found that the Commission had failed to answer the question, "Uneconomic by whom?"[69] We therefore take this opportunity to resolve any uncertainty, and hereby clarify that our standard, as written, referred to a reasonably efficient carrier. We consider *all* the revenue opportunities that such a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could reasonably expect to sell, taking into account limitations on entrants' ability to provide multiple services, such as diseconomies of scope in production, management, and advertising.[70] We note that commenters in this proceeding generally agree that it is appropriate to determine impairment by reference to a reasonably efficient competitor.[71]

25. Although the *Triennial Review Order* did not expressly identify the type of carrier for which impairment would be measured, we clarify that a "reasonably efficient competitor" standard accords with the manner in which the Commission conducted its impairment inquiry in that order. For example, the Commission rejected proposals that it should evaluate a requesting carrier's impairment with reference to that carrier's particular business strategy, noting that such an approach "could reward those carriers that are less efficient or whose business plans simply call for greater reliance on UNEs."[72] The Commission also noted that a business-plan specific analysis would potentially "disregard the availability of scale and

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[67] Indeed, we note that the Commission is currently investigating many of the related but distinct issues raised by parties to this proceeding. *See, e.g.*, *Interim Order and NPRM*, 19 FCC Rcd at 16789, para. 11 n.38 (asking parties to refresh the record regarding collocation at remote incumbent LEC premises assembled in response to *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 17806, 17839-56, paras. 70-118 (2000) (subsequent history omitted)); *see also TELRIC NPRM*, 18 FCC Rcd 18945; *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001) (inviting comment on whether the Commission should adopt metrics to prevent discrimination in the provision of special access services); AT&T Corp., Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593 (filed Oct. 15, 2002).

[68] *See Triennial Review Order*, 18 FCC Rcd at 17035, para. 84.

[69] *USTA II*, 359 F.3d at 572.

[70] Diseconomies of scope are the opposite of economies of scope. Diseconomies of scope occur when the cost of producing a good rises when a firm attempts to produce a second good. *See* John C. Panzar, *Technological Determinations of Firm and Industry Structure*, *in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 16 (Richard Schmalensee and Robert Willig, eds., 1989).

[71] *See, e.g.*, Alpheus Comments at 81; ALTS *et al.* Comments at 7; BellSouth Comments at 12; Loop and Transport Coalition Comments at 28; Qwest Comments at 13; Verizon Reply at 8.

[72] *Triennial Review Order*, 18 FCC Rcd at 17056, para. 115.

scope economies gained by providing multiple services to large groups of customers,"[73] and specified that the impairment standard was "based on an entrant providing the full range of services and to all customers supported by the marketplace."[74] Similarly, in its discussion regarding the unbundling of local circuit switching, the Commission stated that its impairment analysis was not based on any particular business model for entry.[75]

26. To the extent that the Commission was unclear on this point in the *Triennial Review Order*, we take this opportunity to emphasize that when we consider whether "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," we refer to whether entry is economic by a hypothetical competitor acting reasonably efficiently. In analyzing entry from the perspective of the reasonably efficient competitor, we do not attach weight to the individualized circumstances of the actual requesting carrier.[76] Thus, we do not presume that a hypothetical entrant possesses any particular assets, legal entitlements or opportunities, even if a specific competitive carrier in fact enjoys such advantages as a result of its unique circumstances.[77] Similarly, under our approach, impairment does not arise due to any errors of business judgment made by an actual requesting carrier.

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[73] *Id.*

[74] *Id.* at 17056, para. 115 n.396.

[75] *Id.* at 17303, para. 517 (stating that "[t]he [impairment] analysis must be based on the most efficient business model for entry rather than [on] any particular carrier's business model").

