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October 28, 2003

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket Nos.: 030851-TP

Dear Ms. Bayo:

Yesterday the Florida Competitive Carriers Association filed its Comments on Staff's Proposed Issues List. Footnote 9 refers to an FCC filing in the D.C. Circuit. The filing was inadvertently omitted as an attachment to our Comments. Enclosed are the 16 copies of the document referenced in footnote 9 and we ask that it be appended to our Comments filed yesterday.

Additionally, the first paragraph on page 15 of the Comments should read:

> Although, the FCCA supports its detailed list of issues for the trigger analysis, alternatively it proposes that the Commission could make some changes to Staff's existing issues and add an all encompassing broad issue such as "what other criteria should the Commission consider in the context of the trigger analysis and what is the impact of those criteria?" A proposed mark-up of Staff's issue follows:

Finally, on page 19, the following issue was inadvertently omitted:

> <u>What should be the just and reasonable price to satisfy BellSouth's continuing obligation under Section 271 of the Act?</u>

We apologize for any inconvenience this may have caused. Please contact me if you have any questions.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

VGK/bae
Enclosure
cc: Adam Teitzman w/enclosure (by hand)
Parties of Record w/enclosure (by email)

ORAL ARGUMENT HELD MARCH 7, 2002
CASE DECIDED MAY 24, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 00-1012, 00-1015 *et al.*

UNITED STATES TELECOM ASSOCIATION, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

OPPOSITION OF RESPONDENTS
TO PETITIONS FOR A WRIT OF MANDAMUS

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The Court has directed the Federal Communications Commission and the United States to file a consolidated response to two petitions for a writ of mandamus: one filed by Verizon, the other filed jointly by the other three Bell companies and the United States Telecom Association ("USTA"). These petitions ask the Court to enforce its mandate in *United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"), *cert. denied,* 123 S. Ct. 1571 (2003). Petitioners assert that the FCC violated the *USTA* mandate when it recently revised its rules governing the unbundling obligations of incumbent local exchange carriers ("ILECs") under 47 U.S.C. § 251(c)(3). *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* FCC 03-36 (released Aug. 21, 2003) ("*Triennial Review Order*" or "*Order*").

In seeking the extreme remedy of mandamus, petitioners bear the "burden of showing that [their] right to issuance of the writ is clear and indisputable." *In re Cheney*, 334 F.3d 1096, 1102 (D.C. Cir. 2003) (emphasis added) (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988)); *see also Cobell v. Norton*, 334 F.3d 1128, 1137 (D.C. Cir. 2003). Petitioners in this case have not come close to satisfying this demanding standard. Not only is direct review a fully adequate means for the ILECs to seek relief (*Cheney*, 334 F.3d at 1102), the *Triennial Review Order* is wholly consistent with – and fully supported by – this Court's mandate in *USTA*. The *Order* abandoned the impairment standard that the Court found deficient in *USTA*, and adopted a new standard that is substantially similar to standards advocated by the ILECs. *See Order* at n.275. The *Order* extensively addressed every factor identified in *USTA*, and, contrary to the ILECs' assertions, did not readopt the rules that were at issue in *USTA*. Among other things, the *Order* eliminated "most unbundling requirements for broadband, making it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire." *Id.* ¶ 4. In addition, the *Order* removed unbundling obligations with respect to certain types of high-capacity loops and transport. The *Order* also eliminated line sharing, subject to grandfather provisions and a reasonable transition period. It removed unbundling obligations with respect to switching used to serve enterprise customers. And as for switching for mass market customers, the *Order* required automatic elimination of unbundling in any market where three competitors have deployed switching, either through traditional circuit switches or intermodal alternatives such as cable or packet switches.

The ILECs now challenge the merits of the few portions of the *Triennial Review Order* that did not go their way. Primarily, they attack the FCC's decision to delegate a role to the state commissions in implementing a granular, market-by-market impairment test. Not only was the lawfulness of such a delegation not even discussed in *USTA*, but the ILECs themselves have repeatedly advocated precisely this kind of delegation to the states. For example, in the proceeding leading to the *USTA* decision, BellSouth argued to the FCC that "[i]t is imperative that the state commissions play an important part in defining network elements due to their knowledge of local market conditions and their extensive experience in making factual determinations about local competition issues."[1] Indeed, in that same proceeding, Verizon's general counsel told the Commission that it would be legally suspect *not to give state commissions such a role*: "Any departure by the Commission from the localized determination of what elements are essential for unbundling, which the Act's arbitration process enables, must be strictly justified and narrowly tailored."[2]

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[1] *Order* at n.1306 (quoting Letter from Robert T. Blau, Vice President – Executive and Federal Regulatory Affairs, BellSouth, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 (filed Feb. 11, 1999)). BellSouth's argument, and the other ILEC arguments for state delegation discussed in this brief, were made well after the Supreme Court rejected the ILECs' argument that pricing decisions should be made by state commissions without FCC oversight. *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

[2] *Id.* (quoting Letter from William P. Barr, General Counsel, GTE Service Corporation, to Lawrence E. Strickling, Chief, Common Carrier Bureau, FCC, CC Docket No. 96-98, at 4 (filed March 1, 1999)).

It is thus clear that the ILECs' real complaint is that the FCC decided not to eliminate immediately the unbundling of switching and several other network elements. But neither the *USTA* decision nor any other court decision requires such a result. And the FCC's decisions were based on highly factual determinations amply justified by the record. For example, the FCC found that less than three percent of the residential voice market is currently served by competitive switches, and that most of this deployment consists of cable networks that bypass the ILEC networks entirely. *See Order* ¶¶ 438-440. The FCC further concluded that the reason mass market deployment has been so limited is because of the ILECs' processes for performing hot cuts manually on an order-by-order basis, which the FCC found currently pose substantial operational and economic barriers. *See id.* ¶¶ 464-475. As discussed below, the ILECs' challenges to these and the FCC's other findings provide no basis for a grant of mandamus to enforce the *USTA* mandate. Accordingly, the Court should deny the ILECs' petitions.

BACKGROUND

As part of the Telecommunications Act of 1996, Congress amended the Communications Act by adopting provisions that require ILECs to take steps to open their local markets to competition. One of those provisions, section 251(c)(3), imposes on ILECs a "duty to provide, to any requesting carrier for the provision of a telecommunications service, nondiscriminatory access" to unbundled network elements ("UNEs") on just and reasonable rates, terms, and conditions. 47 U.S.C. § 251(c)(3). For purposes of determining which network elements ILECs must provide to fulfill this duty, the statute provides that the FCC "shall consider, at a minimum, whether" ILECs' "failure to provide access to [non-proprietary] network elements would impair the ability of the telecommunications carrier seeking to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(B).

The Supreme Court struck down the FCC's first attempt to interpret the "impair" standard under section 251(d)(2). *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 387-92 (1999). It found that the

FCC, in assessing impairment, had improperly failed to consider whether competing local exchange carriers ("CLECs") were able to provide their own facilities or purchase equipment from non-ILEC sources. The Court held that the agency could not, "consistent with the statute, blind itself to the availability of elements outside the network." *Id.* at 389. The Court also faulted the Commission for assuming that "*any* increase in cost (or decrease in quality) imposed by denial of a network element" constituted an impairment under section 251(d)(2). *Id.* at 389-90 (emphasis in original). The Court directed the FCC, on remand, to construe section 251(d)(2) to apply some "limiting standard, rationally related to the goals of the Act." *Id.* at 388.

