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September 28, 2004

Ms. Blanca S. Bayó  
Division of the Commission Clerk and  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

**Re: Docket No. 040601-TP (Covad)**

Dear Ms. Bayó:

Since the time the parties submitted initial briefs in this docket, Covad has made four additional filings, including a request to address the Commission at its upcoming agenda session. In order to ensure a complete record, BellSouth submits this letter in response to: (1) Covad's filing of September 14; (2) Covad's two filings on September 24<sup>th</sup>; and (3) Covad's filing on September 27<sup>th</sup> and asks that it be placed into the record.

BellSouth does not oppose Covad's request to address the Commission, as this matter is of crucial importance to BellSouth. However, BellSouth acknowledges that the Commission may not desire to hear from the parties, and if that is the Commission's decision then BellSouth will certainly defer to the Commission.

With respect to the "supplemental authority" that Covad has filed, none of this material constitutes final, Commission action. Neither the Louisiana Commission nor the North Carolina Commission has ruled on the parties' dispute in parallel proceedings in those states. Even if such rulings had occurred, they are not binding on this Commission.

With respect to Commission action in BellSouth's serving territory, there have been two such decisions, neither of which has yet been memorialized in a written order. BellSouth has summarized below its understanding – subject to the final, written orders – of the actual Commission action that has taken place in its region.

In Tennessee, the Authority voted on September 27, 2004, that BellSouth has a continuing duty under the FCC's *transition plan* to provide line sharing. BellSouth

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September 28, 2004

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understands that the Directors did not adopt Covad's Section 271 argument, a result consistent with staff's recommendation in this docket.

In Georgia, the Commission adopted a staff recommendation that deferred consideration of Covad's 271 argument to a separate docket. Pending such resolution, BellSouth understands the Georgia Commission to have ordered BellSouth to continue to provide new line sharing arrangements after October 1, 2004. The Commission did not state the legal basis for its ruling and thus the basis on which the GPSC reached its decision is unclear to BellSouth.

Finally, BellSouth requests that the Commission officially recognize the attached submission of the FCC to the United States Court of Appeals, District of Columbia Circuit. In the FCC's brief filed in connection with the USTA II decision, the FCC stated that "the Commission [FCC] also removed all existing unbundling obligations with respect to packet switching, and, subject to grandfather provisions and a transition, *eliminated ILEC line sharing duties.*" (emphasis added.)<sup>1</sup> The FCC did not condition its elimination of line sharing duties – it referred to a complete elimination, subject only to the grandfather/transitional plan, a result that is fully consistent with Staff's recommendation in this proceeding.

A copy of this letter is enclosed with an original and fifteen copies. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

  
Meredith Mays

Enclosure

cc: Parties of Record  
Nancy White  
Adam Teitzman

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<sup>1</sup> See FCC's Brief of December 31, 2003, at p. 15-16, in Docket No. 00-1012, copy attached.

**CERTIFICATE OF SERVICE**  
**Docket No. 040601-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail, Hand Delivery\* and FedEx this 28<sup>th</sup> day of September, 2004 to the following:

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BRIEF FOR RESPONDENTS

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

—————  
No. 00-1012 (AND CONSOLIDATED CASES)  
—————

UNITED STATES TELECOM ASSOCIATION, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,

Respondents.

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ON PETITIONS FOR REVIEW OF AN ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

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\* *Cases and other authorities principally relied upon are marked with asterisks.*

## GLOSSARY

BOC	Bell operating company
CLEC	competitive local exchange carrier
CMRS	commercial mobile radio service
DS1	Digital Service, level 1; a type of high-capacity loop that is capable of carrying 24 voice conversations encoded at 64 Kbps
DS3	Digital Service, level 3; a type of high-capacity loop that is the equivalent of 28 DS-1 loops or 44.736 Mbps
DSL	digital subscriber line
EEL	enhanced extended link
FTTH	fiber-to-the-home
IDLC	integrated digital loop carrier
ILEC	incumbent local exchange carrier
IXC	interexchange carrier
MSA	Metropolitan Statistical Area
NASUCA	National Association of State Utility Consumer Advocates
POP	point of presence
TDM	time division multiplexing
UDLC	universal digital loop carrier
UNE	unbundled network element
UNE-P	the UNE platform; a combination of loop, transport, and switching elements that enables CLECs to provide telecommunications services exclusively through the use of UNEs

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

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No. 00-1012 (AND CONSOLIDATED CASES)

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UNITED STATES TELECOM ASSOCIATION, ET AL.,

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FEDERAL COMMUNICATIONS COMMISSION  
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Respondents.

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ON PETITIONS FOR REVIEW OF AN ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR RESPONDENTS

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**STATEMENT OF ISSUE PRESENTED**

Section 251(c)(3) of the Communications Act requires incumbent local exchange carriers (“ILECs”) to provide their competitors with unbundled access to elements of their network. 47 U.S.C. §251(c)(3). Section 251(d)(2) prescribes the standards for determining which network elements ILECs must provide. 47 U.S.C. §251(d)(2). In the order on review, the Federal Communications Commission revised its rules for implementing these statutory provisions. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (“Order”) (JA ), corrected by *Errata*, 18 FCC Rcd 19020 (2003) (JA



). Numerous petitioners challenge multiple aspects of the *Order*. Their various claims all raise the same basic issue:

Whether the FCC's *Order* reasonably construed and implemented the statutory requirements regarding the unbundling of network elements.

### **JURISDICTION**

The Court has jurisdiction generally to review final orders of the FCC. 47 U.S.C. §402(a); 28 U.S.C. §2342(1). For the reasons discussed below, the Court should dismiss as unripe the states' claims concerning preemption of state unbundling rules. The Court also should dismiss the petition filed by the National Association of State Utility Consumer Advocates ("NASUCA") because, as we explain below, NASUCA lacks standing.

### **STATUTES AND REGULATIONS**

Pertinent statutes and regulations are appended to the petitioners' briefs.

