

circuit switching, and particularly UNE-P, creates.<sup>592</sup> Five years ago, the Commission expressed a preference for facilities-based competition.<sup>593</sup> This preference has been validated by the D.C. Circuit as the correct reading of the statute.<sup>594</sup> Since its inception, UNE-P was designed as a tool to enable a transition to facilities-based competition. It is now clear, as discussed below, that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment. Accordingly, consistent with the D.C. Circuit's directive, we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition.

219. As we found above, it is possible for switches to be deployed by competitors on an economic basis. It thus would be contrary to the direction of judicial precedent to unbundle mass market switching, allowing competitors to provide service exclusively using the incumbent LECs' facilities,<sup>595</sup> and discouraging competitive LECs' use and further deployment of competitive switching facilities. Under the D.C. Circuit's mandate, consideration of economic incentives, pursuant to section 251(d)(2)'s "at a minimum" language, is appropriate in the context of unbundling analyses because such consideration accords weight to the Act's aim of encouraging facilities-based competition.<sup>596</sup> The Supreme Court likewise has recognized that section 251(c)(3) is designed to allow competitive LECs unbundled access to certain incumbent LEC facilities to be used in conjunction with facilities that they can deploy themselves or obtain competitively.<sup>597</sup>

220. The record demonstrates the validity of concerns that unbundled mass market switching discourages competitive LEC investment in, and reliance on, competitive switches.<sup>598</sup> Qwest shows that

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<sup>592</sup> Because we exercise our "at a minimum" authority and eliminate unbundled access to mass market local circuit switching, and therefore UNE-P, we need not separately address the D.C. Circuit's concern about the interaction between such unbundling and any cross-subsidies in state retail rates. See *USTA II*, 359 F.3d at 573.

<sup>593</sup> See *UNE Remand Order*, 15 FCC Rcd at 3701, para. 7.

<sup>594</sup> *USTA II*, 359 F.3d at 563 (stating that the Commission's unbundling analysis must "pursue the 'balance' between the advantages of unbundling (in terms of fostering competition by different firms, even if they use the very same facilities) and its costs (in terms both of 'spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities'") (quoting *USTA I*, 290 F.3d at 427); *id.* at 572 (stating that *USTA I* "rul[ed]. . . that [the Commission's] impairment rule take into account not only the benefits but also the costs of unbundling (such as discouragement of investment in innovation), in order to be 'rationally related to the goals of the Act'" (citing *USTA I*, 290 F.3d at 428); *USTA I*, 290 F.3d at 425 (noting that "a disincentive effect" from unbundling "cannot be discounted a priori").

<sup>595</sup> The situation regarding local circuit switching, which is acquired as part of a UNE-P arrangement, is thus distinguishable from those UNEs which are used in conjunction with the competitor's own facilities.

<sup>596</sup> See *USTA II*, 359 F.3d at 563.

<sup>597</sup> *Verizon Communications v. FCC*, 535 U.S. 467, 492 (2002); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389-92 (1999).

<sup>598</sup> Qwest Comments at 60; SBC Comments at 55-56; Ad Hoc Telecommunications Manufacturing Coalition Comments at 9; USTA Comments at 13. We note that in this context – where the incumbent LECs already operate ubiquitous legacy circuit switching networks – our inquiry into unbundling's impact on investment incentives focuses primarily on the *competitive LECs'* incentives to deploy alternative switching facilities. In fact, given that we do not require packet switches to be unbundled, there is no basis for an argument that our treatment of circuit switches gives incumbent LECs a disincentive to upgrade their switches.

during the same time that competitive LEC use of UNE-P increased dramatically, investment by facilities-based competitive LECs declined by 56 percent.<sup>599</sup> Competitive LECs have not rebutted the evidence of commenters showing that competitive LECs in many markets have recognized that facilities-based carriers could not compete with TELRIC-based UNE-P, and therefore have made UNE-P their *long-term business strategy*.<sup>600</sup> Indeed, some proponents of UNE-P effectively concede that it discourages infrastructure investment, at least in some cases.<sup>601</sup> Some competitive LECs have openly admitted that they have no interest in deploying facilities.<sup>602</sup> Particularly in residential markets, facilities-based competitive LECs have been unable to compete against other competitors using incumbent LECs' facilities at TELRIC-based rates, and are thus discouraged from innovating and investing in new facilities.<sup>603</sup> The disincentive effects of unbundled local circuit switching are not limited to the deployment of competitive switches, however. For example, even when some competitive LECs acquired a significant number of customers in densely populated areas they never converted to reliance

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<sup>599</sup> See *id.*

<sup>600</sup> See, e.g., USTA Comments at 13; see also SBC Comments at 55 (“AT&T’s and WorldCom’s platform-dependent mass-market strategy in New York – which resulted in over a million residential customers – had, at the time of the *Triennial Review* proceeding, yet to produce a single customer converted to these carriers’ own facilities”); see also Letter from Jerry Ellig, Senior Research Fellow, Mercatus Center at George Mason University, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, WC Docket No. 04-313, Attach. 2 at 31-32 (filed Nov. 18, 2004) (stating that empirical research indicates that the availability of UNE-P serves as a disincentive to facilities-based competition); PACE Reply, Exh. 3 at 2-3 (Balhoff Testimony) (reproducing Congressional testimony in which Michael Balhoff, of Legg Mason, concluded that deployment of competitive facilities to serve the residential market has been limited by the disadvantages facilities-based competitors face in competing against competitors relying solely on UNEs); Florida PSC Dec. 1, 2004 *Ex Parte* Comments, Attach. at 5 n.3 (“While facilities-based CLECs have made much greater headway into the business market (at 76% of all CLEC business lines), existing policies have led to suppressed investment in the residential market and have favored UNE-P providers.”).

<sup>601</sup> See, e.g., Utah Committee of Consumer Services Reply at 28-29.

<sup>602</sup> See, e.g., Letter from Albert H. Kramer, Counsel for Birch, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, Attach. at 1 (filed Jan. 17, 2001) (“[I]t is not economical to self-provision switching for customers served by individual analog lines, even where a switch has already been deployed and the cost of that switch is regarded as a sunk cost.”) (emphasis omitted); *id.* at 3, 7 (Birch has “abandon[ed] serving customers using self-provisioned switching, unless those customers have sufficient needs to justify a DS1 facility,” and will not even serve customers that are ‘located a few blocks from one of its switches,’ despite the fact that ‘Birch has been able to rapidly build a customer base,’ which CLECs have argued is the prerequisite for converting customers to their own facilities”), *cited in* SBC Comments at 56.

<sup>603</sup> See SBC Comments at 56 (citing 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* para. 771b, at 174 (2d ed. 2002) (“the right to share a monopoly discourages firms from developing their own alternative inputs”); *id.* para. 773c, at 209 (unbundling will reduce an entrant’s incentives to enter the market by other means); *id.* para. 771b, at 175 (when the government forces a company to “provide [a] facility and regulat[es] the price to competitive levels, then the [prospective entrant’s] incentive to build an alternative facility is destroyed altogether”); see also *id.* at 56-57 (“facilities-based CLECs have previously urged the Commission to ‘set real limits on the availability of UNEs from ILECs’”) (citing Comments of Cox Communications, Inc. at ii, 3, CC Docket Nos. 96-98, 95-185 (filed May 26, 1999); Comments of Focal Communications at 5, CC Docket Nos. 96-98, 95-185 (filed May 26, 1999); Comments of Rhythms NetConnections Inc. at 27-28, CC Docket Nos. 96-98, 95-185 (filed May 26, 1999)); Commissioner Kennedy Oct. 18, 2004 *Ex Parte* Letter at 6.

on their own facilities.<sup>604</sup> Thus, unbundled local circuit switching also creates disincentives for competitive LECs to use those competitive switches that have been deployed. In addition, Verizon cites evidence that the availability of UNE-P also has hindered the ability of competitors to use intermodal facilities to compete for local telephone customers.<sup>605</sup> In light of this evidence, and the limited number of cases in which requesting carriers may be impaired without access to unbundled switching, we conclude that the costs associated with unbundling outweigh any benefits with respect to mass market local circuit switching.<sup>606</sup>

221. In reaching the decision not to unbundle mass market switching, we follow the D.C. Circuit's admonition to promote deployment of competitors' facilities and to reserve access to UNEs for situations

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<sup>604</sup> See, e.g., Verizon Comments in CC Docket Nos. 01-338, 96-98, 98-147 at 37 (filed Apr. 5, 2002) ("The two largest purchasers of UNEs, WorldCom and AT&T, certainly do not use UNEs as a transition to their own facilities, as indicated by their continuing use of the UNE-P to serve over a million mass market customers in New York alone rather than migrating those customers to their own switches (of which they have plenty)."); SBC Comments in CC Docket Nos. 01-338, 96-98, 98-147 at 7 (filed Apr. 5, 2002) ("In New York, for example, where AT&T and WorldCom have 28 circuit switches, neither carrier appears to have migrated a single one of their 1 million residential customers.").