[76] We recognize the conceptual tension inherent in *all* legal standards that rely on abstract norms rather than particular facts (*e.g.*, the "reasonable person standard" of tort law). To illustrate, it would be inappropriate to presume that the reasonably efficient competitor has no business plan and no assets of any type, but a test that measures impairment according to the actual business plan and assets held by the requesting carrier would defeat the purpose of using – indeed, would not be – a general test. The reasonably efficient competitor therefore is more like a conceptual goal than an abstract entity with particular characteristics. Our goal under this standard is to make our impairment determination by placing little or no reliance on the specific facts about an individual requesting carrier, such as that carrier's competitive position vis-à-vis other market participants, or that carrier's particular business strengths or weaknesses. This approach avoids the administrability and other problems that would arise if we were to analyze impairment on a competitor-by-competitor basis, taking into account the revenue opportunities, efficiencies, and costs of each competitor's entire network in each relevant geographic market. *See* Letter from Edwin J. Shimizu, Director Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 at 2 (filed Dec. 7, 2004) (Verizon Dec. 7, 2004 Deployment Costs *Ex Parte* Letter); *see also* Letter from Karen Brinkmann, Counsel for ACS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 at 5 (filed Dec. 8, 2004) (ACS Dec. 8, 2004 *Ex Parte* Letter) (arguing that customer-specific impairment findings would "provide improper incentives, [and] encourage[e] continued use of UNEs rather than [competitive LEC] investment in facilities").

[77] Thus, for example, the fact that one carrier possesses rights-of-way that mitigate the costs of constructing transmission facilities would not render "inefficient" another carrier that does not enjoy such rights-of-way. We therefore reject the arguments of some parties that just because one competitive LEC holds a particular set of assets, "by extension, any efficient [competitive LEC]" must be deemed to hold those assets. *See* Letter from Gary L. Phillips, General Attorney and Assistant General Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 at 2 (filed Dec. 8, 2004) (arguing that Time Warner Telecom is not impaired). As BellSouth states, "[a]ssessing economic entry from the perspective of a particular [competitive LEC] or an 'average' [competitive LEC] would reward inefficiency. It also would make it difficult for the Commission to distinguish uneconomic entry from poor business planning or regulatory gamesmanship." BellSouth Comments at (continued....)

27. In addition, we presume that a requesting carrier will use reasonably efficient technology and incorporate this clarification into our analysis in two ways, one explicit and one implicit. First, we explicitly reject arguments that support unbundling based on the costs associated with a particular architecture or approach – even an architecture or approach employed by the incumbent LEC – where entry using a more efficient available technology would permit economic entry. For example, we reject below arguments based on certain costs associated with the use of the traditional circuit switches used by many incumbent LECs, citing, among other things, the cheaper alternative switching arrangements available to new entrants.[78]

28. Second, our inferences regarding the potential for deployment are based on the characteristics of markets where actual deployment has occurred, which presumes that competitive LECs will use reasonably efficient technologies and take advantage of existing alternative facilities deployment where possible. Consistent with guidance from the court, our conclusions today regarding impairment rely heavily on the inferences that can be drawn from the state of competition in one geographic market regarding the potential for competition in another market. Specifically, to the extent competitors have deployed facilities sufficient to demonstrate that entry is economic in one geographic market, we presume that those facilities are reasonably efficient and that that carrier, or other carriers, could enter other, similar geographic markets on an economic basis using similar (or even more efficient) technologies.[79] Facilities-based competitive LECs have every incentive to deploy efficient technologies so as to maximize quality of service and minimize their costs.[80]

B. Service Considerations

29. In response to the *USTA II* court's guidance, we revise our standard to foreclose unbundling exclusively to provide services in markets that already are sufficiently competitive. Specifically, we abandon the "qualifying services" approach set forth in the *Triennial Review Order*[81] that limited the section 251(d)(2) inquiry to a subset of telecommunications services, which was rejected by the D.C. Circuit.[82] Under our qualifying services approach, access to UNEs was provided only for the provision of services competing with "core" incumbent LEC offerings, although carriers obtaining access to UNEs

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14; *see also* Verizon Reply, Attach. A, Declaration of Alfred E. Kahn & Timothy J. Tardiff (Verizon Kahn/Tardiff Reply Decl.) at para. 15 (stating that the *Triennial Review Order* "properly recognizes that the unbundling obligation should not be linked to the fortunes of particular firms and/or types of firms pursing particular business plans").