### **COUNTERSTATEMENT**

**1. The Telecommunications Act of 1996.** The telephone network in each local service area consists primarily of wires or buried cable called "loops" that run from telephone company switches to each business or residential customer's telephone, the switches themselves, and the transport "trunks" that carry calls between switches.<sup>1</sup> For many years, telephone regulators assumed "that [local] service could be provided at the lowest cost to the maximum number of

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<sup>1</sup> See, e.g., *Verizon Communications v. FCC*, 535 U.S. 467, 489-90 (2002) ("*Verizon*").

consumers through a regulated monopoly network.”<sup>2</sup> Therefore, “[s]tate and federal regulators devoted their efforts ... to regulating the prices and practices of these monopolies and protecting them against competitive entry.” *Local Competition Order* ¶1.

In 1996, Congress abandoned these regulatory assumptions and objectives. In the local competition provisions of the Telecommunications Act of 1996 (“1996 Act”), 47 U.S.C. §§251-261, Congress sought to end the dominance of regulated local monopolies and to open their markets to competition. Congress imposed upon the incumbents “a host of duties.” *AT&T*, 525 U.S. at 371-72. Foremost among these duties is “the [ILEC’s] obligation under 47 U.S.C. §251(c) ... to share its network with competitors.” *Id.* at 371. Under that provision, a competitive local exchange carrier (“CLEC”) may use the incumbent’s network in three ways: “It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent’s network ‘on an unbundled basis’; and it can interconnect its own facilities with the incumbent’s network.” *Ibid.*

The 1996 Act gave a significant role to state commissions in implementing these network sharing requirements. Among other things, state commissions arbitrate any disputed issues between incumbents and CLECs regarding network sharing, and approve any agreement or statement of general terms for network sharing. 47 U.S.C. §252. State commissions also determine the rates, pursuant to statutory standards and Commission regulations, at which incumbents share their networks with CLECs. *Ibid.*

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<sup>2</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15505 (¶1) (1996) (“*Local Competition Order*”), *aff’d in part and rev’d in part*, *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev’d in part and aff’d in part*, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (“*AT&T*”), *on remand*, *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000), *rev’d in part and aff’d in part*, *Verizon*, 535 U.S. 467.

In requiring incumbents to allow CLECs to use their networks, Congress recognized that, in the short term, no competitor could replicate an incumbent's entire network. *See* Joint Statement of Managers, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 148 (1996) (“*Joint Explanatory Statement*”). Congress explicitly stated that “[s]ome facilities and capabilities (e.g., central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251.” *Ibid.* The Act and the Commission’s implementing rules provide for the leasing of unbundled network elements (“UNEs”) under section 251(c)(3). Congress and the Commission believed this option would play a crucial role in opening local markets to competition.<sup>3</sup>

In determining what UNEs the incumbents must make available to new entrants, “the Commission *shall consider, at a minimum*, whether ... access to such network elements as are proprietary in nature is *necessary*,” and whether, as to non-proprietary elements, “the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.” 47 U.S.C. §251(d)(2)

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<sup>3</sup> Section 251(c)(3) imposes on incumbent LECs:

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. §251(c)(3). *See* 47 U.S.C. §153(29) (defining “network element”). *See also, e.g., Local Competition Order* §§231-232; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (¶¶2-14, 110-112) (1999) (“*UNE Remand Order*”), *rev’d and remanded, United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA*”), *cert. denied*, 123 S. Ct. 1571 (2003).

(emphasis added). The 1996 Act also provides the applicable pricing standard for UNEs: Arbitrated rates must be just, reasonable, and nondiscriminatory, and must be “based on the cost ... of providing the ... network element.” 47 U.S.C. §252(d)(1).

A separate provision of the Act establishes a national policy of “encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing ... regulating methods that remove barriers to infrastructure investment.” 1996 Act, §706(a), 47 U.S.C. §157 note. The Supreme Court has said that the network element unbundling provisions of section 251(d)(2) should be implemented in a manner that is “rationally related to the goals of the Act,” *AT&T*, 525 U.S. at 388, and the Commission has found that the section 706 policy of encouraging new investment in advanced telecommunications services is a statutory goal that permissibly informs the unbundling analysis. *Order* ¶¶172-178 (JA - ).

**2. The Local Competition Order.** In August 1996, the FCC issued its initial order addressing the most basic issues involving local competition arising under the 1996 Act. In that order, the Commission determined that it had general jurisdiction to adopt a broad range of implementing rules that state commissions would apply in arbitrating interconnection agreements. *See Local Competition Order* ¶24. Those rules would, among other things, govern the terms and conditions under which ILECs must share their networks with CLECs and the rates they may charge for doing so.

The Commission prescribed a pricing methodology, “total element long run incremental cost” (“*TELRIC*”), that reflects the “forward-looking” costs of providing the network elements, rather than “historical” costs entered on a carrier’s accounting books. *Id.* ¶¶674-703. Similar to

pricing methodologies used in a number of regulatory contexts,<sup>4</sup> TELRIC is designed to determine what it would cost, in today's market, to replace the functions of an asset that make it useful. The FCC determined that such a methodology would be compensatory while also providing proper economic signals for efficient entry by new competitors. *Local Competition Order* ¶620.

The Commission construed the “necessary” and “impair” standards that section 251(d)(2) requires the agency to consider when determining which UNEs an incumbent must offer to new entrants. The Commission found that the failure of ILECs to provide access to *non-proprietary* UNEs would “impair” a CLEC’s ability to provide a competing service if, without such access, the quality of that new entrant’s service would decline or its cost would rise. *Local Competition Order* ¶285. The Commission found that access to *proprietary* UNEs was “necessary” if, without access to such elements, the CLEC’s “ability to compete would be significantly impaired or thwarted.” *Id.* ¶282. The Commission did not consider whether network elements might be available from sources other than ILECs. *See id.* ¶283 (“necessary” standard), ¶¶286-287 (“impair” standard).

The Commission adopted a list of seven UNEs that ILECs were required to provide to requesting carriers at TELRIC-based rates. *Local Competition Order* ¶27, App. B (Rule 51.319).