<sup>605</sup> Verizon Comments at 108-09 (citing assessments of industry analysts and cable operators of the effects of UNE-P on the ability of cable operators to compete using intermodal facilities); see also Balhoff Testimony at 2-3 ("[T]here were some competitors that tried to invest [in competitive facilities to serve the mass market], but some have admitted that they were disadvantaged by a system in which TELRIC competitors had a more attractive short-term business proposition with virtually no capital costs and lesser competitive risk."). Thus, despite the assertions of some commenters, it is not necessary for the Commission to find that unbundled switching rates are lower than competitive LECs' average cost to use competitive switches in order to find that the availability of UNE-P creates disincentives for competitive facilities investment. See, e.g., PACE *et al.* Reply at 8-13. The lower capital costs and lesser competitive risk associated with a UNE-P mass market strategy, as compared to a facilities-based strategy, indicate that the availability of UNE-P could deter competitive LEC investment even if the unbundled switching rate were equal to, or even somewhat higher than, the competitive LECs' average cost to deploy competitive switches. Regardless, the commenters' analysis of switching improperly compares TELRIC rates with ARMIS cost data. We have concluded in the past that ARMIS embedded cost data are unsuitable for comparison with forward-looking TELRIC rates. See, e.g., *Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc., for Authorization to Provide In-Region, InterLATA Services in California*, WC Docket No. 02-306, Memorandum Opinion and Order, 17 FCC Rcd 25650, 25678, para. 59 n.166 (2002) (rejecting comparisons between ARMIS embedded cost data and forward-looking TELRIC rates); PACE *et al.* Reply at 9-10 (acknowledging that TELRIC rates are based on new technology and citing BellSouth testimony that TELRIC switching rates reflect some distortions associated with the "use of a hypothetical network and most efficient, least-cost provider requirement").

<sup>606</sup> In the *Triennial Review Order*, the Commission addressed a narrower issue, and concluded, on that record, that unbundling of mass market local circuit switching did not undermine the advanced telecommunications deployment goals of section 706 of the Act. *Triennial Review Order*, 18 FCC Rcd at 17257, para. 450. Here, we address the broader question of whether unbundling of mass market local circuit switching creates disincentives for competitive LECs to pursue facilities-based competition by relying on, and investing in, any type of competitive switch, whether or not it is used to offer advanced telecommunications services. Both the D.C. Circuit and this Commission have recognized that, as a general matter, both investment in facilities and facilities-based competition are "goals of the Act" to which any unbundling rules must be "rationally related." *USTA I*, 290 F.3d at 429; *UNE Remand Order*, 15 FCC Rcd at 3757-60, paras. 134-39. Consequently, we find inapposite the claims of commenters that unbundled local circuit switching does not discourage the deployment of advanced services. See, e.g., PACE *et al.* Reply at 39-40; Utah Committee of Consumer Services Reply at 28.

where competitors are providing a real alternative to parts of the incumbent's network.<sup>607</sup> Considering the disincentives for competitive LECs to rely on competitive switches, we decline to unbundle switching on a nationwide basis pursuant to our "at a minimum" authority, regardless of the assertions of some commenters that requesting carriers may face some limited impairment in particular subsets of the mass market without access to unbundled local circuit switching.

### 3. Other Possible Sources of Impairment

222. We decline to unbundle mass market local circuit switching on the basis of asserted barriers to entry other than those that the Commission relied upon in the *Triennial Review Order*. As discussed above, we conclude that neither economic nor operational impediments associated with switch deployment or hot cuts pose barriers to entry sufficient to give rise to impairment on a nationwide basis. A number of commenters allege that competitive LECs are impaired in specific circumstances due to unique characteristics of the particular customer markets or geographic markets they seek to serve or because of the competitive carrier's size.<sup>608</sup> As an initial matter, these commenters' claims are at odds with our impairment standard, which evaluates impairment based on a "reasonably efficient competitor," not based on the individualized circumstances of a particular requesting carrier.<sup>609</sup> Further, our impairment analysis "consider[s] 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."<sup>610</sup> As we found above, competitive switches can be used to serve both mass market and

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<sup>607</sup> *USTA II*, 359 F.3d at 563, 572, 581-82, 584; *USTA I*, 290 F.3d at 424-26. We disagree with the contention of American Public Communications Council *et al.* that we should exercise our "at a minimum" authority to preserve UNE-P for competitive LECs serving payphone service providers as a means of furthering competition among payphone providers and widespread deployment of payphones in furtherance of section 276 of the Act. *See, e.g.,* American Public Communications Council *et al.* Comments at 9-13; Letter from Jacob S. Farber, Counsel for American Public Communications Council *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338, Attach. at 9 (filed Dec. 7, 2004) (American Public Communications Council *et al.* Dec. 7, 2004 *Ex Parte* Letter). We believe that we can best, and most directly, address the payphone industry through our implementation of section 276, which enumerates specific actions for the Commission to take to further the goals it establishes. 47 U.S.C. § 276(b); *see also supra* para. 23.

<sup>608</sup> *See, e.g.,* Dialog Comments at 2-4 (alleging that competitive LECs are uniquely impaired when seeking to serve rural areas); SouthEast Comments at 3-5 (same); USA Telephone Comments at 3-4 (same); Pennsylvania Consumer Advocate Comments at 13 (same); Dialog Comments at 7-8 (alleging that competitive LECs are uniquely impaired when seeking to serve residential customers); Momentum Comments at 5-14 (same); Ohio Consumers' Council Comments at 12-18 (same); American Public Communications Council *et al.* Comments at 23-26 (alleging that competitive LECs are uniquely impaired when seeking to serve payphone service providers); WorldNet Comments (alleging that competitive LECs are uniquely impaired in Puerto Rico); SBA Comments at 5-7 (alleging that small competitive LECs would be particularly affected by the elimination of UNE-P); National ALEC Association Reply at 6 (same).

<sup>609</sup> *See supra* Part IV.A.

<sup>610</sup> *See supra* para. 24. This highlights a shortcoming in the Puerto Rico Telecommunications Regulatory Board's petition for waiver of the Commission's national finding of no impairment for enterprise switching. *See* Public Notice, *Wireline Competition Bureau Seeks Comment on Waiver Petition Filed by the Telecommunications Regulatory Board of Puerto Rico for Enterprise Market Switching Impairment*, DA 04-7 (Jan. 9, 2004). Specifically, the Board's petition for waiver with respect to enterprise switching failed to include *any* consideration of the revenues a competitor would be likely to earn, which might counterbalance any potential operational impairment experienced by carriers seeking to serve the enterprise market with competitive switches. *See generally* (continued....)

enterprise customers, and can be used to serve wide geographic areas.<sup>611</sup> Based on the current record, commenters have not adequately demonstrated that they cannot serve the particular customer or geographic markets at issue in conjunction with other markets in a manner that would make entry economic.<sup>612</sup> Moreover, the evidence of disincentives for competitive LECs to rely on competitive switches convinces us to exercise our section 251(d)(2) “at a minimum” authority and decline to *unbundle local circuit switching*.