In response to the Supreme Court's remand, the Commission revised its interpretation of section 251(d)(2). It determined that the failure to provide access to a non-proprietary UNE would "impair" a requesting carrier's ability to provide service if, "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 FCC Rcd 3696, 3725 (¶ 51) (1999) ("*UNE Remand Order*"). When it adopted its new list of UNEs in the *UNE Remand Order,* the Commission committed to reviewing the ILECs' UNE obligations in three years with a view toward revising the list if circumstances warranted. *Id.* ¶ 15. The agency initiated this Triennial Review proceeding in December 2001. *Triennial Review NPRM,* 16 FCC Rcd 22781 (2001).

Five months after the FCC opened the Triennial Review rulemaking, this Court issued its decision in the *USTA* case, which involved various challenges by the ILECs to the *UNE Remand Order.* The Court in *USTA* rejected the agency's interpretation of section 251(d)(2) in the *UNE Remand Order* and remanded the matter for further consideration. It found three defects in the network element unbundling rules that were before it. First, the Court took issue with what it saw as the Commission's decision "to adopt a uniform national rule, mandating [network element] unbundling in every geographic market and customer class, without regard to the state of competitive impairment in any particular market." *USTA,* 290 F.3d at 422. The Court said that the Commission should have adopted "a more nuanced concept of impairment than is reflected in findings ... detached from any specific markets or market categories." *Id.* at 426. Second, while recognizing that "any cognizable competitive 'impairment' would necessarily be traceable to some kind of disparity in cost," the Court faulted the Commission for relying on "cost disparities that, far from being any indication that competitive supply would be wasteful, are simply disparities faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector." *Ibid.* Third, the Court set aside the Commission's decision to require "line sharing" – unbundling of the high frequency portion of the loop used by new entrants to provide broadband services via telephone lines – because the agency "failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite)." *Id.* at 428.

When *USTA* was decided, the FCC was already in the midst of its Triennial Review proceeding. After requesting and receiving comments on the impact of the *USTA* decision, the Commission issued its *Triennial Review Order.* In response to *USTA,* the Commission in the *Order* revised its definition of impairment once again, finding that a CLEC is impaired for purposes of section 251(d)(2) if the "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." *Order* ¶ 84. The Commission's new framework for analyzing impairment responds directly and comprehensively to each of the three shortcomings that the Court identified in *USTA*.

First, the Commission's revised approach implements the Court's direction to address "market-specific variations in competitive impairment" (*USTA,* 290 F.3d at 422) by calling for a more "granular" analysis that considers "customer class, geography, and service." *Order* ¶ 118. As to customer class, the Commission's revised impairment analysis separately addresses the mass market (primarily residential customers) and various enterprise market segments (serving business customers). *Id.* ¶¶ 123-124. With respect to geographic markets, the Commission's revised approach makes national findings where separate analyses of each geographic area would yield the same result. Where that is not the case, however, the new rules provide for area-specific variations in impairment findings, authorizing fact-finding by state commissions "to ensure that the unbundling rules are implemented on the most accurate level possible while still preserving administrative practicality." *Id.* ¶ 130. With respect to service distinctions, the Commission's new impairment standard expressly takes into account "*all* the revenue opportunities that a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could reasonably expect to sell." *Id.* ¶ 100 (emphasis in original).

Second, the Commission carefully delineated the types of costs that it would consider in determining impairment – focusing on those costs that pose recognized barriers to competitive entry. *Order* ¶¶ 85-86. The Commission explained that its analysis would focus substantially on sunk costs, "first-mover advantages" flowing from incumbents' history as monopoly providers, large absolute cost advantages, and scale economies (though not at levels that typically exist for any entrant into any industry). *Id.* ¶¶ 87-90. In focusing on these barriers, the agency adopted an impairment standard that is substantially similar to standards that the ILECs advocated. *See id.* at n.275. The Commission's analysis also recognized and took into account countervailing cost advantages that new entrants may possess. *Id.* ¶ 89. In addition, responding to the Supreme Court's direction that the impairment inquiry must consider "the availability of elements outside the incumbent's network" (*AT&T,* 525 U.S. at 389), the Commission's revised rules give the greatest weight to evidence of actual deployment by facilities-based competitors in assessing whether any existing cost disparities constitute impairment-causing barriers to entry. *Id.* ¶¶ 93-95. The principal triggers that the FCC prescribed for geographic market-specific findings of impairment by state commissions are based on evidence of actual deployment of competitive facilities. *See, e.g., Order* ¶¶ 329-331 (loops), 394-404 (transport), 498-500 (switching).

Third, the Commission eliminated line sharing, subject to grandfathering and a reasonable transition. *Order* ¶¶ 255-269. In reaching this conclusion, the Commission considered several factors, including: all the revenues that a new entrant could expect to receive from use of the whole loop (*id.* ¶ 258); the development of "line splitting" as a viable way for CLECs to share the low (or, in some cases, the high) frequency portion of a whole loop with other CLECs, if their business plans do not include the provision of both voice and broadband services (*id.* ¶ 259); and the relevance of other broadband platforms (such as cable) to the costs and benefits of mandatory line sharing (*id.* ¶¶ 262-263).

The revised impairment framework that the FCC adopted in the *Order* has yielded a significantly reduced list of network elements that ILECs must unbundle. The Commission removed unbundling obligations with respect to the highest capacity enterprise loops, as well as lower capacity enterprise loops at locations where state commissions – employing a granular approach – find that deployment triggers are met. The agency also curtailed unbundling obligations with respect to mass market loops that have fiber components. In addition, it eliminated unbundling obligations with respect to the highest capacity transport facilities, as well as lower capacity transport facilities along routes where state commissions determine that deployment triggers are met. Similarly, the Commission removed unbundling obligations with respect to switching for the enterprise market, and directed state commissions – again, using a granular approach – to remove such obligations regarding mass market switching in particular geographic markets if deployment triggers are satisfied. The Commission went on to remove existing unbundling obligations for packet switching, and, subject to grandfather provisions and a transition, eliminated

ILECs' line sharing duties. Finally, the Commission lifted unbundling obligations relating to most ILEC broadband facilities. *See generally Order* ¶¶ 4, 7.

In sum, as the *Order* makes plain, the Commission took great pains to address the issues that the Court identified in *USTA*.