**3. Judicial Review of the Local Competition Order.** On review, the incumbents argued that the 1996 Act precluded the FCC from adopting pricing regulations, arguing that the Act gave state commissions exclusive jurisdiction to apply the pricing provisions. The Eighth Circuit agreed and invalidated the Commission’s pricing rules. *Iowa Utilities Board*, 120 F.3d at 794-

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<sup>4</sup> *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 412 & n.13 (5th Cir. 1999), *cert. dismissed*, 531 U.S. 975 (2000); *Local Competition Order* ¶¶631, 681.

800. The court did not consider the merits of the TELRIC methodology. It overturned on the merits certain Commission rules regarding network element performance features – holding that although the Commission could require incumbents to make “modifications to [their] facilities to the extent necessary to accommodate interconnection or access to network elements,” the agency could not require incumbents “to alter substantially their networks to provide superior quality interconnection and unbundled access.” *Id.* at 812-13 & n.33. The court upheld the Commission’s construction of the “necessary” and “impair” standards in section 251(d)(2), as well as the initial list of UNEs. *Id.* at 810-12.

In January 1999, the Supreme Court reversed the Eighth Circuit’s jurisdictional ruling – holding that the FCC has statutory authority to adopt rules (including pricing rules) to implement the 1996 Act, and that “the state commissions’ participation in the administration of the new federal regime is to be guided by federal-agency regulations.” *AT&T*, 525 U.S. at 378 n.6.; *see generally id.* at 376-85. The Court separately upheld several of the FCC’s rules on the merits, including the Commission’s conclusion that the 1996 Act permits competitors to provide service relying *solely* on elements in the incumbent’s network. *Id.* at 392-93.

In two respects, the Court found that the Commission had not properly applied the “necessary” and “impair” standards in section 251(d)(2). 525 U.S. at 387-92. First, noting that the FCC’s interpretation of “necessary” and “impair” omitted any consideration of self-provisioning by the requesting carrier or of purchases from non-ILEC sources, the Court stressed that the agency “cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent’s network.” *Id.* at 389. Second, the Court rejected the suggestion in the Commission’s analysis “that *any* increase in cost (or decrease in quality) imposed by denial of a

network element” would satisfy the “necessary” or “impair” standard. *Ibid.* The Court directed the Commission, on remand, to construe section 251(d)(2) “to apply some limiting standard, rationally related to the goals of the Act.” *Id.* at 388.

4. **The UNE Remand Order.** In response to the Supreme Court’s remand, the Commission revised its construction of the “necessary” and “impair” standards and issued a new list of network elements. *See generally UNE Remand Order*, 15 FCC Rcd at 3704-09 (executive summary).

Addressing the “impair” standard, the Commission determined that the failure to provide access to a non-proprietary network element would cause “impair[ment]” if, “taking into consideration the availability of alternative elements outside the incumbent’s network ..., lack of access to that element materially diminishes a requesting carrier’s ability to provide the services it seeks to offer.” *UNE Remand Order* ¶51. Whether lack of access “materially” diminished a requesting carrier’s ability to provide service depended in part upon “the extent to which alternatives in the market are available as a practical, economic, and operational matter.” 47 C.F.R. §51.317(b)(2).<sup>5</sup>

Section 251(d)(2) requires the Commission to “consider” the “impair” standard “at a minimum” in assessing the scope of unbundling, and the Supreme Court had directed the agency to “give some substance” to that standard, “taking into account the objectives of the Act.”

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<sup>5</sup> The Commission found that access to a proprietary element is “necessary” within the meaning of section 251(d)(2)(A) “if, taking into consideration the availability of alternative elements outside [of] the incumbent’s network ..., lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.” *UNE Remand Order* ¶44 (emphasis in original); *see also* 47 C.F.R. §51.317(a)(1). The Commission’s “necessary” standard was not challenged on review of the *UNE Remand Order* and is not challenged in this case.



*AT&T*, 525 U.S. at 390. The Commission on remand determined that it appropriately could “consider other factors [– in addition to the “necessary” and “impair” standards –] that are consistent with the objectives of the Act in making [its] unbundling determination.” *UNE Remand Order* ¶¶101, 110-116.

At that time, the incumbents argued to the Commission that state commissions should play a significant role in applying the “necessary” and “impair” standards. For example, BellSouth asserted 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 ....” *Order* n.1306 (JA ) (quoting Letter from Robert T. Blau, BellSouth, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 (filed Feb. 11, 1999)). US WEST argued that “state commissions [are] 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.” *Id.* n.1306 (JA ) (quoting US WEST Comments at 30, CC Docket No. 96-98 (May 26, 1999) (citation omitted)).

The Commission largely rejected the ILECs’ arguments for a significant state role, instead primarily adopting national rules without regard to geographic market differences. The Commission’s new list of UNEs effectively removed one element (operator services/directory assistance) that had been on the original list; it limited the competitive circumstances in which two other previously available elements (circuit switching and shared transport) must be provided; it included a subelement (subloops), which had not been separately identified in the prior list but which the Commission previously had authorized state commissions to require; and it added a new switching element (packet switching) to be made available in limited circumstances. *See generally* *UNE Remand Order*, 15 FCC Rcd at 3706-08; *see also* *USTA*, 290

F.3d at 420-21 (describing the revised list of network elements as narrower in some respects and broader in other respects than the earlier list). By separate order applying the newly revised “impair” standard, the Commission also required ILECs to provide CLECs with unbundled access to the high frequency portion of the loop. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) (“*Line Sharing Order*”). The provision of this network element would enable “line sharing” – *i.e.*, the provision by a CLEC of high speed data services to customers over the same loops that the incumbent used to provide those customers with voice service. *See USTA*, 290 F.3d at 421.

5. **The Verizon Decision.** In response to the Supreme Court’s remand of the Commission’s TELRIC pricing rules, the Eighth Circuit considered those rules on the merits for the first time and reversed them in part. *Iowa Utilities Board v. FCC*, 219 F.3d 744. The Supreme Court again granted petitions for certiorari and upheld the TELRIC pricing methodology as lawful and reasonable. *Verizon*, 535 U.S. 467.