223. Further, we conclude that transport costs faced by competitive LECs using competitive switches do not give rise to economic impairment.<sup>613</sup> Transport costs arise in arrangements that enable switches deployed by competitive LECs to serve a larger geographic area than switches deployed by the incumbent LEC, permitting competitors to achieve their own unique and competitive efficiencies by deploying a switch and aggregating traffic from dispersed locations to that switch.<sup>614</sup> In addition,

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Waiver Petition of the Telecommunications Regulatory Board of Puerto Rico for Enterprise Market Switching Impairment in Defined Puerto Rico Markets, CC Docket Nos. 01-338, 96-98, 98-147 (filed Dec. 30, 2003). Consequently, we dismiss the Puerto Rico Telecommunications Regulatory Board’s petition for waiver for failing to comply with the requirements for such petitions established in the *Triennial Review Order*. *Triennial Review Order*, 18 FCC Rcd at 17263, para. 458 (“However, where competitive LECs have the opportunity to earn revenues that outweigh the costs associated with entry, carriers are not impaired without unbundled access to local circuit switching for DS1 enterprise customers.”). Moreover, as we noted above, although we do not address our enterprise switching rules here, we believe that our analysis here with respect to mass market local circuit switching would be likely to apply equally to DS1 enterprise switching. *See supra* note 533.

<sup>611</sup> *See supra* para. 207. While the American Public Communications Council *et al.* claim that adding a UNE-L line serving a payphone service provider produces a negative margin in particular states, and thus would not be economic even using a competitive switch already serving more profitable customers, we note that the American Public Communications Council *et al.* incorrectly compared costs based on state-specific estimates taken from January 2003 BOC filings with average estimated revenues not necessarily related to the actual revenues carriers could earn in those states. *See American Public Communications Council et al. Dec. 7, 2004 Ex Parte Letter*, Attach. at 4-5; *American Public Communications Council et al. Reply* at 10-15. Further, we note that these commenters themselves concede that it is possible to serve payphone service providers using competitive switches in at least some markets. *American Public Communications Council et al. Comments* at 18. Thus, we conclude that these data do not support a finding of impairment with respect to any particular market.

<sup>612</sup> As one example, commenters claiming impairment in rural areas have not presented economic evidence demonstrating that it is uneconomic to serve all rural areas generally, or particular rural areas specifically, by deploying a switch in a more urban area and using that switch to serve both the urban and rural areas. As another example, commenters claiming impairment with respect to residential customers have not presented evidence demonstrating that it is uneconomic to use a competitive switch to serve both business customers and residential customers. In addition, we question the merits of the commenters’ claims in light of the inferences we are able to draw about potential deployment; the increased demand for switches in the absence of unbundling; the innovation of ever-cheaper packet switches; and the improvement in incumbent LEC hot cut processes.

<sup>613</sup> *See, e.g., PACE et al. Comments* at 71-77; *Ionary et al. Comments* at 4-6; *see also Triennial Review Order*, 18 FCC Rcd at 17279-80, paras. 480, 483 (citing transport to a remote switch as a possible source of impairment, but declining to accord dispositive weight to economic studies purporting to demonstrate as much (or to countervailing studies disputing this and other sources of economic impairment)).

<sup>614</sup> *BellSouth Comments* at 18-19 (“Knology, a CLEC that predominantly serves the residential market, uses long-haul transport facilities throughout the state of Georgia, and can ‘economically serve its customers in Georgia without access to unbundled switching from BellSouth, notwithstanding the costs of backhauling’”); *see also Qwest Comments* at 54; *Bellsouth Comments* at 20; *Verizon Comments* at 105-06.

competitive LECs may choose particular locations for their switches due to other advantages, such as locating their switches close to other competitors' switches, maximizing the ability to share costs and aggregate traffic, or close to transmission facilities deployed by other competitors, increasing the possibility of finding an alternative wholesale supply.<sup>615</sup> We conclude that a reasonably efficient carrier will seek to minimize its costs when determining switch location and that these costs therefore do not preclude economic entry. In addition, competitive LECs continue to enjoy unbundled access to DS0 and high-capacity loops, dedicated transport, and EELs, meaning that such competitors should have access, in many circumstances, to incumbent LEC facilities at cost-based rates to provide the necessary transport of traffic to their switches. Where competitive LECs do not have such access, there should be competitive alternatives or the ability to self-deploy facilities.<sup>616</sup> Consequently, while transport of traffic to competitive switches involves some additional costs beyond those incurred when using UNE-P, these costs largely are within the control of new entrants.

224. We also conclude that an absence of sufficient collocation space does not hinder competitive LECs' ability to deploy competitive switches to a degree that gives rise to operational impairment.<sup>617</sup> With respect to packet switches, the Commission found in the *Triennial Review Order* "that any collocation costs and delays incurred by requesting carriers to provide packet switched services do not rise to a level" of demonstrating impairment because such disadvantages "are likely outweighed by [competitive LECs'] advantage in relying solely on newer, more efficient technology."<sup>618</sup> Similarly, we note that a reasonably efficient competitor does not have to be collocated in every incumbent LEC central office in order to serve customers in that wire center, reducing the likelihood that lack of collocation space will truly result in impairment in the absence of unbundled switching.<sup>619</sup> Further, the Commission determined that the BOCs' collocation provisioning was sufficient to demonstrate section 271 checklist compliance for each relevant state.<sup>620</sup> Commenters have not shown that such performance has since become inadequate, nor cited systemic problems in collocation performance by other, non-BOC, incumbent LECs. Furthermore, while the Commission may evaluate impairment by making reasonable inferences from the facts in the record, it may not impose unbundling on the basis of purely speculative concerns.<sup>621</sup> We believe that any specific instances where there could be a lack of collocation

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<sup>615</sup> *Triennial Review Order*, 18 FCC Rcd at 17205, para. 367; see also *supra* para. 138.

<sup>616</sup> See *supra* Parts V, VI.

<sup>617</sup> See *Triennial Review Order*, 18 FCC Rcd at 17278, para. 477 (finding that "absence of sufficient collocation space in the incumbent LEC central office or offices might in some markets render competitive entry impossible and thus result in impairment"); see also *Supra* Comments at 16; *PACE et al.* Comments at 94.

<sup>618</sup> *Triennial Review Order*, 18 FCC Rcd at 17322, para. 539.

<sup>619</sup> As discussed above, competitive LECs are able to use competitive switches to serve customers in larger geographic areas than incumbent LECs, including customers located outside the wire center where the competitive switch is located. See *supra* para 207. Competitive LECs thus are able to avoid collocating in every central office because of their ability to serve customers in distant wire centers.

<sup>620</sup> See *Federal Communications Commission Authorizes Qwest to Provide Long Distance Service in Arizona; Bell Operating Companies Long Distance Application Process Concludes; Entire Country Authorized for "All Distance" Service*, News Release (Dec. 3, 2003).

<sup>621</sup> *Iowa Utilities Board*, 525 U.S. at 391-92 ("Section 251(d)(2) does not authorize the Commission to make isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives (continued....)

space in the incumbent LEC's central office can be dealt with adequately through the Commission's rules governing access to collocation, which is a more direct way of remedying any such problems.<sup>622</sup>

225. Finally, we note that there are many costs that all competitors in a market – incumbent LECs and competitive LECs alike – must incur and recover.<sup>623</sup> We again do not reach a national finding of impairment on the basis of such costs. Commenters cite a number of costs associated with using existing circuit switches to serve the mass market that “are simply disparities faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector.”<sup>624</sup>

#### D. Transition Plan

226. Because unbundled local circuit switching will no longer be made available pursuant to section 251(c)(3), we establish a transition plan to migrate the embedded base of unbundled local circuit switching used to serve mass market customers to an alternative service arrangement.<sup>625</sup> In particular, eliminating unbundled access to incumbent LEC switching on a flash cut basis could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors.<sup>626</sup>

227. We require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of this Order. This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to

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of the Act and giving some substance to the ‘necessary’ and ‘impair’ requirements.”); *see also, e.g., USTA II*, 359 F.3d at 570; *USTA I*, 290 F.3d at 425-26.

<sup>622</sup> *See, e.g.*, 47 C.F.R. § 51.323(k)(3) (requiring incumbent LECs to make available adjacent space collocation where physical collocation space is exhausted).

<sup>623</sup> *See, e.g.*, Qwest Reply at 76 n.216.