ARGUMENT

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *In re Executive Office of the President,* 215 F.3d 20, 23 (D.C. Cir. 2000) (quoting *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976)). This is not one of those situations. As a threshold matter, mandamus is not available here because petitioners can obtain adequate relief in the normal course of litigation. Thus, there is no need for the Court to resort to the extreme measure of issuing a writ of mandamus. More importantly, petitioners have not identified any way in which the *Order* is inconsistent with *USTA,* much less shown that the *Order* "violated" *USTA*'s mandate. The Court in *USTA* simply directed the Commission to give more careful consideration to certain factors in assessing impairment under section 251(d)(2). In the *Triennial Review Order,* the Commission did precisely that, giving consideration to each of the factors identified and responding extensively to the Court's opinion. While petitioners may disagree with some of the agency's specific unbundling decisions, virtually all of the issues they raise in their mandamus petitions were never presented to – or discussed by – the Court in *USTA*. Accordingly, the Court should deny the mandamus petitions.

I. PETITIONERS DO NOT NEED A WRIT OF MANDAMUS TO OBTAIN ADEQUATE RELIEF

The remedy of mandamus "is reserved for extraordinary circumstances in which … no other adequate means to obtain relief exist." *Byrd v. Reno,* 180 F.3d 298, 302 (D.C. Cir. 1999); *see also In re Sealed Case,* 151 F.3d 1059, 1063 (D.C. Cir. 1998). Mandamus "may not be invoked as a mere substitute for appeal" where a party can obtain adequate relief by seeking direct appellate review of an FCC order and requesting a stay pending review. *In re GTE Service Corp.*, 762 F.2d 1024, 1026-27 (D.C. Cir. 1985). In accordance with that precedent, the Court should deny the mandamus petitions in this case. Petitioners cannot seriously claim that they have no other adequate means to obtain relief. They have already petitioned for review of the *Triennial Review Order* and moved for a stay pending review. The normal process of litigation will afford petitioners a full opportunity to win the relief they seek.

Petitioners argue that the "traditional course" of litigation does not ensure them of obtaining relief because, notwithstanding their previous court victories, "they remain stuck with the same unlawful unbundling regime." USTA Pet. at 28-29. That is simply wrong. In the *Triennial Review Order,* the Commission substantially revised its analysis of impairment under section 251(d)(2), and significantly reduced the number of network elements that are subject to unbundling requirements. Among other things, the Commission:

- curtailed unbundling obligations affecting mass market loops that have fiber components (*Order* ¶¶ 272-295);

- lifted existing unbundling obligations for packet switching (*id.* ¶¶ 537-541);

- eliminated ILEC line sharing duties, subject to grandfather provisions and a transition (*id.* ¶¶ 255-269);

- removed unbundling obligations with respect to the highest capacity enterprise loops, as well as lower capacity enterprise loops at locations where state commissions find that deployment triggers are met (*id.* ¶¶ 314-317, 321, 324);

- eliminated unbundling obligations with respect to the highest capacity transport facilities, as well as lower capacity transport facilities along routes where state commissions determine that deployment triggers are met (*id.* ¶¶ 384, 387-389, 392); and

- removed unbundling obligations with respect to switching for the enterprise market, and directed state commissions to remove such obligations for mass market switching in particular geographic markets if deployment triggers are satisfied (*id.* ¶¶ 451-453, 498-505).

Petitioners thus have no basis for their claim that "the Commission remains unwilling to abandon 'its belief in the beneficence of the widest unbundling possible.'" Verizon Pet. at 23 (quoting *USTA,* 290 F.3d at 425). Indeed, the Commission's reduction of ILECs' unbundling duties is so substantial that many CLECs – companies that uniformly supported the FCC's previous unbundling orders – have filed petitions for review of the *Triennial Review Order* and have sought stays of parts of that order.

Petitioners also assert that "the statutory remedy of judicial review is inadequate" because the *Order*, by delegating certain tasks to the states, would require petitioners "to run a 51-state gauntlet that will make it impossible for the Court to ensure compliance with its mandate." USTA Pet. at 14. But if petitioners obtain a stay pending judicial review, none of the rules to which they object – including the delegation of certain tasks to the states – will take effect while the stay is in place. On the other hand, if petitioners fail to make the showing necessary to obtain a stay, they cannot possibly satisfy the even more stringent standard for justifying the more extreme remedy of mandamus. In any event, petitioners will have a full opportunity to assert all of their challenges to the *Triennial Review Order* when they submit their merits briefs in the normal course of litigation. In the unlikely event that those briefs persuade the Court that the *Order* is inconsistent with *USTA,* the Court can grant the ILECs' petitions for review and fashion an appropriate remedy. Thus, the petitions for review of the *Order*, accompanied by a stay request, offer petitioners an adequate means of attaining any relief to which they may be entitled.

Petitioners contend that a stay will not give them sufficient relief. They claim that even if the FCC's rules are stayed, state commissions will continue to require ILECs to provide the "UNE platform" (or "UNE-P") – *i.e.,* all of the key elements (loops, transport, and switching) that are needed to provide basic local phone service. USTA Pet. at 29; Verizon Pet. at 30. That speculative assertion as to the future behavior of state commissions is plainly insufficient to justify a writ of mandamus. Petitioners are not entitled to mandamus unless they can show that they have a "clear and indisputable" right to issuance of the writ. *Miller v. French,* 530 U.S. 327, 339 (2000) (internal quotations omitted). And it is hardly "clear and indisputable" that state commissions would impose extensive unbundling obligations on ILECs if the FCC's rules were stayed. Indeed, at least one independent market analyst disagrees with the ILECs' gloomy projections concerning the states. Legg Mason predicts that ILECs will be able to use the process created by the *Triennial Review Order* to persuade state regulators to grant them significant relief from UNE-P unbundling obligations. Legg Mason, UNE-P Quarter-Loaf: Bells Lost, Still Likely to Gain Some Relief (Sept. 17, 2003) (Attachment A).

In the end, petitioners have not offered a single valid reason why they cannot obtain adequate relief through their petitions for review of the *Order* and their joint motion for stay and expedition. For that reason alone, the Court should deny the mandamus petitions.

II. THE FCC'S ORDER DID NOT VIOLATE THE *USTA* MANDATE

Mandamus cannot be used to challenge agency action unless the agency commits a clear violation of a "ministerial" duty that is "so plainly prescribed as to be free from doubt and equivalent to a positive command": "[W]here the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Consolidated Edison Co. v. Ashcroft,* 286 F.3d 600, 605 (D.C. Cir.) (quoting *Wilbur v. United States,* 281 U.S. 206, 218-19 (1929)), *cert. denied,* 537 U.S. 1029 (2002). In particular, this Court has held that a writ of mandamus can be invoked to challenge agency action following a judicial remand only where an agency order is "[c]learly ... not responsive to the court's remand" – for example, when an agency simply "ignored" the Court's mandate by reinstating the same rules on the same ground that the Court had already held to be insufficient. *Radio-Television News Directors Association v. FCC,* 229 F.3d 269, 271 (D.C. Cir. 2000). This case does not fit that description. Far from ignoring the Court's mandate, the FCC conscientiously responded to it, examining all of the factors identified by the Court, completely changing the test for impairment, and removing or altering the unbundling obligations for numerous elements.