[78] *See infra* paras. 208-09. We do not intend to suggest that incumbent LECs could elect to use less efficient technology and thereby prevent unbundling.

[79] Consistent with our findings below, when evaluating impairment with respect to transmission facilities, we limit our assumptions regarding an entrant's use of efficient technologies to use of technologies of the desired capacity level, and reject arguments that we should deny unbundled access simply because a requesting carrier can deploy an OCn-capacity facility. *See infra* paras. 86, 166.

[80] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17026, para. 70 n.233 ("Facilities-based competition also increases the likelihood that new entrants will find and implement more efficient technologies, thus benefiting consumers."). Incumbent LECs' networks have been constructed incrementally over the course of decades, and thus generally incorporate outdated legacy technologies, which is not the situation for facilities-based competitive LECs.

[81] *Id.* at 17067-77, paras. 135-53.

[82] *USTA II*, 359 F.3d at 592.

for the provision of such "qualifying" services could also use the UNEs to provide other services.[83] In accord with the court's concerns, we amend our unbundling framework and prohibit requesting carriers from obtaining UNEs exclusively to provide service in end-user markets that already are competitive without UNEs.

1. Background

30. Section 251(c)(3) confers on incumbent LECs "[t]he duty to provide [UNEs] to any requesting carrier for the provision of a *telecommunications service*."[84] In establishing which elements should be unbundled in section 251(d)(2), Congress directed the Commission to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the *services* that it seeks to offer."[85] As we have previously held, section 251(d)(2) is ambiguous as to the particular services requesting carriers can provide using UNEs.[86] The Commission has partially resolved this ambiguity by holding that the reference to "services" in section 251(d)(2) is reasonably interpreted to mean "telecommunications services" as used in section 251(c)(3).[87]

31. In its review of the *Triennial Review Order*, the D.C. Circuit noted that, in a prior decision, it had endorsed the general approach of making UNEs available only for the provision of particular telecommunications services,[88] but rejected on statutory grounds the method the Commission had used to identify qualifying services. The court held that the word "services," as used in section 251(d)(2), does not restrict the scope of the unbundling inquiry to "qualifying services."[89] Rather, the court held, the statute requires the Commission to subject *all* telecommunications services to the section 252(d)(2) unbundling inquiry.

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[83] *Triennial Review Order*, 18 FCC Rcd at 17070, para. 139 (defining qualifying services); *id.* at 17072, para. 143 (adopting rules for use of UNEs for non-qualifying services). Although we discard our qualifying services approach, this does not call into question our existing rule that a carrier obtaining access to a UNE for the provision of a telecommunications service for which UNEs are available may use that UNE to provide other services as well. 47 C.F.R. § 51.100(b); 47 C.F.R. § 51.309(b). We do, however, amend our rule to remove references to our vacated "qualifying services" test.

[84] 47 U.S.C. § 251(c)(3) (emphasis added).

[85] *Id.* at § 251(d)(2)(B) (emphasis added).

[86] *Triennial Review Order*, 18 FCC Rcd at 17068, para. 138; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd 9587, 9595, para. 15 (2000) (*Supplemental Order Clarification*), *aff'd. CompTel v. FCC*, 309 F.3d 3 (D.C. Cir. 2002); *USTA I*, 290 F.3d at 422 (stating that Congress "charged the Commission with identifying those network elements whose lack would 'impair' would-be competitors' ability to enter the market, yet gave no detail as to either the kind or degree of impairment that would qualify").