<sup>624</sup> *USTA I*, 290 F.3d at 426. Moreover, the competitive carrier cost-based arguments fail to take into consideration that “average unit costs are necessarily higher at the outset for any new entrant into virtually any business.” *USTA I*, 290 F.3d at 427. In the *Triennial Review Order*, the Commission found that the record was insufficient to support an impairment finding based on several theoretical sources of potential economic impairment, including costs associated with using existing circuit switches to serve the mass market, such as the purchase of additional analog equipment, costs to acquire additional collocation space, the purchase of additional cabling and power, as well as overhead and marketing costs. *Triennial Review Order*, 18 FCC Rcd at 17251, 17285-86, paras. 441, 485. Commenters in this proceeding cite a number of these sorts of costs. *See, e.g., ALTS et al. Comments* at 93; *PACE Coalition, et al. Comments* at 70, 75; *see also, e.g., ACN Reply* at 2 (citing the current financial climate as hindering its ability to obtain the financing necessary to convert to a UNE-L strategy).

<sup>625</sup> The *Triennial Review Order* left unresolved the issue of the appropriate number of DS0 lines that distinguishes mass market customers from enterprise market customers for unbundled local circuit switching. *See Triennial Review Order*, 18 FCC Rcd at 17293, para. 497. We need not resolve that issue here because, in this Order, we eliminate unbundled access to local circuit switching for the mass market, as well. The transition period we adopt here thus applies to all unbundled local circuit switching arrangements used to serve customers at less than the DS1 capacity level as of the effective date of this Order. The transition for local circuit switching for the DS1 enterprise market was established in the *Triennial Review Order*, 18 FCC Rcd at 17318, para. 532.

<sup>626</sup> *See Interim Order and NPRM*, 19 FCC Rcd at 16794, 16795-96, paras. 20, 24 (discussing need for transition to avoid harmful disruption in the telecommunications markets).

section 251(c)(3) except as otherwise specified in this Order.<sup>627</sup> The transition we adopt is based on the incumbent LECs' asserted ability to convert the embedded base of UNE-P customers to UNE-L on a timely basis while continuing to meet hot cut demand for new UNE-L customers. We believe it is appropriate to adopt a longer, twelve-month, transition period than was proposed in the *Interim Order and NPRM*.<sup>628</sup> We believe that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversions.<sup>629</sup> Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. By the end of the twelve month period, requesting carriers must transition the affected mass market local circuit switching UNEs to alternative facilities or arrangements.

228. We do, however, adopt the *Interim Order and NPRM*'s proposal that unbundled access to local circuit switching during the transition period be priced at the higher of (1) the rate at which the requesting carrier leased UNE-P 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 UNE-P plus one dollar.<sup>630</sup> We believe that the moderate price increases help ensure an orderly transition by

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<sup>627</sup> The requesting carrier shall continue to have access to shared transport, signaling, and call-related databases as provided in the *Triennial Review Order* for those arrangements relying on unbundled local circuit switching that have not yet been converted to alternative arrangements. *Triennial Review Order*, 18 FCC Rcd at 17319-20, 17323-34, paras. 533-34, 542-60. We note that TSI's petition for reconsideration of the *Triennial Review Order* that requests that the Commission find signaling elements to be competitively available either through third party providers or through self-provisioning and that competitive LECs do not need mandatory access to signaling was not timely filed. TSI Telecommunications Services, Inc. Petition for Reconsideration, CC Docket No. 01-338 (filed Oct. 3, 2003). In any event, even if we were to consider TSI's petition, because we otherwise generally eliminate unbundled switching, and with it unbundled access to signaling, we dismiss that petition as moot.

<sup>628</sup> See *Interim Order and NPRM*, 19 FCC Rcd at 16799, para. 29 (proposing a six-month period).

<sup>629</sup> See, e.g., Letter from James Bradford Ramsay, General Counsel, NARUC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 at 3 (filed Dec. 8, 2004) (stating that the transition plan must provide time for competitive LECs "to revise their business plans and decide to deploy any needed infrastructure, generate needed capital for economically sound deployments, negotiate alternative arrangements, or withdraw from particular markets"); Letter from Ruth Milkman, Counsel for MCI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 at 1-2 (filed Dec. 7, 2004) (asserting that any transition for mass market local circuit switching needs to accommodate the possibility that some competitive LECs will need to partner with other competitive LECs that already "have in place the equipment and facilities necessary to serve customers via UNE-L"); New York Department of Public Service Comments at 12-13 (proposing that the transition proposed in the *Interim NPRM* be lengthened by an additional six months due in part to the need for additional time for carriers and consumers to adapt to the new circumstances); *supra* para. 215 (discussing evidence that some competing carriers may seek alternative service arrangements rather than relying on UNE-L); see also Michigan-Based CLEC Coalition Comments at 8 (proposing a twelve month transition plan for mass market local circuit switching).

<sup>630</sup> *Interim Order and NPRM*, 19 FCC Rcd at 16797-99, para. 29. To the extent that a state public utility commission order raises some rates and lowers others for the aggregate combination of loops, shared transport, and switching (i.e., UNE-P), the incumbent LEC may adopt either all or none of these UNE platform rate changes. This choice by the incumbent LEC shall not diminish the effectiveness of the state commission order with respect to UNE loop rates (when not ordered as part of the UNE platform). UNE-P arrangements no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes.

mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated for these network elements, while at the same time, these price increases, and the limited duration of the transition, provide some protection of the interests of incumbent LECs in those situations where unbundling is not required.<sup>631</sup> We expect incumbent LECs to meet hot cut demand, and to work to prevent unnecessary customer disruption. To the extent that specific problems arise, carriers are free to petition for waiver of this requirement with respect to their particular circumstances.<sup>632</sup> Of course, the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period. The transition mechanism adopted today also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of UNE-P or for a transition to UNE-L.<sup>633</sup>

## VIII. REMAINING ISSUES

### A. Conversions

229. We determined in the *Triennial Review Order* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations, provided that the competitive LEC seeking to convert such services satisfies any applicable eligibility criteria.<sup>634</sup> The *USTA II* court upheld this determination.<sup>635</sup> The BOCs have nevertheless urged us in this proceeding to prohibit conversions entirely.<sup>636</sup> Given our conclusion above that a carrier's current use of special access does not demonstrate a lack of impairment,<sup>637</sup> we conclude that a bar on conversions would be inappropriate.

230. We decline to adopt an across-the-board prohibition on conversions for three reasons. First, the scope of the purported problem that a conversion bar is designed to remedy is far smaller than several commenters suggest. The BOCs argue that unless the conversion rule is repealed, a tremendous number of existing special access channel terminations will be converted to UNEs by interexchange carriers.<sup>638</sup> But the rules we adopt today already prevent the use of UNEs – and therefore also prevent the conversion

<sup>631</sup> See *id.* at 16799, para. 30.

<sup>632</sup> 47 C.F.R. § 1.3.

<sup>633</sup> See, e.g., MCI, *MCI and Qwest Reach Commercial Agreement for Wholesale Services*, Press Release (May 31, 2004), available at <http://global.mci.com/news/news2.xml?newsid=10710&mode=long&lang=en&width=530&langlinks=off>; SBC, *SBC, Sage Telecom Reach Wholesale Telecom Services Agreement*, Press Release (Apr. 3, 2004), available at <http://www.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=21080>.

<sup>634</sup> *Triennial Review Order*, 18 FCC Rcd at 17348-50, paras. 585-89.

<sup>635</sup> *USTA II*, 359 F.3d at 592-93.

<sup>636</sup> See BellSouth Comments at 37-38; Qwest Comments at 71-76; SBC Comments at 93-94; Verizon Comments at 75-77.

<sup>637</sup> See *supra* Part IV.D.