As an initial matter, the Court in *USTA* did not direct the FCC to take any particular action with respect to any specific network element or elements. Rather, the Court instructed the Commission to do a better job of explaining its impairment analysis and, in doing so, to consider certain factors. Indeed, petitioners have conceded as much. When they filed an opposition to WorldCom's petition for certiorari in the *USTA* case, petitioners told the Supreme Court that "the D.C. Circuit's decision rests in large part on the court's conclusion that the FCC had not considered relevant factors or sufficiently explained its judgments." Brief for Respondents BellSouth, *et al., WorldCom, Inc. v. USTA,* S. Ct. No. 02-858 (filed Feb. 5, 2003), at 19. At that time, the ILECs accepted the premise that the *USTA* decision "largely impos[ed] explanatory and evidentiary burdens on the FCC." *Ibid.* (internal quotations omitted).

To the extent that petitioners now argue that the FCC's new impairment standard fails to meet the explanatory and evidentiary burdens imposed by the Court in *USTA,* they are simply wrong. As explained above, the FCC in the *Triennial Review Order* fully satisfied *USTA*'s mandate. In response to the Court's direction to address "market-specific variations in competitive impairment" (*USTA,* 290 F.3d at 422), the Commission adopted a more "granular" impairment analysis that takes into account "customer class, geography, and service." *Order* ¶ 118. Moreover, to ensure the most comprehensive and accurate assessment of these highly localized factors, the FCC delegated certain fact-finding tasks to the states. *See generally id.* ¶¶ 179-196. In addition, consistent with the Court's directive in *USTA,* the Commission made clear that its revised impairment analysis would not rely on "cost disparities" that are "faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector." *See USTA,* 290 F.3d at 426. Instead, the Commission focused its impairment inquiry on costs that have been widely recognized by respected economists and antitrust scholars as potential barriers to market entry. *Order* ¶¶ 73-91. Finally, in accordance with the *USTA* mandate (290 F.3d at 428-29), the Commission decided to eliminate line sharing, subject to grandfathering and a reasonable transition period. In reaching this decision, the agency, consistent with the Court's instructions, took into account the relevance of competitive broadband services provided by cable systems and satellite service providers. *Order* ¶¶ 255-269.

Petitioners make much of the dissenting statements by Chairman Powell and Commissioner Abernathy. But those statements reflected a disagreement over specific applications of the Commission's newly adopted impairment standard – a standard that the Commission adopted *unanimously*. The Commission's new standard for assessing impairment fully responds to the concerns articulated by the Court in *USTA*.

Virtually all of petitioners' arguments in support of their mandamus petitions involve issues that were neither presented to nor addressed by the Court in *USTA*. Petitioners attack the Commission's unbundling decisions with respect to certain categories of elements (*e.g.*, mass market switching). But the Court in *USTA* did not direct the Commission to eliminate any particular unbundling obligations with respect to any specific types of network elements. Furthermore, the unbundling decisions that petitioners now challenge were based on a new evidentiary record that postdated the order that the Court reviewed in *USTA*. Any challenges to those fact-specific determinations are most appropriately addressed when the Court considers the multiple petitions for review of the *Triennial Review Order*.

Similarly, insofar as petitioners challenge the FCC's decision to delegate certain fact-finding tasks to state commissions, they are raising an issue that the Court in *USTA* had no occasion to address. Petitioners are free to challenge the delegation decision on direct appellate review of the *Order*. But they cannot legitimately claim that the FCC's delegation to the states "defied" the *USTA* mandate. The Court in *USTA* did not even address the delegation issue because no party raised it. And no party raised the delegation issue in *USTA* because, during the administrative proceeding that culminated in the *UNE Remand Order*, the ILECs actually *supported* the same sort of delegation that they now oppose. *See UNE Remand Order* ¶ 119 (the ILECs urged the Commission to "adopt national standards to be applied by state commissions on a market-by-market basis"); *Order* at n.1306 (collecting ILEC arguments supporting delegation).

In any event, for the reasons discussed below, petitioners' challenges to the *Order* lack merit. Consequently, petitioners are clearly not entitled to the extraordinary remedy of mandamus.

A. The FCC's Impairment Analysis Of Mass Market Switching Was Reasonable.

The FCC relied on substantial record evidence in finding that CLECs are generally impaired in their ability to serve mass market customers without unbundled switching. The FCC found that less than three percent of the residential voice market is currently served by competitive switches, and that most of this deployment consists of cable companies that bypass the ILECs' networks entirely. *Order* ¶¶ 438-440. The record showed that CLECs have deployed approximately 1300 switches nationwide, but that these switches are used almost exclusively to serve large enterprise customers. *Ibid.* The FCC found that CLECs had ample incentives to use these switches to serve mass market customers and that many had planned to do so, but the evidence showed that it was uneconomic for CLECs to use these switches to serve mass market customers. *Id.* ¶¶ 437-440.

The FCC concluded that the reason for such limited deployment of CLEC switches was the ILECs' process for performing "hot cuts," in which the ILEC disconnects a customer's loop from the ILEC's own switch and reconnects the loop to a CLEC's switch. *See AT&T Corp. v.* FCC, 220 F.3d 607, 625 (D.C. Cir. 2000). Hot cuts are generally not necessary for enterprise customers, but are almost always required for mass market customers. *Order* ¶¶ 451, 464-465; *see also id.* at n.1354. The FCC found that the manual process the ILECs use to make hot cuts on an order-by-order basis is incapable of handling the volume of orders that mass market customers generate for CLECs and creates costs that preclude serving mass market customers through these arrangements. *See id.* ¶¶ 459, 465, 468-479. In the FCC's considered judgment, these barriers combine to "create an insurmountable disadvantage" to CLECs that seek to serve the mass market by using their own switches. *Id.* ¶ 475. The FCC reasonably found that because there is currently no efficient way for CLECs to connect their own switches to mass market loops, ILEC switches share the natural monopoly characteristics of voice grade loops, which the ILECs concede must be unbundled. *Id.* ¶ 226.

Petitioners claim that the FCC was required to find no impairment on the basis of their assertions in two *ex parte* letters that they had performed "over a million hot cuts." USTA Pet. at 24. But a million hot cuts represent less than one percent of the ILECs' 112 million residential lines (and an even smaller percentage of mass market lines, which include small business). *See Order* ¶ 438. The assertion that ILECs have completed a million hot cuts over a period of more than five years is hardly compelling evidence that ILECs could efficiently execute the *multiple* millions of hot cuts that would have to be performed in a matter of *days* or *weeks* if CLECs had to make a flash-cut transition from UNE-P to self-provisioned switching.

Contrary to petitioners' assertions, the record showed that ILECs often have difficulty keeping up with current hot cut demand. For instance, when AT&T tried to serve mass market business customers using its own switches, "hot cuts could not be provided in the volumes required to support AT&T's customer demand, leading to cancellation of orders for AT&T's competitive service offering." *Order* ¶ 468. Several other CLECs, including ATX, GCI, and McLeod, encountered similar problems. *Id.* ¶¶ 466, 468. In light of these documented difficulties, the Commission had good reason to conclude that ILECs would be unable to handle the exponential growth in hot cut demand if CLECs could no longer obtain unbundled switching.