[87] *Triennial Review Order*, 18 FCC Rcd at 17068, para. 138; *USTA II*, 359 F.3d at 591 ("The Commission assumes, as we believe it must, that the reference to 'services' in § 251(d)(2) is meant to refer to the 'telecommunications services' covered by § 251(c)(3).").

[88] *USTA II*, 359 F.3d at 591-92 (citing *CompTel*, 309 F.3d at 12-14).

[89] *Id.* at 591-92.

32. The *USTA II* court also made clear, however, that UNEs should not be made available for the provision of service in certain markets, observing that where there is "robust competition," it is "hard to see any need for the Commission to impose the costs of mandatory unbundling."[90] In particular, the court observed that the mobile wireless and long distance services markets support significant levels of competition, and questioned whether unbundling was appropriate with respect to those markets.[91]

33. In the same decision, the court also broadly upheld the Commission's exercise of its "at a minimum" authority to consider factors other than impairment when evaluating whether an element should be subject to unbundling.[92] Section 251(d)(2) provides that "the Commission shall consider, *at a minimum*, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[93] In the *Triennial Review Order*, the Commission relied on this authority to hold that certain network elements need not be unbundled, despite the possibility of some impairment, where unbundling appears likely to undermine important goals of the Act.[94] The D.C. Circuit affirmed the Commission's use of this method of weighing the benefits and costs of unbundling, citing "at least two ways" in which the Commission might consider "not only the benefits but also the costs of unbundling":

> One way would be to craft a standard of impairment that built in such a balance, as for example by hewing rather closely to natural monopoly features. The other is to use a looser concept of impairment, with the costs of unbundling brought into the analysis under § 251(d)(2)'s "at a minimum" language. The Commission has chosen the latter, and we cannot fault it for doing so. . . . [I]n principle, there is no statutory offense in the Commission's decision to adopt a standard that treats impairment as a continuous rather than as a dichotomous variable, and potentially reaches beyond natural monopoly, but then to examine the full context before ordering unbundling.[95]

2. Prohibition on Unbundling for Exclusive Service to Competitive Markets

34. In light of the guidance received from the D.C. Circuit, we abandon our previous interpretation of section 251(d)(2), and subject all telecommunications services to our unbundling framework. The qualifying service rules set forth in the *Triennial Review Order* maintained that carriers were barred, as a statutory matter, from using UNEs to provide exclusively those telecommunications services that do not compete with "core" incumbent LEC offerings. We now conclude that whether a requesting carrier

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[90] *Id.* at 576, 592 (stating that "robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic").

[91] *See id.*

[92] *Id.* at 572, 579.

[93] 47 U.S.C. § 251(d)(2) (emphasis added).

[94] In particular, the Commission in the *Triennial Review Order* used its at a minimum authority in support of its decision not to require unbundling of fiber-to-the-home loops and packet switches, and, subject to certain limitations, also of hybrid loops. *See Triennial Review Order*, 18 FCC Rcd at 17145, 17152, 17323, paras. 278, 293, 541.

[95] *USTA II*, 359 F.3d at 572.

seeking to provide a telecommunications service is eligible to access UNEs is not subject to such prequalification and instead depends solely on our "impairment" analysis and other factors we consider under section 251(d)(2). Consistent with *USTA II*, we deny access to UNEs in cases where the requesting carrier seeks to provide service exclusively in a market that is sufficiently competitive without the use of unbundling.[96] In particular, we deny access to UNEs for the exclusive provision of mobile wireless services[97] and long distance services.[98] In these two markets, where competition has evolved without such access, we are unable to justify imposing the costs of mandatory unbundling to promote competition.[99]

35. As the D.C. Circuit stressed in its *USTA I* and *USTA II* decisions, the Commission must take into account both the benefits and costs of unbundling before it may require an incumbent LEC to provide unbundled access to network elements pursuant to section 251(c)(3).[100] Applying this requirement in the

[96] The markets we find to be sufficiently competitive for purposes of this Order are markets that the Commission previously has examined and found to be substantially competitive.