<sup>638</sup> See, e.g., Qwest Dec. 8, 2004 Newman/Crain *Ex Parte* Letter at 2 (describing the efforts of one interexchange carrier in Qwest's region to convert special access channel terminations to UNEs); BellSouth Dec. 7, 2004 Special Access *Ex Parte* Letter at 5 (arguing that continuing to permit conversions "would create the possibility of a massive wealth transfer between carriers through a shift [from special access circuits] to unbundled facilities").

of special access circuits to UNEs – where carriers would use them exclusively to provide long distance service or mobile wireless service.<sup>639</sup> It is clear from the record that a significant percentage of the special access channel terminations that the BOCs sell to carriers are provided to interexchange carriers<sup>640</sup> and wireless carriers,<sup>641</sup> and are therefore largely shielded already from potential conversion to UNEs.<sup>642</sup> By contrast, the record is far from clear as to how many of the special access channel terminations that the BOCs sell to carriers are susceptible to conversion to high-capacity loops. For example, the BOCs explain that the “channel terminations” category of special access circuits includes both EEL equivalents and loop equivalents, and in some cases entrance facility equivalents as well.<sup>643</sup> Without greater detail about what types of circuits the BOCs are selling to interexchange carriers and competitive LECs, we cannot conclude that additional protections against conversions are necessary.<sup>644</sup>

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<sup>639</sup> See *supra* Part IV.B.

<sup>640</sup> The BOCs indicate that 72.9% of all DS1 channel terminations that they sell to wireline carriers are sold to AT&T, MCI, and Sprint. See BOC Dec. 13, 2004 *Ex Parte* Letter, Attach. 1, at 7; see also BellSouth Dec. 7, 2004 Special Access *Ex Parte* Letter, Confidential Appendix 2; Qwest Dec. 8, 2004 Newman/Crain *Ex Parte* Letter, Attach.; Letter from Gary L. Phillips, General Attorney & Assistant General Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, Attach. (filed Dec. 7, 2004); Verizon Verses/Lataille/Jordan/Reney Decl., Confidential Exh. 10A (all providing comparable data). As for DS3 channel terminations, 65.5% of all circuits sold by the BOCs to wireline carriers are sold to AT&T, MCI, and Sprint. See BOC Dec. 13, 2004 *Ex Parte* Letter, Attach. 2, at 4; see also BellSouth Dec. 7, 2004 Special Access *Ex Parte* Letter, Confidential Appendix 2; Qwest Dec. 8, 2004 Newman/Crain *Ex Parte* Letter, Attach.; Letter from Gary L. Phillips, General Attorney & Assistant General Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, Attach. (filed Dec. 8, 2004); Verizon Verses/Lataille/Jordan/Reney Decl., Confidential Exh. 10C (all providing comparable data).

<sup>641</sup> The BOCs indicate that between 7.4% and 22% of all DS1 channel terminations that they sell to carriers are sold to wireless carriers. See BellSouth Dec. 7, 2004 Special Access *Ex Parte* Letter, Confidential Appendix 2; Qwest Dec. 8, 2004 Newman/Crain *Ex Parte* Letter, Attach.; Letter from Gary L. Phillips, General Attorney & Assistant General Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313 at 1 (filed Dec. 10, 2004) (SBC Dec. 10, 2004 Phillips *Ex Parte* Letter); Verizon Verses/Lataille/Jordan/Reney Decl., Confidential Exh. 10A. For DS3 channel terminations, between 6.9% and 15% of all circuits sold by the BOCs to carriers are sold to wireless carriers. See BellSouth Dec. 7, 2004 Special Access *Ex Parte* Letter, Confidential Appendix 2; Qwest Dec. 8, 2004 Newman/Crain *Ex Parte* Letter, Attach.; SBC Dec. 10, 2004 Phillips *Ex Parte* Letter at 1; Verizon Verses/Lataille/Jordan/Reney Decl., Confidential Exh. 10C.

<sup>642</sup> Our rules also prevent conversions to UNEs for which we find no impairment, such as entrance facilities. See *supra* paras. 136-41.

<sup>643</sup> BellSouth included entrance facilities in its channel termination figures; Verizon included them in its DS1 figures but was able to exclude entrance facilities from its DS3 figures. See BOC Dec. 13, 2004 *Ex Parte* Letter, Attach. 1, at 7.

<sup>644</sup> We also decline to extend our EEL eligibility criteria to stand-alone high-capacity loops, as Verizon and SBC requested. See Verizon Comments at 78-79; SBC Comments at 97-98. The *USTA II* court affirmed our eligibility criteria, and we therefore are under no obligation to make any changes to them at this time. *USTA II*, 359 F.3d at 592-93. In the *Triennial Review Order*, we declined to extend the EEL eligibility criteria to stand-alone loops or other network elements, finding that the record did not indicate the same concern about gaming the Commission’s rules that EELs presented. *Triennial Review Order*, 18 FCC Rcd at 17351-52, para. 592. We reach the same conclusion here, as the record again does not convince us that high-capacity UNE loops are susceptible to misuse by interexchange carriers seeking to avoid special access charges. See, e.g., Letter from Andrew D. Lipman, Patrick J. Donovan, and Jeffrey R. Strenkowski, Counsel for New Edge Networks, Inc. to Marlene H. Dortch, Secretary, FCC, (continued....)

231. Second, a prohibition on conversions would be inconsistent with our determination today that the availability of tariffed incumbent LEC services does not foreclose access to UNEs. As we have explained, we do not prohibit access to UNEs where tariffed incumbent LEC services are available, due to concerns about the administrability of such a prohibition and the risk of abuse by incumbent LECs, and we have declined to find that current use of special access indicates a carrier's lack of impairment.<sup>645</sup> The BOCs' arguments against conversions are essentially the same as their arguments for finding non-impairment wherever special access facilities are available; neither the BOCs nor any other commenter has offered a compelling reason why we should prohibit conversions even after finding that the availability of special access services does not conclusively demonstrate non-impairment.<sup>646</sup> At the same time, competitive LECs do provide evidence that their use of tariffed special access services does not necessarily indicate that they are not impaired without access to UNEs. For example, competitive LECs demonstrate that they often must purchase special access circuits because they encountered difficulties in purchasing the circuits as UNEs.<sup>647</sup> In those cases, the competitive LECs accept special access pricing in order to provide prompt service to their customers, then convert those circuits to UNEs as soon as possible.<sup>648</sup> Competitive LECs also explain that they may purchase special access services as part of a

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WC Docket No. 04-313 at 3 (filed Dec. 7, 2004) (explaining that interexchange carriers typically use EELs or their special access equivalents, while stand-alone loops are typically purchased by competitive LECs). Moreover, interexchange carriers commonly order stand-alone high-capacity loops and attach them to transport that they have ordered through special access. This scenario is already subject to our EELs eligibility criteria. *Triennial Review Order*, 18 FCC Rcd at 17346, para. 583. We reiterate that we will continue to monitor the application of our eligibility criteria and will revisit our decision to limit the criteria to high-capacity EELs "[s]hould there become an apparent need in the future . . . to guard against [improper] access to other parts of the network." *Id.* at 17351-52, para. 592.

<sup>645</sup> See *supra* Part IV.D.

<sup>646</sup> The BOCs contend that we should prohibit conversions even if we do not make a general finding of non-impairment where tariffed alternatives are available. See, e.g., BellSouth Comments at 38-39 n.140 (arguing that the potential for incumbent LEC abuse is inapplicable where a competitive LEC is currently using special access services). But, as we explain below, this argument unjustifiably assumes that a competitor currently using special access services has voluntarily chosen to forgo UNEs. In fact, the record shows that many competitive LECs regularly purchase special access services only because incumbent LEC policies and practices have restricted their access to UNEs. See *supra* para. 64; *infra* note 648.

<sup>647</sup> Mpower, for example, asserts that the only reason it buys special access circuits, rather than UNEs, from Verizon is because Verizon adds an "exorbitant" nonrecurring charge of \$1,000 to UNE loop orders for mid-span repeater installation. Mpower Dec. 8, 2004 *Ex Parte* Letter at 1. Similarly, XO, Xspedius, and other competitive LECs describe problems with the BOCs denying access to UNEs on the grounds that no facilities are available. XO Dec. 7, 2004 *Ex Parte* Letter at 2; Loop and Transport Coalition Comments at 56; Xspedius Falvey Decl. at paras. 37-38. The Loop and Transport Coalition asserts that competitive LECs are sometimes forced to order special access services because incumbent LECs refuse to combine UNEs or permit commingling of UNEs with tariffed services. Loop and Transport Coalition Comments at 56-59. In response to competitive LECs' allegations about difficulties with the UNE provisioning process, BellSouth notes that the Commission approved its provisioning policies and procedures in the process of granting BellSouth in-region, long distance authority under section 271. BellSouth Dec. 7, 2004 Special Access *Ex Parte* Letter at 4. However, as we describe above, the difficulties competitive LECs describe are only one of several reasons why we decline to prohibit conversions. We therefore find that the Commission's grants of section 271 applications do not justify reaching a different conclusion.