Indeed, state commissions "have found difficulties regarding hot cut performance" at higher demand volumes. *Order* at n.1437. For example, in New York, the first state where a Bell company won approval to offer long-distance service under 47 U.S.C. § 271, the state commission has found that Verizon's processing of hot cuts would have to accelerate dramatically if CLECs could no longer obtain unbundled switching. At Verizon's present pace, the New York commission concluded, it would take "*over 11 years*" just to switch existing UNE-P customers in New York to CLECs' switches. *Id.* ¶ 469 (emphasis added) (quoting New York Comments at 4 n.18).

Petitioners assert that when the FCC granted Bell companies' long-distance applications under 47 U.S.C. § 271, it found that those companies could handle reasonably foreseeable volumes of hot cuts. USTA Pet. at 24; Verizon Pet. at 11. At the time of these section 271 proceedings, however, CLECs were principally using UNE-P (including ILEC switches) to serve mass market customers, and "reasonably foreseeable" volumes of hot cuts were accordingly quite low. *Order* at n.1435. The Commission in this case focused on a different issue: whether ILECs could handle the explosive increase in hot cut volumes if CLECs could no longer obtain unbundled switching. The section 271 orders on which petitioners rely simply did not assess the ILECs' "ability to provision large batches of cut overs in a timely and reliable manner under these circumstances." *Ibid.*

Petitioners contend that the Commission was merely "speculating" about the ILECs' ability to satisfy increased demand for hot cuts. USTA Pet. at 24; *see also* Verizon Pet. at 11-12. Ultimately, however, in deciding whether ILECs could efficiently perform the unprecedented volumes of hot cuts that would result from the elimination of unbundled switching, the Commission necessarily had to make a predictive judgment. In these circumstances, where "complete factual support in the record for the Commission's judgment is not possible or required," the Commission's predictive judgment in its area of expertise is entitled to particularly deferential review. *FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 813-14 (1978); *see also WorldCom, Inc. v. FCC,* 238 F.3d 449, 459 (D.C. Cir. 2001); *Fresno Mobile Radio v. FCC,* 165 F.3d 965, 971 (D.C. Cir. 1999); *Melcher v. FCC,* 134 F.3d 1143, 1151-52 (D.C. Cir. 1998); *Aeronautical Radio, Inc. v. FCC,* 928 F.2d 428, 445 (D.C. Cir. 1991).

The record fully supports the Commission's predictive judgment here. Competing carriers presented evidence of delays and service disruptions when they requested large numbers of hot cuts. *See Order* ¶¶ 466, 468. Given these past problems, it was reasonable for the FCC to determine that ILECs could not handle vastly greater volumes of hot cuts. Even if ILECs had performed hot cuts flawlessly in the past – which the record shows was not the case – they would have to upgrade their performance dramatically before they could efficiently handle the enormous volumes of hot cuts that CLECs would request in the absence of unbundled switching. In New York alone, "Verizon's hot-cut performance would have to improve approximately 4400 percent." New York Comments at 4. The Commission justifiably concluded that ILECs could not achieve such an extraordinary upgrade in performance without making fundamental changes to the current hot cut process.

Petitioners also attack the Commission's finding that the hot cut process creates economic barriers to entry. They claim that the FCC improperly based its finding of economic impairment on customer churn, "an ordinary issue for market entrants, with no link to natural monopoly." USTA Pet. at 26. But the FCC's economic impairment analysis only considered churn, a characteristic of serving mass market customers, as one factor that affects competing carriers' ability to enter the mass market. Indeed, the Commission determined that "customer churn *exacerbates* the operational and economic barriers to serving mass market customers" with non-ILEC switches. *Order* ¶ 471 (emphasis added). And those barriers, which are a result of the current hot cut process, are not the product of typical cost disparities that any market entrant might face. In fact, incumbents do not have to perform hot cuts in order to serve their own customers because their networks "were designed for use in a single carrier, non-competitive" market: "Accordingly, for the incumbent, connecting or disconnecting a customer is generally merely a matter of a software change." *Id.* ¶ 465. By virtue of the networks' design, only CLECs that use their own switches to serve the mass market incur the substantial operational and economic costs associated with hot cuts. In view of these considerations, the Commission reasonably concluded: "The barriers associated with the manual hot cut process are directly associated with incumbent LECs' historical local monopoly, and thus go beyond the burdens universally associated with competitive entry." *Ibid.* These barriers are precisely the types of costs – "linked (in some degree) to natural monopoly" – that the Court in *USTA* said the FCC could properly consider in assessing impairment under section 251(d)(2). *USTA*, 290 F.3d at 427.

Petitioners also are wrong to assert that the FCC improperly considered hot cut costs in isolation, without regard to potential revenues or other countervailing factors. *See* Verizon Pet. at 13-15; USTA Pet. at 25-27. In analyzing impairment, the Commission considered whether the cumulative effect of any barriers to entry "is likely to make entry uneconomic, *taking into account available revenues and any countervailing advantages that a requesting carrier might have*." *Order* ¶ 85 (emphasis added). Applying this standard to mass market switching, the Commission properly found that the operational and economic cost barriers imposed by hot cuts outstripped any potential revenues or CLEC advantages. The

Commission determined that the "inherent limitation in the number of manual cut overs that can be performed ... is likely to make entry into a market uneconomic" because CLECs could not readily achieve the scale economies they need to compete with ILECs. *Order* ¶ 469. The Commission also found record evidence that "the current level of churn for carriers providing service to the mass market has significant negative revenue effects on the ability of [CLECs] to recover the high costs associated with manual hot cuts." *Id.* ¶ 471. These negative effects on potential revenues led the Commission to conclude that hot cut costs would be "prohibitively expensive" in many areas. *Id.* ¶ 470.

The Commission also found substantial differences in potential revenues and costs between the mass market and the "enterprise" market (for larger businesses). The Commission reasonably found – and petitioners do not dispute – that CLECs in the enterprise market are *not* impaired without access to unbundled switching because differences in network architecture for that market obviate the need for hot cuts, and because enterprise customers with long-term contracts offer greater revenue opportunities than mass market customers do. *Order* at n.1354; *id.* ¶ 452. But the Commission also reasonably concluded that CLECs in the mass market *are* impaired without unbundled switching. Unlike CLECs in the enterprise market, mass market CLECs must pay for hot cuts in order to serve their customers; and they must somehow recover those hot cut costs in a market that offers far fewer revenue opportunities and a less stable customer base. Under the circumstances, the Commission reasonably found impairment in the mass market and no impairment in the enterprise market with respect to unbundled switching. The Commission's differentiation between these "specific ... market categories" is just the sort of market distinction that the Court in *USTA* directed the Commission to consider. *See USTA,* 290 F.3d at 426.

Petitioners maintain that, rather than finding impairment, the Commission should have addressed its hot cut concerns in a more "narrowly-tailored" way. Verizon Pet. at 13-15; USTA Pet. at 25. As the FCC explained, however, the evidence fully supported a finding of impairment, and the availability of measures to address that impairment do not detract from the FCC's conclusion. Moreover, the FCC *did* take affirmative steps to address the impairment caused by hot cuts in a narrowly tailored way. *See Order* ¶¶ 487-490 (directing state commissions to develop a batch cut process within nine months); *id.* ¶ 424 (directing state commissions to consider whether "impairment could be addressed by a narrower rule making unbundled switching temporarily available for a minimum of 90 days"). While petitioners may have preferred a different approach, "[t]he fact that there are other solutions to a problem is irrelevant provided that the option selected [by the FCC] is not irrational." *Loyola University v. FCC,* 670 F.2d 1222, 1227 (D.C. Cir. 1982).