In affirming the pricing rules, the Court noted first that Congress had directed the FCC to prescribe methods “that would subject both incumbents and entrants to the risks and incentives that a competitive market would produce.” 535 U.S. at 476. The Court then observed that the Act appears to favor “novel ratesetting [for UNEs] designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents’ property.” *Id.* at 489.

The Court specifically rejected the ILECs’ arguments that pricing network elements at TELRIC rates would produce “not competition, but a sort of parasitic free riding, leaving TELRIC incapable of stimulating the facilities-based competition intended by Congress.” 535

U.S. at 504. Citing the record evidence of substantial facilities investment by competitive entrants, the Court found that the Commission's reliance on TELRIC pricing for UNEs "is not easily described as an unreasonable way to promote competitive investment in facilities." *Id.* at 517.<sup>6</sup>

The Court also upheld the Commission's "additional combination rules," which required ILECs to perform the functions necessary to combine UNEs under section 251(c)(3), even if those elements were not ordinarily combined in the incumbent's own network. 535 U.S. at 532. The Court concluded that the rules were reasonably designed "to ensure that the statutory duty to provide unbundled elements gets a practical result." *Ibid.*

**6. The USTA Decision.** Eleven days after the Supreme Court decided *Verizon*, this Court issued its decision on review of the *UNE Remand Order*. *USTA*, 290 F.3d 415. Incumbent LECs once again had challenged the breadth of the Commission's network element unbundling regime, and this Court granted their petitions for review.

This Court found three defects with the new UNE rules. First, it took issue with what it saw as the Commission's decision "to adopt a uniform national rule, mandating unbundling in every geographic market and customer class, without regard to the state of competitive impairment in any particular market." 290 F.3d at 422. The Court stated 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." *Ibid.* Second, while recognizing that

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<sup>6</sup> The Court made clear that its function as a reviewing court was not to evaluate as a matter of fact "whether a different forward-looking pricing scheme would have generated even greater competitive investment." *Id.* at 512. *See also id.* at 538 ("The job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility in deciding what and how items must be leased and the way to set rates for leasing them.").

“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.” *Id.* at 426. Third, the Court set aside the Commission’s decision to require line sharing 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.

7. **The EELs Case.** In two orders clarifying the *UNE Remand Order*, the Commission – as an interim measure pending further consideration – restricted the use of a combination of network elements known as the enhanced extended link (“EEL”). The Commission required CLECs buying that combination to use it to provide at least “a significant amount” of local exchange service in addition to long-distance service. *See Supplemental Order*, 15 FCC Rcd 1760 (1999); *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000). This was the first time the Commission had placed explicit service restrictions on the use of UNEs, and it was challenged on review by a trade association representing CLECs, which argued, *inter alia*, that the FCC had no authority to impose such restrictions. *Competitive Telecommunications Ass’n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) (“*CompTel*”).

This Court affirmed, relying in large part on its recent decision in *USTA*. *CompTel*, 309 F.3d at 13. The Court stated that its decision in *USTA* had “clearly found in the FCC an authority to make distinctions that were based on regional differences or on customer markets.” *Ibid.* If those kinds of distinctions were permissible, the Court stated, “it is hard to understand why the Act would not allow restrictions keyed to a specific ‘service’ of the requesting carriers.”

*Ibid.* The Court reviewed the FCC's EELs decision under the usual standard of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

**8. The Triennial Review Order.** In the *UNE Remand Order*, the FCC had committed to revisit its unbundling rules in three years. *UNE Remand Order* ¶15. In December 2001 – before this Court issued its *USTA* decision – the Commission initiated that “Triennial Review” proceeding “to ensure that our regulatory framework remains current and faithful to the pro-competitive, market-opening provisions of the 1996 Act in light of our experience over the last two years, advances in technology, and other developments in the markets for telecommunications services.” *Triennial NPRM*, 16 FCC Rcd 22781 (¶1) (2001) (JA ). In that NPRM, the Commission proposed a more “granular” or nuanced impairment analysis and said its analysis would take account of intermodal alternatives to ILEC services, particularly in broadband markets. Following the *USTA* decision, the FCC invited additional comment to incorporate explicitly into the ongoing Triennial Review the issues this Court identified.

The Commission concluded the Triennial Review rulemaking – and the remand proceedings it had incorporated – with the issuance of its Triennial Review *Order*. Most importantly for current purposes, the *Order* revises the “impair[ment]” analysis under section 251(d)(2) to consider whether the “lack of access to an [ILEC] network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic,” and it provides for market-by-market application of that standard. *Order* ¶¶84, 118 (JA , ). The *Order* addresses directly the three shortcomings that this Court identified in *USTA*.

First, the *Order* addresses “market-specific variations in competitive impairment” by ensuring the conduct of a “granular” analysis that considers “customer class, geography, and service.” *Order* ¶118 (JA ) (quoting *USTA*, 290 F.3d at 422). As to customer class, the Commission’s revised impairment analysis separately addresses the mass market and various enterprise market segments. *Id.* ¶¶123-124 (JA - ). With respect to geographic markets, the Commission makes national rules where separate analyses of each geographic area would yield the same result; where that is not the case, the new rules provide for area-specific variations in impairment findings and delegate focused fact-finding authority to the state commissions. *Id.* ¶130 (JA ). With respect to service distinctions, the new impairment standard 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 (JA ) (emphasis in original). The Commission’s new rules also require that at least one of the services that a CLEC offers with a network element be a “qualifying service” – *i.e.*, one of those core telecommunications services “that compete directly against traditional [ILEC] services.” *Id.* ¶¶140-141 (JA - ).