<sup>648</sup> See, e.g., XO Dec. 7, 2004 *Ex Parte* Letter at 2 ("XO has purchased . . . Special Access circuits when compelled to do so by the ILECs, and even then intend to convert them to UNEs as early as possible."); Mpower Dec. 8, 2004 *Ex Parte* Letter at 2 (asserting that because Verizon charges "confiscatory" prices for routine network modifications (continued...))

broader contract, which enables them to avoid having to coordinate connectivity through the access service request and local service request processes. But that option is available only because the availability of UNEs gives the competitive LECs leverage to negotiate lower prices for tariffed services.<sup>649</sup> In short, the record does not establish a lack of impairment where competitive LECs are using special access facilities.<sup>650</sup> Under these circumstances, as the *USTA II* court recognized, imposition of a bar on conversions would give rise to “anomalies, as CLECs hitherto relying on special access might be barred from access to EELs as unbundled elements, while a similarly situated CLEC that had just entered the market would not be barred.”<sup>651</sup>

232. Finally, we decline to prohibit conversions because of the line-drawing and administrative difficulties such a prohibition would create. A “no conversions” rule would require us to evaluate the relationships between and among a series of distinct transactions between a competitor and an incumbent LEC. For example, a carrier seeking to evade such a ban could argue that its order of a UNE did not constitute a conversion when it was not coincident with cancellation of the associated special access circuit, or when the UNE ordered and the tariffed offering surrendered were sufficiently distinct in functionality. AT&T points out that a rule prohibiting conversions would create numerous disputes over whether a customer contract reflects a new order or a renewal.<sup>652</sup> Qwest implicitly acknowledges the problems inherent in administering a conversion ban, advocating a carrier-specific approach to disallowing conversions, and seeking complementary rules that would prohibit the disconnection of a special access circuit and reactivation of a circuit which duplicates its function within 90 days.<sup>653</sup> Given the logistical challenges of creating a regime where specific carriers are entitled to particular circuits for specific periods of time, we find these regulations antithetical to our revised framework and too burdensome to adopt.

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before provisioning DS1 UNE loops, Mpower and other competitive LECs “have no choice but to order the facilities as special access circuits and then convert to UNEs”); *see also* Loop and Transport Coalition Comments at 55-56 (arguing that short-term reliance on special access services by competitive LECs cannot be said to demonstrate “robust competition”).

<sup>649</sup> *See, e.g.*, Time Warner Telecom Comments at 15-16. Time Warner Telecom explains that although it does not purchase UNEs, it nonetheless relies on UNE availability as leverage when negotiating with the BOCs. In other words, competitive LECs such as Time Warner Telecom can obtain more favorable rates from BOCs for tariffed services because UNEs are available; these competitive LECs insist that without UNEs, the BOCs will have no incentive to offer tariffed wholesale services at rates that will enable competitive LECs to compete. *Id.*; *see also* Loop and Transport Coalition Comments at 52 (asserting that the availability of UNEs constitutes “the only meaningful source of price competition for special access in most areas”).

<sup>650</sup> For the reasons we discuss here, we disagree with the BOCs’ assertion that our rule permitting conversions amounts to nothing more than a transfer of wealth from incumbent LECs to competitive LECs. *See, e.g.*, Verizon Comments at 78; BellSouth Dec. 7, 2004 Special Access *Ex Parte* Letter at 5. On the contrary, permitting conversions where requesting carriers are impaired and, thus, legally entitled to UNEs, ensures that competitive LECs are able to obtain network elements at prices that allow them to compete, as envisioned by the 1996 Act.

<sup>651</sup> *USTA II*, 359 F.3d at 593.

<sup>652</sup> AT&T Comments at 141.

<sup>653</sup> Qwest Reply at 66-67. Qwest would also bar a competitor purchasing a special access circuit from obtaining a UNE along a parallel circuit. *Id.*

## B. Implementation of Unbundling Determinations

233. We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act.<sup>654</sup> Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.<sup>655</sup> We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.<sup>656</sup> We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

234. We recognize that our rules governing access to dedicated transport and high-capacity loops evaluate impairment based upon objective and readily obtainable facts, such as the number of business lines or the number of facilities-based competitors in a particular market.<sup>657</sup> We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3).<sup>658</sup> Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements.<sup>659</sup> In other words, the incumbent LEC must provision the UNE and

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<sup>654</sup> 47 U.S.C. § 252.

<sup>655</sup> *Id.*

<sup>656</sup> 47 U.S.C. § 251(c)(1); 47 U.S.C. § 252(b)(5).

<sup>657</sup> *See supra* Parts V.C.2, VI.C.2.

<sup>658</sup> As in the past, we do not believe it is necessary to address the precise form that such a certification must take, but we note that a letter sent to the incumbent LEC by a requesting carrier is a practical method of certification. *See Triennial Review Order*, 18 FCC Rcd at 17369, para. 624; *Supplemental Order Clarification*, 15 FCC Rcd at 9602-03, para. 29. Although we again decline to adopt specific record-keeping requirements, we expect that requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification. *See Triennial Review Order*, 18 FCC Rcd at 17370, para. 629; *Supplemental Order Clarification*, 15 FCC Rcd at 9604, para. 32.

<sup>659</sup> We do not adopt auditing rules for the self-certifications relating to our impairment rules for dedicated transport and high-capacity loops. We decline to adopt an auditing requirement because, in contrast to EELs self-certifications, the requesting carrier seeking access to the UNE certifies only to the best of its knowledge, and is unlikely to have in its possession all information necessary to evaluate whether the network element meets the factual impairment criteria in our rules. However, these rules do not supersede any audit rights included in any interconnection agreements or other commercial arrangements. *See, e.g., Supplemental Order Clarification*, 15 FCC Rcd at 9604, para. 32 (noting that some interconnection agreements contain audit rights). Further, we retain our existing certification and auditing rules governing access to EELs. *See* 47 C.F.R. § 51.318.

subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.<sup>660</sup>

## IX. PROCEDURAL MATTERS

### A. Effective Date of Rules

235. Given the need for prompt action, the requirements set forth here shall take effect on March 11, 2005, rather than 30 days after publication in the Federal Register. Commission rules permit us to render an order effective sooner than 30 days after publication in the Federal Register where good cause exists.<sup>661</sup> Similarly, section 553(d) of the Administrative Procedures Act (APA)<sup>662</sup> permits any agency to make a rule effective less than 30 days after its publication as “provided by the agency for good cause found and published with the rule.”<sup>663</sup> Consistent with our rules and the APA, we find in this instance that there exists good cause to make this Order effective on March 11, 2005.

236. We find such good cause exists in this instance because making the rules effective on March 11 will serve the public interest by preventing unnecessary disruption to the marketplace. In adopting the interim unbundling requirements, which the rules we adopt today supplant, the Commission provided that they would remain in effect only until the earlier of (1) six months after the effective date of the *Interim Order and NPRM*, or (2) the effective date of the rules adopted in this order.<sup>664</sup> The Commission also provided for transitional requirements to take effect for the six months following expiration of the interim rules.<sup>665</sup> We find that it would be contrary to the public interest and unnecessarily disruptive to the market to permit a gap between the expiration of the interim unbundling requirements and the effective date of the rules that we adopt today, during which the previously adopted transitional requirements would be effective for a short period of time. The Commission has exercised its section 553(d) authority based on considerations such as the need to avoid regulatory confusion and industry disruption arising from the delayed applicability of newly adopted rules.<sup>666</sup> These considerations are applicable here, and counsel implementation, by March 11, 2005, of the rules adopted herein.

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<sup>660</sup> Of course, this mechanism for addressing incumbent LEC challenges to self-certifications is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements. 47 U.S.C. § 252(a)(1).

<sup>661</sup> See 47 C.F.R. §§ 1.103(a), 1.427(b).