B. The FCC's Delegation Of Certain Matters To The States Was Lawful And Reasonable.

In *USTA,* the Court directed the Commission to develop a "more nuanced" approach to analyzing impairment, taking into account "specific markets or market categories." *USTA,* 290 F.3d at 426. In accordance with the *USTA* mandate, the Commission in the *Triennial Review Order* adopted a more market-specific framework for evaluating impairment. Under that framework, the agency properly distinguished between certain market categories or customer classes when the record supported such distinctions. In many instances, however, the record did not contain sufficient information to enable the FCC to make conclusive impairment findings about specific markets. To address those situations, the Commission delegated to the states the task of applying the FCC's impairment test to determine whether impairment existed in a particular market. *See generally Order* ¶¶ 186-196. This delegation was reasonably designed to ensure the most accurate and comprehensive analysis of impairment on a market-specific basis.

Far from violating the *USTA* mandate, the FCC's delegation to the states directly responds to the Court's call for a "more nuanced" analysis of impairment that accounts for differences in "specific markets or market categories." *USTA,* 290 F.3d at 426. The Commission reasonably determined that, in certain circumstances, the states are in the best position to conduct the fact-specific impairment analysis that the Court contemplated in *USTA*. *Order* ¶ 188.

Contrary to petitioners' claims (USTA Pet. at 16-18; Verizon Pet. at 15-19), the delegation in this proceeding is not inconsistent with the *USTA* mandate. The lawfulness of such a delegation was not even mentioned in *USTA*. Indeed, the ILECs themselves "consistently advocated for a significant state role in analyzing impairment" in the FCC's previous UNE rulemaking proceedings. *Order* at n.1306. In particular, in the proceeding that led to the *USTA* litigation, the ILECs urged the FCC to "adopt national standards *to be applied by state commissions on a market-by-market basis.*" *UNE Remand Order* ¶ 119 (emphasis added). US WEST argued to the FCC in the *UNE Remand* proceeding that "state commissions ... would thus be ideally positioned to track such localized data on a current basis and to determine where the Commission's unbundling presumptions would or would not apply." *Order* at n.1306 (quoting US WEST Comments at 30, CC Docket No. 96-98 (May 26, 1999) (citation omitted)). In the same proceeding, Verizon's general counsel argued that "the Commission cannot adopt a single, 'one size fits all' national list of UNEs," and that the Commission's UNE rules "must be tailored to accommodate variations in the facilities based competition that already exists and that is currently possible through the use of available substitutes." *Ibid.* (quoting Letter from William P. Barr, General Counsel, GTE, to Lawrence E. Strickling, Chief, Common Carrier Bureau, FCC, CC Docket No. 96-98, at 4 (filed March 1, 1999)). Verizon's general counsel went on to conclude that, legally, state commissions were the appropriate entities to make these determinations: "[T]he Act clearly establishes a mechanism – individualized arbitrations conducted by state commissions – to take such variations into account." *Ibid.*

The ILECs' past endorsement of state participation in impairment decisions is inconsistent with their current assertion that the statute "clearly" bars delegation. As petitioners previously recognized, nothing in the Communications Act prohibits the FCC from involving the states in the impairment analysis. The Act simply directs the Commission to "establish regulations to implement the requirements" of section 251. 47 U.S.C. § 251(d)(1). It does not foreclose the possibility that FCC regulations could provide a role for states in assessing impairment. Indeed, the Act explicitly permits states to adopt unbundling rules of their own, so long as those rules are consistent with section 251 and do not substantially prevent implementation of that provision's requirements. *Id.* § 251(d)(3). The Act thus contemplates a meaningful role for the states in the unbundling process.

The fact that the states themselves have power to regulate unbundling supports the FCC's delegation. Courts have repeatedly ruled that limitations on delegation are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *United States v. Mazurie,* 419 U.S. 544, 556-57 (1975); *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation,* 792 F.2d 782, 795 (9th Cir. 1986); *Southern Pacific Transp. Co. v. Watt,* 700 F.2d 550, 556 (9th Cir.), *cert. denied,* 464 U.S. 960 (1983).

If petitioners mean to suggest that the FCC cannot delegate tasks without express statutory authorization, they are mistaken. The courts have long recognized that express statutory authority is not a prerequisite for agency delegation. *See Fleming v. Mohawk Wrecking & Lumber Co.,* 331 U.S. 111, 121-22 (1947); *Assiniboine,* 792 F.2d at 795-96; *Tabor v. Joint Board for Enrollment of Actuaries,* 566 F.2d 705, 708 n.5 (D.C. Cir. 1977). In *Fleming,* for example, the Supreme Court held that although no statute expressly authorized the federal administrator of price controls to delegate his subpoena authority, he could properly make such a delegation under his general statutory authority to "issue such regulations and orders as he may deem necessary or proper" to carry out his statutory duties. *Fleming,* 331 U.S. at 121 (internal quotations omitted). Here, as in *Fleming,* a broad rulemaking provision – section 201(b) of the Communications Act – governs the scope of agency authority to implement sections 251 and 252. *AT&T,* 525 U.S. at 377-85. The grant of general authority under section 201(b), coupled with the states' explicitly authorized role under section 251(d)(3), suffices to authorize the delegation to the states here.

Petitioners contend that, since Congress authorized delegation expressly in other provisions of the statute, its silence on the subject in section 251(d) must be construed to prohibit delegation. USTA Pet. at 17-18; Verizon Pet. at 16. This flawed argument places unjustified reliance on "the expressio unius maxim – that the expression of one is the exclusion of others." *Mobile Communications Corp. v. FCC,* 77 F.3d 1399, 1404 (D.C. Cir.), *cert. denied,* 519 U.S. 823 (1996). This maxim has little force in the administrative setting, where the courts must defer to an agency's reasonable statutory interpretation unless Congress has directly spoken to the precise question at issue. *Id.* at 1404-05; *see also Chevron USA v. NRDC,* 467 U.S. 837, 842 (1984); *Cheney R.R. Co. v. ICC,* 902 F.2d 66, 68-69 (D.C. Cir.), *cert. denied,* 498 U.S. 985 (1990).

Petitioners make much of the contrast between section 251(d), which does not mention delegation, and section 251(e)(1), which expressly authorizes the FCC to delegate any or all of its jurisdiction over numbering administration to the states. USTA Pet. at 18. This difference is easily explained. Because section 251(e)(1) gives the FCC "exclusive jurisdiction" over numbering administration, 47 U.S.C. § 251(e)(1), Congress apparently felt the need to clarify that the FCC could cede all or part of that exclusive jurisdiction to the states. No such clarification was necessary for section 251(d), which does not vest exclusive jurisdiction in the FCC. Instead, section 251(d) explicitly preserves the states' authority to adopt and enforce their own unbundling rules, so long as those rules do not conflict with federal law. *Id.* § 251(d)(3).