Second, the Commission changed its approach to cost disparities in assessing impairment. Focusing on those kinds of costs that pose recognized barriers to competitive entry, *Order* ¶¶85-86 (JA - ), the Commission said its analysis would concentrate on “sunk costs, particularly when combined with scale economies,” on “first-mover advantages” flowing from incumbents’ history as monopoly providers, on large “absolute cost advantages,” and on “scale economies,” though not at levels that “typically exist for any entrant into any industry,” *id.* ¶¶88, 89, 90, 87 (JA , , , ). The agency adopted an impairment standard that is substantially

similar to standards that the ILECs had advocated. *See id.* n.275 (JA - ). **The Commission's** analysis also takes into account countervailing cost advantages that new entrants may possess. *Id.* ¶89 (JA - ). And the Commission's revised rules give greatest weight to evidence of actual deployment by facilities-based competitors in determining whether any relevant cost disparities that exist actually constitute impairment-causing barriers to entry. *Order* ¶¶93-95 (JA - ).<sup>7</sup>

Third, the Commission phased out line sharing. *Order* ¶¶255-269 (JA - ). In reaching this decision, the Commission considered all the revenues that a new entrant could expect to receive from use of the whole loop (*id.* ¶258 (JA - )); the development of "line splitting" as a viable way for two CLECs to share a loop, one using the low frequency portion of the loop, the other using the high frequency portion (*id.* ¶259 (JA - )); and the relevance of other broadband platforms (such as cable) to the costs and benefits of mandatory line sharing (*id.* ¶¶262-263 (JA - )).

The revised impairment framework results in a significantly shorter list of UNEs. 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 find that deployment-based triggers are met. The Commission curtailed unbundling obligations with respect to mass market loops that have fiber components used in the provision of broadband services. The Commission removed 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-based triggers are met. The Commission removed

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<sup>7</sup> *See also Order* ¶¶329-331, 359, 394-404, 498-500 (JA - , - , - ) (adopting deployment-based "triggers" for geographic market-specific impairment fact-finding by state commissions).



unbundling obligations with respect to switching for the enterprise market, as well as mass market switching at locations where state commissions find that deployment-based triggers are met. The Commission also removed all existing unbundling obligations with respect to packet switching, and, subject to grandfather provisions and a transition, eliminated ILEC line sharing duties. *See generally* Order ¶¶4, 7 (JA , ).

The FCC determined that CLECs remained impaired in serving mass market customers without access to unbundled switching. Order ¶¶7, 459-461 (JA , - ). This determination stemmed in large part from the fact that the ILEC networks – developed in a monopoly environment – are designed to permit easy electronic connection and disconnection of customers served by ILEC switches, but require expensive and operationally difficult manual “hot cuts” to rewire connections between a customer’s loop and a CLEC switch. Order ¶465 & n.1409 (JA ).

The hot cut process “create[d] an insurmountable disadvantage to carriers seeking to serve the mass market” with their own switches (*id.* ¶475 (JA )), as demonstrated not only by commenters’ submissions regarding costs and operational difficulties (*id.* ¶¶464-474 (JA - )) but also by the “extremely limited deployment of [CLEC] circuit switches to serve the mass market” (*id.* ¶435 (JA )). Indeed, because there currently was no economically efficient way of connecting CLEC switches to mass market loops, the Commission found that ILEC switches shared many of the essential characteristics of voice grade loops, which all parties agree should be made available as UNEs. *See id.* ¶¶226, 429 & n.1316, 439 (JA , , ).

Although the record supported a national impairment finding with respect to mass market switching, certain high-capacity loops, and some types of transport, the Commission recognized

the possibility that circumstances in some geographic markets might warrant a different finding. The Commission thus adopted deployment-based triggers (or standards) for the states to apply to make market-specific determinations. *See Order* ¶¶462-463, 493-505 (JA - , - ). If those triggers are satisfied, the element at issue must be withdrawn following a period of transition designed to avoid market disruption. *Id.* ¶¶528-532 (JA - ). If the triggers are not satisfied, state commissions are to undertake further analysis of potential deployment under the Commission’s general impairment standard. With respect to switching, the Commission directed state commissions to institute procedures to address and mitigate the source of impairment. If the triggers for switching are not satisfied and if further analysis of potential deployment under the Commission’s general “impairment” standard does not rebut the existence of impairment, states that undertake this process are directed to consider whether narrower “rolling” access requirements would cure the impairment, and, if so, to implement such requirements. *Id.* ¶¶463, 521-524 (JA , - ). Under such a regime, CLECs would be given “rolling” access to unbundled switching for 90 days on the theory that CLECs could aggregate customers and obtain hot cuts in more efficient and less costly “batches.” If states determine that such procedures are inadequate, they are directed to conduct “continuing reviews of impairment for unbundled switching.” *Id.* ¶463 (JA ). In the event that states decline to participate in this process, the FCC will assume their role. *Id.* ¶527 (JA ).

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

In the *Order*, the FCC revised its interpretation of the statutory impairment standard. It concluded that CLECs requesting unbundled access are impaired “when lack of access to an [ILEC] 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 (JA ). Under its new impairment test, the Commission asks “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.” *Ibid.*<sup>8</sup> In this case, unlike *USTA*, no party challenges the Commission’s impairment standard *per se*. Petitioners here attack various aspects of the FCC’s implementation of that standard. None of those challenges has merit.

When this Court invalidated the FCC’s previous UNE rules in *USTA*, it directed the agency to adopt “a more nuanced concept of impairment” that accounts for distinctions among “specific market categories.” 290 F.3d at 426. The Commission reasonably decided to implement that directive in part by delegating to the states the task of making fact-specific findings concerning impairment in instances where the record did not permit the FCC to make the distinctions contemplated by *USTA*. The Communications Act does not bar such delegation; indeed, the statute expressly provides for substantial state involvement in implementing the local competition provisions of the 1996 Act, and the incumbents previously advocated the same kind of delegation at issue here.

The record amply supported the FCC’s determination that CLECs face “an insurmountable disadvantage” in serving the mass market without access to unbundled circuit switching. *Order* ¶475 (JA ). Aggregate data showed that CLECs were serving only a tiny percentage of the mass market with their own switches; and CLECs and state commissions

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<sup>8</sup> The impairment standard, market guidelines, and competitive triggers at issue in this case implement the specialized UNE provisions of the Communications Act. Accordingly, they are distinct from the market definition standards and analyses of entry and competitive effects that the Department of Justice applies in enforcing the antitrust laws, and they may lead to different results.

demonstrated that the “hot cut” process (connecting ILEC loops to CLEC switches) imposed costs and operational burdens on CLECs that made market entry uneconomic without unbundled ILEC switching. *Id.* ¶¶438-440, 466-468 (JA - , - ). Although the FCC’s analysis “could [have] end[ed]” there, the Commission also asked states to take steps that might lessen the documented impairment, and it provided ILECs with an opportunity to rebut the FCC’s impairment finding before state commissions in specific circumstances. *Id.* ¶¶422-424 (JA - ).