<sup>662</sup> 5 U.S.C. § 500 *et seq.*

<sup>663</sup> 5 U.S.C. § 553(d)(3).

<sup>664</sup> See *Interim Order and NPRM*, 19 FCC Rcd 16783, 16794, para. 21.

<sup>665</sup> See *id.* at 16797-98, para. 29.

<sup>666</sup> See *Omnipoint Corp v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996).

## B. Final Regulatory Flexibility Analysis

237. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The FRFA is set forth in Appendix C.

## C. Paperwork Reduction Act Analysis

238. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

## X. ORDERING CLAUSES

239. Accordingly, IT IS ORDERED that pursuant to Sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 303(r) and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, the *Order on Remand* in CC Docket No. 01-338 and WC Docket No. 04-313 IS ADOPTED, and that Part 51 of the Commission's Rules, 47 C.F.R. Part 51, is amended as set forth in Appendix B. The requirements of this Order shall become effective on March 11, 2005, pursuant to 5 U.S.C. § 553(d)(3).

240. IT IS FURTHER ORDERED, pursuant to Sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 303(r) and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Emergency Joint Petition for Stay filed in CC Docket Nos. 01-338, 96-98 and 98-147 by the Coalition for High-Speed Online Internet Competition and Enterprise on August 27, 2003; the Joint Petition for Stay filed in CC Docket Nos. 01-338, 96-98 and 98-147 by BellSouth Corporation, Qwest Communications International, Inc., SBC Communications Inc., the United States Telecom Association, and the Verizon telephone companies on September 4, 2003; the Emergency Petition for Stay filed in CC Docket Nos. 01-338, 96-98 and 98-147 by Sage Telecom, Inc. on September 22, 2003; the Emergency Stay Petition filed in CC Docket Nos. 01-338, 96-98 and 98-147 by DCSI Corporation *et al.* on September 22, 2003; the Emergency Petition for Stay filed in CC Docket Nos. 01-338, 96-98 and 98-147 by NuVox Communications, Inc. on September 25, 2003; and the Petition for Emergency Stay filed in CC Docket Nos. 01-338, 96-98 and 98-147 by Allegiance Telecom, Inc., Cbeyond Communications, LLC, El Paso Global Networks, Focal Communications Corporation, McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp. and TDS Metrocom, LLC on September 26, 2003 ARE DISMISSED AS MOOT.

241. IT IS FURTHER ORDERED, pursuant to Sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 303(r) and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Petition for Clarification or Reconsideration filed in CC Docket Nos. 01-338, 96-98 and 98-147 by AT&T Wireless on October 2, 2003; the Petition for Reconsideration or Clarification filed in CC Docket Nos. 01-338, 96-98 and 98-147 by the Cellular Telecommunications & Internet Association on October 2, 2003; the Petition for Reconsideration or Clarification filed in CC Docket Nos. 01-338, 96-98 and 98-147 by Nextel Communications, Inc. on October 2, 2003; and the Petition for Reconsideration filed in CC Docket Nos. 01-338, 96-98 and 98-147 by T-Mobile USA, Inc. on October 2, 2003 ARE DISMISSED AS MOOT.

242. IT IS FURTHER ORDERED, pursuant to Sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 303(r) and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Petition for Reconsideration filed in CC Docket Nos. 01-338, 96-98 and 98-147 by the National Association of State Utility Consumer Advocates (NASUCA) on October 2, 2003 IS DISMISSED AS MOOT.

243. IT IS FURTHER ORDERED, pursuant to Sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 303(r) and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Petition for Clarification and/or Partial Reconsideration filed in CC Docket Nos. 01-338, 96-98 and 98-147 by BellSouth Corporation on October 2, 2003 IS DISMISSED AS MOOT to the extent indicated herein.

244. IT IS FURTHER ORDERED, pursuant to Sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 303(r) and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Petition for Reconsideration filed in CC Docket No. 01-338 by TSI Telecommunication Services, Inc. on October 3, 2003 IS DISMISSED AS MOOT.

245. IT IS FURTHER ORDERED, pursuant to Sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 303(r) and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Petition for Waiver filed in CC Docket Nos. 01-338, 96-98 and 98-147 by the Telecommunications Regulatory Board of Puerto Rico on December 30, 2003 IS DISMISSED.

246. IT IS FURTHER ORDERED, pursuant to Sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 303(r) and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Petition for Waiver filed in CC Docket Nos. 01-338, 96-98 and 98-147 by BellSouth Corporation on February 11, 2004 IS DISMISSED AS MOOT.

247. IT IS FURTHER ORDERED, pursuant to Sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 303(r) and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Petition for Rulemaking filed by Qwest Communications International, Inc. on March 29, 2004 IS DISMISSED AS MOOT.

248. IT IS FURTHER ORDERED, pursuant to Sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 303(r) and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Petition for Emergency Clarification and/or Errata filed in WC Docket No. 04-313 and CC Docket No. 01-338 by the Association for Local Telecommunications Services, Alpheus Communications, LP, Cbeyond Communications, LLC, Conversent Communications, LLC, GlobalCom, Inc., Mpower Communications Corp., New Edge Networks, Inc., OneEighty Communications, Inc., TDS Metrocom, LLC on August 27, 2004 IS DISMISSED AS MOOT.

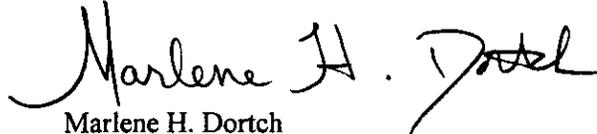
249. IT IS FURTHER ORDERED, pursuant to Sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 303(r) and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that the Emergency Petition for Expedited Determination that Competitive Local Exchange Carriers are Impaired Without

DS1 UNE Loops filed in WC Docket No. 04-313 and CC Docket No. 01-338 by XO Communications, Inc. on September 29, 2004 IS DENIED.

250. IT IS FURTHER ORDERED, pursuant to Sections 1, 3, 4, 201-205, 251, 252, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 303(r) and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, that as of the effective date of this Order, the interim period described in the *Interim Order and NPRM*, WC Docket No. 01-338 and CC Docket No. 01-338, and all requirements associated with that period, shall terminate and be superseded by the transition periods described in this Order.

251. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Order on Remand*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary

## APPENDIX A – LIST OF COMMENTERS

<u>Commenter</u>	<u>Abbreviation</u>
Access One Incorporated	Access One
ACN Communication Services, Inc.	ACN
ACS of Anchorage, Inc.	ACS
Ad Hoc Telecommunications Manufacturing Coalition	Ad Hoc Telecommunications Manufacturing Coalition
Alabama Public Service Commission	Alabama Commission
Alpheus Communications, L.P.	Alpheus
American Public Communications Council <i>et al.</i>	American Public Communications Council <i>et al.</i>
Arizona Corporation Commission	Arizona Commission
Association for Local Telecommunications Services Cbeyond Communications Blackfoot Communications, Inc. U.S. Telepacific Corp. d/b/a Telepacific Communications Eschelon Telecom, Inc. Choice One Communications Inc. Biddeford Internet Corporation d/b/a Great Works Internet Pac-West Telecom, Inc. US LEC Corp. Lightship Telecom Globalcom, Inc. Megagate Broadband, Inc. Broadriver Communications Corporation Network Telephone Corporation Supra Telecommunications and Information Systems, Inc. Cavalier Telephone, LLC New Edge Network, Inc. Conversent Communications, LLC FDN Communications segTEL, Inc.	ALTS <i>et al.</i>
AT&T Corp.	AT&T
ATX Communications, Inc. and Bluevista Phone Service	ATX and Bluevista
ATX Communications, Inc. Blackfoot Communications, Inc. Freedom Ring Communications, L.L.C. (d/b/a Bayring Communications) CTC Communications Corp. Focal Communications Corporation GlobalCom, Inc. Lightship Telecom, Inc.	ATX, Blackfoot, <i>et al.</i>