[97] In this Order we use the term "mobile wireless service" to refer to all mobile wireless telecommunications services, including commercial mobile radio service (CMRS). *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 04-111, Ninth Report, 19 FCC Rcd 20597, para. 219 (2004) (*Ninth CMRS Competition Report*). CMRS includes paging, air-ground radiotelephone service and offshore radiotelephone service, as well as mobile telephony services, such as the voice offerings of carriers using cellular radiotelephone, broadband PCS and SMR licenses. *See* 47 C.F.R. § 20.9; *see also* 47 C.F.R. § 20.3.

[98] In this Order, we use the term "long distance service," or "interexchange service," to mean telecommunications service between stations in different exchange areas. *Cf.* Modification of Final Judgment, § IV(K), *reprinted in*, *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982) (subsequent history omitted) (defining "interexchange telecommunications" as "telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area").

[99] Because we prohibit the use of UNEs for the exclusive provision of mobile wireless service, we dismiss as moot several pending petitions for clarification or reconsideration seeking Commission determinations that CMRS carriers may obtain access to incumbent LEC transmission facilities between wireless cell cites and incumbent LEC wire centers as UNEs and that the Commission's service eligibility criteria do not apply to CMRS carriers. *See* AT&T Wireless Petition for Clarification or Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147 (filed Oct. 2, 2003); Cellular Telecommunications & Internet Association Petition for Reconsideration or Clarification, CC Docket Nos. 01-338, 96-98, 98-147 (filed Oct. 2, 2003); T-Mobile USA, Inc. Petition for Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147 (filed Oct. 2, 2003); Nextel Communications, Inc. Petition for Reconsideration or Clarification, CC Docket Nos. 01-338, 96-98, 98-147 (filed Oct. 2, 2003). Because we deny all unbundled access to incumbent LEC network elements for the exclusive provision of mobile wireless service, we also dismiss as moot that portion of Nextel's petition that asks the Commission to grant "fresh look" relief for CMRS carriers from termination liability for conversion of special access circuits to UNEs. *See* Nextel Communications, Inc. Petition for Reconsideration or Clarification, CC Docket Nos. 01-338, 96-98, 98-147 (filed Oct. 2, 2003).

[100] *See, e.g.*, *USTA I*, 290 F.3d at 427-28 (directing the Commission to weigh the costs of unbundling as part of an "analysis of the competing values at stake in implementation of the Act"); *id.* at 428-29 (directing the Commission to consider intermodal competition as part of the "competitive context" of its unbundling decisions because "unbundling is not an unqualified good . . . [and] nothing in the Act appears a license to inflict on the economy the [costs of unbundling] under conditions where it had no reason to think doing so would bring on a significant enhancement of competition"); *USTA II*, 359 F.3d at 572 (noting that there is more than one way that the "Commission could have accommodated our ruling in *USTA I* that its impairment rule take into account not only the (continued....)

context of markets where competition has evolved without access to UNEs, the D.C. Circuit stated that it is "hard to see any need for the Commission to impose the costs of mandatory unbundling" in cases "where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic."[101] The court specified, in particular, that this inquiry would likely foreclose access to UNEs for the provision of mobile wireless and long distance service.[102] With respect to mobile wireless services, the D.C. Circuit, noting that the Commission repeatedly has found the mobile wireless services market to be highly competitive,[103] found that the data "clearly show that wireless carriers' reliance on special access has not posed a barrier that makes entry uneconomic," and that "market evidence already demonstrates that existing rates outside the compulsion of § 251(c)(3) [*i.e.*, network elements at special access prices] don't impede competition."[104] The court strongly suggested that it also views the long distance market clearly to be competitive.[105]

36. In response to the court, we consider the state of competition in the mobile wireless services market and long distance services market in determining whether a requesting carrier may obtain access to a UNE solely to provide those services. Based on the record, the court's guidance, and the Commission's previous findings, we find that the mobile wireless services market[106] and long distance

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benefits but also the costs of unbundling (such as discouragement of investment in innovation)"); *id.* at 576 ("[T]he purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition – preferably genuine, facilities-based competition. Where competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling."); *id.* at 580 ("We therefore hold that that Commission reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would impose excessive impediments to infrastructure investment.").