Petitioners also argue that the FCC's delegation does not impose meaningful standards on the states. USTA Pet. at 18-20. In fact, the Commission established objective competitive "triggers" that would require a state to find no impairment in those markets where the triggers are satisfied. For example, under the switching triggers, states must find no impairment in those markets where: (1) three or more unaffiliated CLECs are using their own switches to serve mass market customers; or (2) two or more unaffiliated entities are providing competitive switching facilities at wholesale. *Order* ¶¶ 498-505.

Petitioners contend that the FCC gave the states too much discretion to define the relevant markets for assessing whether the triggers are met. Verizon Pet. at 20-21. To the contrary, the Commission provided significant guidance on market definition, directing the states to consider "the locations of customers actually being served by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets economically and efficiently using currently available technologies." *Order* ¶ 495; 47 C.F.R. § 51.319(d)(2)(i). The FCC also made clear that a state commission cannot define a market as encompassing an entire state. *Order* ¶ 495. Furthermore, the agency said, states should assess variations in impairment among customer classes and geographic areas, and "should attempt to distinguish among markets where different findings of impairment are likely." *Ibid.* These guidelines are reasonably designed to ensure that state commissions throughout the nation adopt consistent market definitions.

Petitioners assert that the self-provisioning trigger, which the FCC set at three competitors, is too high. Verizon Pet. at 26. This is a challenge to agency line-drawing. This Court generally is "unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn … are patently unreasonable, having no relationship to the underlying regulatory problem." *Cassell v. FCC,* 154 F.3d 478, 485 (D.C. Cir. 1998) (internal quotations omitted). The Commission reasonably concluded that three self-provisioning competitors marked "the appropriate threshold in order to be assured that the market can support 'multiple, competitive' local exchange service providers using their own switches." *Order* ¶ 501 (quoting *USTA,* 290 F.3d at 427). While petitioners may have preferred a lower threshold, the line drawn by the FCC is reasonable. Moreover, the FCC made clear that where the triggers are not met, the presence of even one self-provisioning competitor in a market will increase the likelihood of a finding of no impairment. The FCC directed the states to give "particularly substantial weight" to a CLEC's use of a self-deployed switch to serve the mass market: "[T]he existence of even one such switch might in some cases justify a state finding of no impairment, if [the state] determines that the market can support 'multiple, competitive supply.'" *Order* ¶ 510 (quoting *USTA,* 290 F.3d at 427).

There is no longer any basis for petitioners' contention that the self-provisioning trigger can be met only if three facilities-based competitors are "operationally ready and *willing* to provide service to *all* customers in the designated market.'" USTA Pet. at 20 (emphasis added) (quoting *Order* ¶ 499). In a recent erratum, the Commission corrected paragraph 499 of the *Order*, clarifying that *wholesale* service providers must "be operationally ready and willing to provide wholesale service to all competitive providers in the designated market." *Errata,* FCC 03-227, ¶ 21 (released Sept. 17, 2003) (Attachment B). The corrected paragraph does *not* require that, for purposes of the switching triggers, self-provisioning competitors must be ready and willing to serve all retail customers in the market. The Commission made similar corrections in the *Order*'s discussion of how states should analyze impairment in areas where the triggers are not met. It deleted the fifth sentence of paragraph 519 as well as footnote 1586. *Errata* ¶ 23. These deletions eliminate any suggestion in the *Order* that a state's finding of no impairment is contingent on a determination that a facilities-based competitor could economically serve all customers in the market. *See* Verizon Pet. at 23-24.

Petitioners are wrong to suggest (USTA Pet. at 20) that if the triggers are not met, states will have unconstrained discretion to decide whether CLECs could deploy their own switches in a given market. In evaluating impairment for each network element, states must ask the same question that the FCC posed in the *Order*: "whether all potential revenues from entering a market exceed the costs of entry, taking into consideration any countervailing advantages that a new entrant may have." *Order* ¶ 84. The FCC has given the states extensive guidance on the evidence that they should consider when conducting the impairment inquiry, including any entry barriers that might warrant a finding of impairment, actual marketplace evidence of facilities deployment and intermodal alternatives, and evaluation of all potential revenues. *Id.* ¶¶ 85-104, 476-485, 506-520. In short, the FCC has developed standards to "ensure that the states implement their delegated authority in the same carefully targeted manner as [the FCC's] federal determinations" under section 251(d)(2). *Id.* ¶ 189.

Petitioners contend that the FCC should have done more "to control for retail-price effects in determining impairment." USTA Pet. at 21. According to petitioners, the Court in *USTA* precluded the FCC from basing its impairment analysis on revenue shortfalls in areas where state regulators set retail rates "below cost." *Ibid.*; Verizon Pet. at 24-25. But that is not what the *USTA* opinion said. The Court in *USTA* found that the FCC had failed to consider how universal service subsidies might affect its impairment analysis in markets where retail rates are set "below cost" or "above cost." *USTA*, 290 F.3d at 422-23. In the *Triennial Review Order,* the FCC filled this gap in its earlier analysis: It carefully considered the impact of universal service subsidies when it devised its new standard for analyzing impairment. *Order* ¶¶ 154-169.

Insofar as petitioners claim that the FCC improperly discounted the effect of intermodal competition "because intermodal alternatives are not wholesale platforms" (Verizon Pet. at 27), they mischaracterize the *Order*. As a general matter, the FCC did not "discount" intermodal competition. It expressly directed the states to factor such competition – from cable, packet switches, and other sources – into their impairment analysis. *Order* at n.1549. And the Commission itself took intermodal competition into account when it decided to eliminate ILECs' line sharing obligations. *Id.* ¶¶ 262-263.

Petitioners apparently believe that the FCC should have given greater weight to intermodal competition when assessing impairment with respect to mass market switching. In that context, the Commission reasonably found that the impact of intermodal competition was minimal – and not just because intermodal alternatives were unavailable at wholesale (although that was a relevant consideration). The Commission noted that the small fraction of the market served by cable telephony and the limited availability of that service could not justify a national finding of no impairment. *Order* ¶¶ 443-444; *cf. USTA*, 290 F.3d at 428-29 (cable operators provide substantial intermodal competition in the broadband market, serving more than half of all broadband subscribers nationwide). Similarly, the agency found that a minuscule percentage of subscribers used wireless service as a replacement for basic wireline service, and that wireless connections were not yet equal in quality to traditional wireline facilities. *Order* ¶ 445. Finally, and most importantly, the Commission concluded that because providers of cable telephony and wireless service provide their own loops (and therefore do not need hot cuts), their presence in the market does nothing to refute the evidence that the hot cut process generally precludes CLECs from using their own switches in the mass market. *Id.* ¶ 446.