<u>Commenter</u>	<u>Abbreviation</u>
MPower Communications Corp., Ntelos, Inc. OneEighty Communications, Inc. RCN Telecom Services, Inc. TDS Metrocom, LLC	
BellSouth Corporation	BellSouth
California Public Utilities Commission	California Commission
CIENA Corporation	CIENA
CompTel/ASCENT Alliance	CompTel/ASCENT
Covad Communications Company	Covad
D.C. Public Service Commission	D.C. Public Service Commission
Dialog Telecommunications, Inc.	Dialog
Digital Telecommunications Inc.	Digital Telecommunications
EarthLink, Inc.	Earthlink
General Communications, Inc.	GCI
Hawaii Public Utilities Commission	Hawaii Public Utilities Commission
Integra Telecom, Inc.	Integra
Ionary Consulting Cat Communications Int'l Brahmacom	Ionary <i>et al.</i>
Iowa Utilities Board	Iowa Utilities Board
Kansas Corporation Commission	Kansas Commission
Loop and Transport CLEC Coalition Advanced Telecom, Inc. Birch Telecom, Inc. Broadview Networks, Inc. Eschelon Telecom, Inc. Grande Communications, Inc. KMC Telecom Holdings, Inc. NuVox Communications SNiP LiNK, LLC Talk America Inc. Xspedius Communications LLC XO Communications Inc.	Loop and Transport Coalition
MCI, Inc.	MCI
McLeodUSA Telecommunications Services, Inc.	McLeod
Michigan-Based CLEC Coalition	Michigan-Based CLEC Coalition
Michigan Public Service Commission	Michigan Public Service Commission
Minnesota Public Utilities Commission	Minnesota Public Utilities Commission
Missouri Public Service Commission	Missouri Public Service

<u>Commenter</u>	<u>Abbreviation</u>
	Commission
Montana Public Service Commission	Montana Public Service Commission
Mountain Telecommunications Inc.	Mountain Telecommunications
Momentum Telecom, Inc.	Momentum
National ALEC Association	National ALEC Association
National Association of State Utility Consumer Advocates	NASUCA
National Association of Regulatory Utility Commissioners	NARUC
Nebraska Utilities Commission	Nebraska Utilities Commission
New Jersey Board of Utilities	New Jersey Board of Utilities
New Jersey Division of the Ratepayer Advocate	New Jersey Ratepayer Advocate
New Mexico Public Regulation Commission	New Mexico Public Regulation Commission
New York State Department of Public Service	New York DPS
North Carolina Utilities Commission	North Carolina Utilities Commission
NTS Communications, Inc.	NTS
NuVox, Inc.	NuVox
Office of the Ohio Consumer's Counsel	Ohio Consumer's Counsel
Ohio Public Utilities Commission	Ohio Public Utilities Commission
Oklahoma Corporation Commission	Oklahoma Corporation Commission
Oregon Public Utility Commission	Oregon Public Utility Commission
The PACE Coalition Broadview Networks Grande Communications Talk America	PACE <i>et al.</i>
PAETEC Communications, Inc.	PAETEC
Pacific LightNet	Pacific LightNet
Pennsylvania Office of the Consumer Advocate	Pennsylvania Consumer Advocate
Pennsylvania Public Utilities Commission	Pennsylvania Public Utilities Commission
Public Service Commission of Maryland	Maryland Commission
Public Service Commission of West Virginia	Public Service Commission of West Virginia
Public Service Commission of Wisconsin	Public Service Commission of Wisconsin
Qwest Communications International Inc.	Qwest
SAFE-T Joint Commenters	SAFE-T Joint Commenters

<u>Commenter</u>	<u>Abbreviation</u>
<i>SBC Communications Inc.</i>	SBC
Small, Independent Competitive Local Exchange Carriers	Small, Independent Competitive Local Exchange Carriers
SouthEast Telephone, Inc.,	SouthEast
Sprint Corporation	Sprint
Stephen D. Barnes	Stephen D. Barnes
Supra Telecommunications and Information Systems, Inc.	Supra
Telescope Communications, Inc.	Telescope
Tennessee Regulatory Authority	Tennessee Regulatory Authority
Texas Office of the Public Utility Counsel Consumer Federation of America	Texas Office of Public Utility Council <i>et al.</i>
Texas Public Utility Commission	Texas Public Utility Commission
Time Warner Telecom	Time Warner Telecom
T-Mobile USA, Inc.	T-Mobile
U.S. Small Business Administration, Office of Advocacy	SBA
United States Telecom Association	USTA
United System Access Telecom, Inc., d/b/a USA Telephone	USA Telephone
Utah Committee of Consumer Services	Utah Committee of Consumer Services
Utah Division of Public Utilities	Utah Division of Public Utilities
Utah Public Service Commission	Utah Public Service Commission
Verizon Telephone Companies	Verizon
Vermont Department of Public Service	Vermont Department of Public Service
William R. Meyer	William R. Meyer
WorldNet Telecommunications	WorldNet

<b>Reply Commenters</b>	<b>Abbreviation</b>
ACN Communications Services, Inc	ACN
ACS of Alaska ACS of Anchorage ACS of Fairbanks	ACS
Alpheus Communications, L.P.	Alpheus
American Public Communication Counsel <i>et al.</i>	American Public Communication Counsel <i>et al.</i>
Association for Local Telecommunications Services Cbeyond Communications Blackfoot communications, Inc. U.S. Telepacific Corp. (d/b/a Great Works Internet) Pac-West Telecomm, Inc. US LEC Corp. Lightship Telecom Globalcom, Inc. Megagate Broadband, Inc. Broadriver Communication Corporation Network Telephone Corporation Supra Telecommunications and Information Systems, Inc. Cavalier Telephone, LLC New Edge Network, Inc. Conversent Communications, LLC FDN Communications segTEL, Inc.	ALTS <i>et al.</i>
AT&T Corp.	AT&T
ATX Communications Freedom Ring Communications L.L.C. (d/b/a BayRing Communications) CTC Communications Corp. Focal Communications Corporation Globalcom, Inc. MPower Communications Corp. NTELOS, Inc. RCN Telecom Services, Inc. TDS Metrocom, LLC	ATX, BayRing, <i>et al.</i>
BellSouth Corporation	BellSouth
Cbeyond Communications, LLC	Cbeyond
CIENA Communications	CIENA
Conversent Communications, LLC	Conversent
Covad Communications	Covad
Dialog Telecommunications	Dialog
Gateway Telecom (d/b/a Stratuswave Communications)	Gateway Telecom
General Communications, Inc	GCI
Global Internetworking, Inc.	Global Internetworking
Integra Telecom, Inc.	Integra

<u>Reply Commenters</u>	<u>Abbreviation</u>
ITC^DeltaCom Communications, Inc	ITC^DeltaCom
Kentucky Public Service Commission	Kentucky Public Service Commission
Loop and Transport CLEC Coalition Advanced Telecom, Inc. Birch Telecom, Inc. Broadview Networks, Inc. Eschelon Telecom, Inc. Grande Communications, Inc. KMC Telecom Holdings, Inc. NuVox Communications SNiP LiNK, LLC Talk America Inc. Xspedius Communications LLC XO Communications Inc.	Loop and Transport Coalition
MCI, Inc.	MCI
McLeodUSA Telecommunications Services, Inc.	McLeod
Momentum Telecom, Inc	Momentum
Mountain Telecommunications, Inc.	Mountain Telecommunications
National Association of State Utilities Consumer Advocates	NASUCA
Navigator Telecommunications, Inc	Navigator Telecommunications
New Jersey Division of Ratepayer Advocate	New Jersey Ratepayer Advocate
New York State Public Service Commission	New York DPS
Nextel	Nextel
NII Communications	NII Communications
NuVox, Inc.	NuVox
New York, TeleSave, Inc	TeleSave
Office of the Ohio Consumer's Counsel	Ohio Consumer's Counsel
Pennsylvania Public Utilities Commission	Pennsylvania Public Utilities Commission
The PACE Coalition Broadview Networks Grande Communications Talk America	PACE <i>et al.</i>
Puerto Rico Telecommunications Regulatory Board	Puerto Rico Telecommunications Regulatory Board
Puerto Rico Telephone Company	PRTC
Qwest Communications International, Inc.	Qwest
SBC Communications Inc.	SBC
SouthSlope Cooperative Telephone Company	SouthSlope
Sprint Corporation	Sprint
SYMTELO	SYMTELO