[101] *USTA II*, 359 F.3d at 576, 592 (expressing a belief that the CMRS retail market and long distance service market are competitive).

[102] *Id.* at 576 (discussing competition in the CMRS market and stating that "[w]here competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling"); *id.* at 592 ("As we noted with respect to wireless carriers' UNE demands, 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.").

[103] *Id.* at 575-76 (citing evidence that competition for mobile wireless services is flourishing).

[104] *Id.* at 575, 576 (stating that "the multi-million dollar sums that the Commission regularly collects in its auctions of such spectrum, . . . and that firms pay to buy already-issued licenses, . . . seem to indicate that wireless firms currently expect that net revenues will, by a large margin, more than recover all their non-spectrum costs (including return on capital)").

[105] *Id.* at 592 (stating that "CLECs have pointed to no evidence suggesting that they are impaired with respect to the provision of long distance services"); *see also id.* ("As we noted with respect to wireless carriers' UNE demands, *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.").

[106] The Commission repeatedly has found the mobile wireless service market to be competitive. *See, e.g.*, *Ninth CMRS Competition Report*, FCC 04-216, para. 20 (addressing the status of competition for CMRS and some non-CMRS mobile wireless services and observing that, during 2003, the CMRS industry continued to experience the (continued....)

services market[107] are markets where competition has evolved without access to UNEs.[108] We further find that whatever incremental benefits could be achieved under the Act by requiring mandatory

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benefits of competition, including "increased service availability, intense price competition, and a wider variety of service offerings"); *id.* at para. 223 (stating that 97% of the U.S. population has access to three or more different mobile wireless operators, and 87% of the U.S. population lives in counties with five or more mobile telephone operators); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 02-379, Eighth Report, 18 FCC Rcd 14783, 14786, para. 4 & n.12 (2003) (*Eighth CMRS Competition Report*) (stating that "the Commission has routinely acknowledged that it has chosen not to regulate mobile wireless providers as dominant carriers" and citing examples); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, FCC 02-179, Seventh Report, 17 FCC Rcd 12985 (2002) (*Seventh CMRS Competition Report*); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, FCC 01-192, Sixth Report, 16 FCC Rcd 13350 (2001) (*Sixth CMRS Competition Report*); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, FCC 00-289, Fifth Report, 15 FCC Rcd 17660 (2000) (*Fifth CMRS Competition Report*); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, WT Docket Nos. 04-70, 04-254, 04-323, Memorandum Opinion and Order, 19 FCC Rcd 21522, para. 191 (2004) (*AWS/Cingular Merger Order*) (permitting the second and third largest providers of mobile telephony services to merge in part because the likelihood of unilateral or coordinated anticompetitive effects as a result of the merger was generally low). The CMRS competition reports and others are available on the FCC's website at *http://wireless.fcc.gov/cmrs-crforum.html*.