Petitioners' assertion that the *Order* "ignores" the impact of unbundled switching on facilities deployment (USTA Pet. at 22) mischaracterizes the *Order*. The FCC extensively considered the ILECs' evidence on this point and concluded that "the record evidence on this matter is inconclusive." *Order* ¶ 447 & n.1365. Among other things, the FCC found that the ILECs' evidence consisted of "overly simplified correlation models or state-to-state comparisons lacking adequate explanation of relevant variables." *Id.* at n.1373. Moreover, the FCC concluded that even if unbundling of local circuit switches did create disincentives to facilities deployment, any such disincentives would be substantially mitigated by the FCC's decision to remove unbundling requirements for packet switching and the advanced networks used with such switching: "[T]o the extent there are significant disincentives caused by unbundling of circuit switching, incumbents can avoid them by deploying more advanced packet switching. This would suggest that incumbents have every incentive to deploy these more advanced networks, which is precisely the kind of facilities deployment we wish to encourage." *Id.* at n.1365.

Finally, petitioners wrongly contend that the FCC failed to assert reviewing authority over state unbundling decisions. USTA Pet. at 22-23. In fact, the FCC will entertain petitions for declaratory ruling from parties who contend that state impairment determinations do not comport with federal standards. *Order* ¶ 426; *see also Errata* ¶ 21. Petitioners' claim that the FCC is not obligated to address such petitions is beside the point. The Commission can, if necessary, act on such petitions in cases where state commissions have deviated from federal standards for analyzing impairment.

In addition, Congress created a review process to ensure that state interconnection decisions – including decisions with respect to network element unbundling – comply with federal law. Whenever a state commission resolves a disputed issue via arbitration under section 252, any party aggrieved by the state determination may bring an action in federal district court to determine whether the state's ruling meets the requirements of sections 251 and 252. 47 U.S.C. § 252(e)(6). Federal district courts have already addressed numerous complaints concerning state compliance with federal law in areas such as the pricing of UNEs. *See generally Verizon Maryland Inc. v. Public Service Commission of Maryland,* 535 U.S. 635 (2002). Those courts can likewise ensure that states comply with the federal standards for analyzing impairment that the FCC adopted in this proceeding. *Order* ¶ 427. Indeed, petitioners themselves previously suggested that federal district court review of state arbitration decisions provided an adequate forum for reviewing state impairment determinations. *See id.* at n.1306 (quoting Letter from William P. Barr, General Counsel, GTE, to Lawrence E. Strickling, Chief, Common Carrier Bureau, FCC, CC Docket No. 96-98, at 4 (filed March 1, 1999)).

C. The FCC's Impairment Analysis Of Loops And Transport Was Reasonable.

Near the end of their mandamus petitions, petitioners briefly attack the FCC's impairment analysis of loops and transport. They assert that "the Commission presumed impairment for such facilities except on those *specific* routes, or reaching only those *specific buildings,*" where the FCC's competitive triggers are met. USTA Pet. at 27 (emphasis in original); *see also* Verizon Pet. at 28. Once again, petitioners mischaracterize the *Order*. The Commission did *not* presume impairment in the case of *all* loops and transport facilities. To the contrary, the Commission made a national finding of *no* impairment with respect to certain types of loops and transport facilities; and it generally eliminated unbundling obligations pertaining to those facilities. *Order* ¶¶ 315-317, 324, 388-389.

As for those loops and transport facilities that remain subject to unbundling, substantial record evidence supported the Commission's conclusion that CLECs generally are impaired without unbundled access to those kinds of facilities. In those instances, the agency determined that there were limited wholesale alternatives to the ILECs' unbundled facilities in most areas, and that CLECs could not earn sufficient revenues to cover the high fixed and sunk costs of deploying their own facilities. *Order* ¶¶ 311, 320, 325, 381, 386, 390-391. The Commission recognized that, in a few areas, CLECs had overcome those entry barriers and deployed their own facilities. But those areas represented the *exception,* not the rule. Because the record lacked sufficient detail to allow the FCC to identify those locations where self-provisioning had occurred, the Commission reasonably delegated that task to the states, who are better suited to make such determinations. *Id.* ¶¶ 314, 321, 384, 387, 392.

At the same time, the Commission directed states to evaluate evidence of whether competitive deployment of loops and transport is *possible* in other locations where the deployment triggers are not met. *Order* ¶¶ 335, 410. Thus, contrary to petitioners' suggestion, the FCC has not confined the states' impairment inquiry to those locations where competition has already developed. Nor is the states' evaluation of the potential for competitive deployment "standardless," as petitioners claim. Verizon Pet. at 28. While the Commission identified a variety of factors for the states to consider, the ultimate objective of the impairment analysis is the same in each state: to determine "whether entry would be profitable without the UNE in question" – *i.e.,* whether the cumulative effect of barriers to entry "is likely to make entry uneconomic, taking into account available revenues and any countervailing advantages that a [CLEC] may have." *Order* ¶ 85.

Petitioners contend that the Commission's finding of impairment with respect to loops and transport is inconsistent with the agency's market analysis in its *Pricing Flexibility Order,* 14 FCC Rcd 14221 (1999), *petitions for review denied, WorldCom, Inc. v. FCC,* 238 F.3d 449 (D.C. Cir. 2001). In that order, the Commission established a framework for granting ILECs greater flexibility in pricing their interstate access services. ILECs could qualify for pricing flexibility upon satisfaction of certain "triggers" that were designed to "measure market competition based upon investments in infrastructure by potential competitors." *WorldCom,* 238 F.3d at 455. Petitioners posit that widespread satisfaction of the pricing flexibility triggers justifies a finding that CLECs generally are not impaired without unbundled access to loops and transport facilities. But the Commission reasonably explained why the pricing flexibility triggers are not a good gauge for assessing impairment. It noted that the revenue trigger for pricing flexibility, which "requires only a single collocated competitor and the purchase of substantial amounts of special access in a concentrated area," would offer "little indication that competitors have self-deployed alternative facilities, or are not impaired outside of a few highly concentrated wire centers." *Order* ¶ 397. Similarly, the Commission found that the other pricing flexibility trigger, based on alternative transport-based collocation, sheds little light on whether CLECs have deployed facilities beyond a single collocation. *Ibid.* Therefore, the Commission rightly reasoned, location-specific implementation of the triggers for loops and transport offered the most effective means of determining a lack of impairment.

CONCLUSION

We have shown that the Commission's *Triennial Review Order* responded to each of the criticisms that this Court leveled at the *UNE Remand Order* in its *USTA* decision. There is no sound basis for petitioners' contention that the FCC failed to comply with any mandate of the *USTA* decision. Disagreements over the FCC's specific conclusions and rules can and should be addressed in the consolidated review proceedings (and associated stay motions) that have now been transferred to this Court. The normal Hobbs Act process is the appropriate means of reviewing the agency's important decision here. That process affords petitioners an entirely adequate means of obtaining any relief to which they are entitled. The Court should reject petitioners' attempt to bypass that process and to deprive the agency of an opportunity to defend its entire *Triennial Review Order* in a proceeding that permits full briefing on the merits of all aspects of the *Order*.

For all of the foregoing reasons, petitioners have not come close to demonstrating that they have a "clear and indisputable" right to mandamus relief. *Cobell,* 334 F.3d at 1137. The Court should deny the mandamus petitions.

Respectfully submitted,

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