In contrast to the record for mass market switching, the Commission found little or no evidence of impairment with respect to broadband loop capabilities. It also determined that the presence of significant intermodal competition diminished the need for broadband unbundling. Moreover, the Commission reasoned that extensive broadband unbundling requirements would discourage investment and innovation in the burgeoning broadband market. Therefore, to fulfill its mandate under section 706 of the 1996 Act to promote broadband deployment, the Commission reasonably declined to require unbundling of broadband loop capabilities. The same rationale justified the agency’s decision to phase out line sharing.

As we explain in greater detail below, the Commission also reached reasonable conclusions on various issues involving transmission facilities, network modifications, and the separate unbundling requirements of section 271. The Court should affirm.

### **STANDARD OF REVIEW**

The Court should review the agency’s statutory interpretation under the standard articulated in *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837. In directing the unbundling of network elements whose unavailability would impair a requesting carrier’s

ability “to provide the services that it seeks to offer,” 47 U.S.C. §251(d)(2), Congress “gave no detail as to either the kind or degree of impairment that would qualify.” *USTA*, 290 F.3d at 422. “Given the ambiguity in the statutory language,” the Court’s task under *Chevron* “is not to choose the best interpretation but merely to decide if the Commission’s [reading] is reasonable.” *WorldCom v. FCC*, 246 F.3d 690, 694 (D.C. Cir. 2001). If the agency’s statutory construction is reasonable, it is entitled to deference. *Cellular Telecommunications & Internet Ass’n v. FCC*, 330 F.3d 502, 507 (D.C. Cir. 2003).

To the extent that petitioners challenge the reasonableness of the FCC’s revised unbundling rules, the Court must uphold those rules unless they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706(2)(A). This “[h]ighly deferential” standard of review “presumes the validity of agency action.” *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000). *See also Verizon*, 535 U.S. at 539 (“The job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility ....”).

## ARGUMENT

### **I. THE FCC’S DELEGATION OF CERTAIN MATTERS TO THE STATES WAS LAWFUL.**

This 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. Following that mandate, the Commission adopted a more market-specific framework for evaluating impairment, and under that framework, distinguished among market categories or customer classes when the record supported distinctions. In making certain national findings of impairment, the Commission also recognized that the record before it was not sufficiently

detailed to support the nuanced decisionmaking that *USTA* required. To address those situations – involving, for example, local circuit switching, high capacity local loops, and dedicated transport – the Commission enlisted state commissions to gather and evaluate information relevant to impairment in their states. *See generally Order* ¶¶7, 186-196 (JA , - ). These very specific delegations were reasonably designed to ensure accurate and nuanced analyses of impairment on a market-specific basis.

The incumbents' claims that these delegations are unlawful conflict with their previous position on this point: The ILECs "consistently advocated for a significant state role in analyzing impairment" in earlier UNE rulemaking proceedings. *Order* n.1306 (JA ). In particular, in the *UNE Remand* proceeding that led to the *USTA* litigation, ILECs had 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 had argued to the FCC 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* n.1306 (JA ) (quoting US WEST Comments at 30, CC Docket No. 96-98 (May 26, 1999) (citation omitted)). In the same proceeding, Verizon's general counsel had asserted 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, GTE (now Verizon), to Lawrence E. Strickling, FCC, March 1, 1999, at 4). Verizon's general counsel had concluded that, legally, state commissions were the appropriate entities to make these determinations. *Ibid.*

The ILECs now apparently would forbid state participation in the unbundling process. They contend that the statute required “‘*the Commission ... [to] consider*’ ‘impair[ment]’ in ‘*determining*’ which network elements to make available.” Br. 22 (quoting 47 U.S.C. §251(d)(2)) (emphasis supplied in ILEC brief).<sup>9</sup>

Contrary to the ILECs’ claim, nothing in the Communications Act prohibits a state role in the impairment analysis. The Act directs the Commission to “establish regulations to implement the requirements” of section 251. 47 U.S.C. §251(d)(1). It does not foreclose FCC regulations that provide a role for states in assessing impairment. To the contrary, the Act explicitly allows for significant state involvement in making just these kinds of determinations. For example, states are authorized to decide “open issues” in arbitration disputes between incumbents and CLECs. *Id.* §252. Under the Commission’s earlier unbundling rules, this responsibility routinely required state commissions to determine whether certain network elements – such as dark fiber and subloop components – should be unbundled at all. *See, e.g., AT&T Communications of Virginia v. Bell Atlantic-Virginia*, 197 F.3d 663, 671-74 (4<sup>th</sup> Cir. 1999) (reviewing state commission decision, under general impairment standard, regarding CLEC’s right to unbundled dark fiber); *MCI v. Bell Atlantic*, 36 F. Supp. 2d 419, 423-27 (D.D.C. 1999); *MCI Telecommunications Corp. v. Michigan Bell Tel. Co.*, 79 F. Supp. 2d 768, 783-87 (E.D. Mich. 1999), *aff’d*, 2002 WL 1354693 (6<sup>th</sup> Cir. 2002). *See also Local Competition Order* ¶¶281-283 (FCC authorized states to add UNEs so long as they applied FCC’s definition of

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<sup>9</sup> The ILECs have claimed that their early positions in support of state delegation pre-dated the Supreme Court’s jurisdictional analysis in *AT&T* and thus should be ignored. USTA Reply In Support of Motion for Stay and Expedition, filed October 3, 2003, at 6 n.5. In fact, the ILECs filed the comments cited above *after* the Supreme Court issued its *AT&T* decision on January 25, 1999.