[107] The Commission on several previous occasions has concluded that the long distance service market is competitive. In 2004, for example, the Commission found that cost savings realized by allowing BOCs and their section 272 long distance affiliates to share operating, installation and maintenance functions likely would be passed on to long distance consumers because "the long distance market is substantially competitive." *Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates; Petition of SBC for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Sections 53.203(a)(2) and 53.203(a)(3) of the Commission's Rules and Modification of Operating, Installation, and Maintenance Conditions Contained in the SBC/Ameritech Merger Order; Petition of BellSouth Corporation for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2)-(3) of the Commission's Rules; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Report and Order in WC Docket No. 03-228, Memorandum Opinion and Order in CC Docket Nos. 96-149, 98-141, 01-337, 19 FCC Rcd 5102, 5120, para. 28 (2004); *see also, e.g., Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149, 96-61, Second Report and Order in CC Docket No. 96-149; Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15805, para. 86 (1997) (*LEC Classification Order*) ("Because we previously have found that markets for long distance services are substantially competitive in most areas, marketplace forces should effectively deter carriers that face competition from engaging in the practices that Congress sought to address through the section 214 requirements."); *Ninth CMRS Competition Report*, FCC 04-216, para. 195 (discussing quality of service issues and noting that long distance telephone service "is highly competitive"); *cf. Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration of Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.*, CC Docket Nos. 00-251, 00-218, Memorandum Opinion and Order, 18 FCC Rcd 17722, 17762, para. 91 (WCB 2003) (noting that long distance companies such as AT&T and "pre-bankruptcy" WorldCom build, own, operate, and maintain long distance networks and "operate these assets in an environment that clearly is competitive, with a number of ubiquitous facilities-based competitors"); *Applications of XO Communications, Inc.*, IB Docket No. 02-50, Memorandum (continued....)

unbundling in these service markets would be outweighed by the costs of requiring such unbundling. As we found in the *Triennial Review Order*, unbundling can create disincentives for incumbent LECs and competitive LECs to deploy innovative services and facilities, and is an especially intrusive form of economic regulation – one that is among the most difficult to administer.[109] Therefore, as an exercise of our "at a minimum" authority, we decline to order unbundling of network elements to provide service in the mobile wireless services market and the long distance services market.[110]

37. As just noted, our ruling today rests on our "at a minimum" authority. In the past, we have used such authority to decline to require unbundling in contexts where some level of impairment may exist, but where unbundling appeared likely to undermine important goals of the 1996 Act.[111] Our exercise of this authority today is closely comparable. Where a requesting carrier seeks access to a UNE in order to provide a telecommunications service where competition has evolved without access to such a UNE, we find the costs cognizable under the Act of unbundling that UNE outweigh the benefits of unbundling, even if some level of impairment might be present. We believe this application of our at a minimum authority is the most faithful implementation of *USTA II*. There, the court recognized that the structure of the Act "suggests that 'impair' must reach a bit beyond natural monopoly," and thus, before making an

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Opinion, Order and Authorization, 17 FCC Rcd 19212, 19225-26 (IB, WTB, WCB 2002) (holding that the merger of XO and McLeod would not harm the public interest because both entities "operate in the highly competitive U.S. domestic and international long distance and Internet markets targeting small and medium sized business users"); SBC Comments at 24-25.

[108] Mobile wireless carriers do not currently use UNEs in their provision of mobile wireless services. *See, e.g.*, T-Mobile Comments at 2; T-Mobile Reply at 2; Nextel Reply at 2. Interexchange carriers largely have relied on special access to originate and terminate their long distance traffic. *See* Letter from Evan T. Leo, Counsel for BellSouth *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338, Attachs. 1 & 2 (filed Dec. 13, 2004) (BOC Dec. 13, 2004 *Ex Parte* Letter) (showing that nearly all of the DS1s and DS3s purchased by AT&T, WorldCom and Sprint from the incumbent LECs are purchased as special access).

[109] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17071, 17229, paras. 141, 404.

[110] While some commenters express concern that the BOCs someday will monopolize the long distance service market now that they all have acquired section 271 approvals throughout their service areas, they do not rebut the fact that today the long distance service market is competitive. AT&T Comments at 83, 134-5, 139-41 (acknowledging that the incumbent LECs currently do not have a dominant share of the long distance service market); MCI Comments at 173 (stating that incumbent LECs currently "are competing vigorously in the interexchange market"); MCI Reply at 111-15 (acknowledging that competitive LECs have been able to rely on special access for some services "to date," and arguing that incumbent LECs' new incentives to impose a price squeeze may prevent such reliance in the future); *cf.* Verizon Comments, Attach. G, Declaration of Eric. J. Bruno (Verizon Bruno Decl.) at para. 16 (stating that Verizon could not compete seriously for large enterprise customers until it had received authority to provide long distance service in *all* of its service territories, which occurred just last year."). Pending before the Commission is a proceeding examining the implications of the expiration of the section 272 requirements which apply to the BOCs' provision of long distance service. *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, WC Docket No. 02-112, CC Docket No. 00-175, Further Notice of Proposed Rulemaking, 18 FCC Rcd 10914 (2003).

[111] *See Triennial Review Order*, 18 FCC Rcd at 17086-92, paras. 172-78.

unbundling determination, the Commission reasonably may examine the full context of that decision, including the costs of unbundling, under the "at a minimum" language of section 251(d)(2).[112]

38. We do not believe that it is appropriate at this time to render similar judgments regarding other services specified in the Act – namely, telephone exchange service and exchange access service, the two services local exchange carriers provide.[113] The local services market does not share the competitive conditions, observed in the mobile wireless services market and long distance services market, that would support a parallel finding that the costs of unbundling outweigh the benefits. In contrast to its conclusions regarding competition in the mobile wireless services and long distance services markets, the Commission has not reached similar competitive conclusions about the core markets traditionally served by local exchange carriers. Nor has the D.C. Circuit suggested that we do so. In addition, to the extent that competition has evolved in the local exchange services market, again unlike in the mobile wireless services and long distance services markets, such competition has not evolved without UNEs. Instead, in particular since the passage of the 1996 Act, competition in this market has been substantially affected by, if not enabled by, the availability of UNEs.[114] For these reasons, as well as those set forth below,[115] we find that the limited use competitive LECs have made of incumbent LECs' tariffed alternatives as components of their local exchange service offerings does not show that a competitive market could develop and survive if access to UNEs were withdrawn completely for this service market.

39. Some incumbent LECs, nevertheless, argue that the Commission should reach similar conclusions about the state of competition in local exchange markets, particularly based on competition from cable companies.[116] As discussed more fully below, we consider such evidence of competition from cable providers as part of our impairment analysis.[117] Our review shows that cable companies predominantly compete in the mass market for broadband services throughout the country.[118] To the

[112] *USTA II*, 359 F.3d at 572.

[113] 47 U.S.C. § 153(26) (defining "local exchange carrier"); *id.* at § 153(47) (defining "telephone exchange service"); *id.* at § 153(16) (defining "exchange access"). We clarify that our determinations regarding telephone exchange service and mobile wireless services should not be understood to imply that mobile wireless service can never be "service within a telephone exchange, or within a connected system of telephone exchanges . . . or comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47).

[114] *See infra* para. 65.

[115] *See infra* Part IV.D.5.

[116] *See* Verizon Comments at 3, 51-54, 91-95; SBC Comments at 68-69; BellSouth Comments at 20-23; Qwest Comments at 34-39. We do not dismiss the notion that such conclusions might someday be appropriate, upon findings of sufficient facilities-based competition in the local exchange market. Nevertheless, we do not believe that competition based on use of the incumbent's facilities, including competition based on UNEs, would constitute a sufficient basis for findings precluding access to UNEs for provision of service to the local exchange market.

[117] *See infra* paras. 95, 193-94.

[118] Some commenters argue that the Commission should deny access to UNEs for the provision of local exchange service due to intermodal competition and voice over IP (VoIP). *See, e.g.*, SBC Comments at 49-55; SBC Reply at 77-79; Verizon Comments at 85-88, 91-99, 106-09; USTA Reply at 7-9; BOC UNE Fact Report 2004 at II. We disagree. Customers seeking to use VoIP as a substitute for circuit-switched telephone service must first subscribe to a broadband service, such as DSL or cable modem service. While broadband penetration rates are increasing, (continued....)