“impair” standard). The incumbents, while disagreeing that these network elements should have been made available, never sought direct review of the FCC’s decision in the *Local Competition Order* to authorize state commissions to make these decisions. The Act also authorizes state commissions to make pricing decisions for UNEs pursuant to guidelines set by the FCC. *See* 47 U.S.C. §252(c)(2); *see also AT&T*, 525 U.S. at 384 (“It is the States that will apply those [FCC] standards and implement that methodology, determining the concrete result in particular circumstances.”). And the Act explicitly permits states to adopt unbundling rules of their own that are consistent with section 251 and do not substantially prevent implementation of that provision’s requirements. 47 U.S.C. §251(d)(3). The Act thus plainly contemplates a meaningful role for the states in the unbundling process.

Contrary to the ILECs’ claim that “clear” textual support would be needed to support the Commission’s delegation, 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 & Sioux Tribes v. Board of Oil & Gas Conservation*, 792 F.2d 782, 795-96 (9<sup>th</sup> Cir. 1986); *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 sections 251(d)(3) and 252, suffices to authorize the delegation to the states here.

The delegation at issue here has attributes that have previously been found to support the lawfulness of delegations in the absence of express authorization. For one thing, the statute itself preserves the states' power to regulate unbundling. *See, e.g.*, 47 U.S.C. §251(d)(3). 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*, 792 F.2d at 795; *Southern Pacific Transp. Co. v. Watt*, 700 F.2d 550, 556 (9<sup>th</sup> Cir.), *cert. denied*, 464 U.S. 960 (1983). The “extraordinary complexity” (*USTA*, 290 F.3d at 421) of the regulatory tasks imposed by section 251(d)(2) also supports a delegated role for state commissions, since courts have found that “the magnitude of the task” at hand “suggests that Congress intended to allow” delegation. *United States v. Mango*, 199 F.3d 85, 91 (2d Cir. 1999). Finally, courts have recognized that delegation may be appropriate where the subject matter of the regulation requires close cooperation between state and federal regulators. *See, e.g.*, *United States v. Matherson*, 367 F. Supp. 779, 782-83 (E.D.N.Y. 1973), *aff'd*, 493 F.2d 1399 (2d Cir. 1974). Such cooperation is fundamental to the 1996 Act, which calls for active state “participation in the administration of [a] new federal regime” addressing local communications matters that previously had been within the states' exclusive domain. *AT&T*, 525 U.S. at 378 n.6.

Applying these settled rules, this Court has approved of Commission “delegations” to state commissions that are virtually indistinguishable from the delegation here, when the Commission declined to exercise jurisdiction over facilities that were exclusively used to provide

interstate service. Carriers dissatisfied with state regulations in these circumstances were limited to filing declaratory actions asking the Commission to assert jurisdiction and preempt the offending state regulation. The courts found that the Commission's decisions to proceed in this manner were lawful and reasonable. See *Diamond International Corp. v. FCC*, 627 F.2d 489, 492-93 (D.C. Cir. 1980); see also *New York Tel. Co. v. FCC*, 631 F.2d 1059, 1065 (2d Cir. 1980).

The ILECs contend that, because Congress expressly authorized delegation in other provisions of the statute, its silence on the subject in section 251(d) must be construed to prohibit delegation. Br. 23. This 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; *Chevron*, 467 U.S. at 842.

The ILECs 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. Br. 23. 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 reasonably could have seen a 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 give the FCC exclusive jurisdiction and

explicitly preserves the states' authority to adopt and enforce their own non-conflicting unbundling rules. *Id.* §251(d)(3).

Finally, the ILECs wrongly contend (Br. 21, 25) that the FCC failed to assert reviewing authority over state unbundling decisions. The FCC stated that it will entertain petitions for declaratory ruling from parties who contend that state impairment determinations do not comport with federal standards. *Order* ¶426 (JA ); *see also Errata* ¶21 (JA ). The ILECs' claim that the FCC is not *obligated* to address such petitions does not undermine the Commission's supervisory *power*. The Commission can, as necessary, act on such petitions where state commissions have deviated from federal standards. And parties can file complaints with the Commission, pursuant to 47 U.S.C. §208, alleging that an ILEC or CLEC has failed to comply with the requirements of the 1996 Act and the Commission's rules. *Order* ¶426 (JA ).

In addition, Congress created a judicial 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 courts have already addressed numerous state decisions concerning whether, under FCC impairment standards, particular network elements should be unbundled – the same kinds of decisions at issue here. *See, e.g., AT&T Communications of Virginia*, 197 F.3d at 671-74 (reviewing state commission decision regarding unbundling of dark fiber). Federal courts have also addressed complaints concerning state compliance with federal law in areas such as UNE pricing. *See generally Verizon Maryland v. Public Service*

*Commission of Maryland*, 535 U.S. 635 (2002). Those courts can likewise ensure that states comply with federal impairment standards. *Order* ¶427 (JA ). Indeed, the ILECs themselves previously suggested that federal district court review of state arbitration decisions was an adequate forum for reviewing state impairment determinations. *See id.* n.1306 (JA ). There is no reason to believe that those courts will fail to ensure that states comply with federal UNE standards.

## II. THE FCC'S IMPAIRMENT ANALYSIS OF SWITCHING WAS REASONABLE.

In conducting its impairment analysis with respect to circuit switching, the Commission examined the operational, cost, and revenue factors associated with that network element. The Commission concluded that, in the enterprise market segment, CLECs generally are not impaired without unbundled switching. *Order* ¶¶451-458 (JA - ). The “revenue opportunities” associated with serving enterprise customers are generally sufficient to justify the sunk and fixed costs of using and installing a switch, and enterprise loops can be connected to a CLEC switch efficiently at the customer premises without the need for expensive and operationally difficult hot cuts at the central office. *Id.* ¶¶451, 452 (JA , ). The Commission’s determination of non-impairment was substantiated by record evidence that more than 13 million business lines were being served through competitive switches. *Id.* ¶453 (JA ).

With respect to the mass market, the Commission concluded that CLECs face “an insurmountable disadvantage” without access to unbundled incumbent circuit switching. *Order* ¶475 (JA ). Only a small portion of the mass market – less than three percent of the residential market – is currently served by competitive switches, and virtually all of this deployment consists of cable networks that bypass the incumbents’ networks entirely. *Id.* ¶¶438-440 (JA - ).

). One significant reason for this impairment is the “hot cut” process, 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*, 220 F.3d at 625. Hot cuts are generally not necessary for enterprise customers, but are almost always required for mass market customers. *Order* ¶¶451, 464-465 (JA , - ); *see also id.* n.1354 (JA ). The FCC found that the ILECs’ manual hot cut process on an order-by-order basis creates unacceptable service disruptions and delays; is incapable of handling the volume of orders that mass market customers generate for CLECs; and creates costs that exacerbate these operational difficulties. *See id.* ¶¶459, 465, 468-479 (JA , - ). The FCC concluded that because there is currently no efficient way for CLECs to connect their own switches to mass market loops, ILEC switches share many of the essential characteristics of voice grade loops, which all parties agree should be made available as UNEs. *See id.* ¶¶226, 429 & n.1316, 439 (JA , , ).

The incumbents correctly state that the continued availability of mass market switching will enable CLECs to continue to provide service through the combination of loop, transport, and switching elements that is often referred to as the “UNE platform” or UNE-P. But the assertion that *AT&T* or *USTA* prohibited this arrangement is wrong. *AT&T* rejected the incumbents’ current claim that UNE-P is the equivalent of resale, holding that it is authorized by the Act if the FCC validly finds impairment for each of the three constituent elements. 525 U.S. at 392-93. Although *USTA* questioned what it regarded as this “completely synthetic competition,” it required further explanation only where the FCC had not made valid impairment findings. 290 F.3d at 424.

**A. Substantial Evidence Supports The FCC's National Impairment Finding For Mass Market Switching.**

The ILECs contend that the FCC lacked a sufficient evidentiary basis for its finding that the hot cut process now impairs CLECs in serving the mass market. They claim (Br. 13-18) that the Commission relied on “self-serving” “anecdotal” claims of competitors, and rejected “objective, aggregate evidence” of hot cut performance that it had found sufficient to justify the authorization of Bell company entry into the long-distance market in proceedings under 47 U.S.C. §271.

As an initial matter, although the Commission considered CLEC claims of impairment, *Order* ¶¶466-468 (JA - ), the Commission's own findings were predicated upon far more than anecdotal evidence. Particularly telling was evidence that, although CLECs have deployed approximately 1300 switches nationwide, those switches are used almost exclusively to serve large enterprise customers and cable customers that do not require hot cuts. *Ibid.* See generally Z-Tel Reply Comments at 18-49 (JA - ). “Given the sunk costs already invested in deployed switches,” the Commission sensibly concluded that competitors should have had “every incentive to spread those costs over a larger base.” *Order* n.1371 (JA ). The fact that CLECs with already-deployed-and-paid-for switches generally had chosen to serve their mass market customers by leasing unbundled ILEC switching rather than with their own unused switching capacity was powerful objective evidence that the hot cut process was a barrier to entry sufficient to constitute impairment. *Id.* nn.1365, 1371 (JA , ) (citing, *e.g.*, Z-Tel Reply Comments at 34-

36 (JA - ), and AT&T Comments at 207-08, 218, 224-31 (JA - , , - ); *see generally* *id.* ¶¶437-440 (JA - ).<sup>10</sup>

The record also contained objective evidence that mass market customers would not accept service that required hot cuts even when the incumbents met the performance standards that had been accepted in the Commission's section 271 decisions. Under those standards, one out of ten customers would suffer delayed cutovers; all would experience outages of several minutes; one in 20 would experience greater outages; and other service problems would inherently arise that could not be blamed on the ILEC. AT&T Comments at 214-15 (JA - ). AT&T submitted testimony that, once these facts became known, mass market customers refused to accept service that required hot cuts, and AT&T had to abandon its business plan of serving mass market business customers through a strategy that depended on hot cuts. AT&T Brenner Decl., ¶¶32-42, 48-51, 60, 72 (JA - , - , , ).

Second, even if hot cut processes had not created impairment at current volumes, the Commission found that ILECs would not be able to provide satisfactory cutovers at the dramatically greater volumes that would result if unbundled switching were eliminated for mass market customers. The FCC here reasonably relied on state commission expertise in identifying "difficulties regarding hot cut performance" at higher demand volumes. *Order* n.1437 (JA ). 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

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<sup>10</sup> The ILECs make the facially implausible suggestion (Br. 11) that the availability of the switching UNE at low TELRIC rates "seduc[es]" CLECs to provide service to the mass market via UNEs, even though they could economically do so with their own already-deployed switches. However low the TELRIC price for unbundled switching may be, it is still an incremental cost to a CLEC that already owns a switch. The incremental cost to the CLEC of its own already-deployed switch approximates zero. *See* Z-Tel Reply Comments at 35 (JA ).



of hot cuts would have to accelerate dramatically if CLECs no longer were permitted to obtain unbundled switching. At Verizon's present pace, the New York commission concluded, it would take "over 11 years" just to move existing customers in New York from UNE-P to CLECs' switches. *Order* ¶469 (JA ) (emphasis added) (quoting New York Comments at 4 n.18 (JA )).

The ILECs 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. Br. 14-15. At the time of those section 271 proceedings, however, CLECs were principally using unbundled ILEC switching to serve mass market customers, and "reasonably foreseeable" volumes of hot cuts were quite low. *Order* n.1435 (JA ). In its Triennial Review, the Commission focused on a different issue: whether ILECs could handle the increase in hot cut volumes that would be necessary 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.*

In several of the section 271 proceedings, both the Bell companies themselves and the FCC affirmatively relied upon the presence of unbundled switching-based competition as evidence of the requisite "presence of a facilities-based competitor" that is needed to establish a Bell company's threshold eligibility to provide in-region long-distance service. 47 U.S.C. §271(c)(1)(A).<sup>11</sup> Those orders were premised on the availability of unbundled switching. The

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<sup>11</sup> See, e.g., *Vermont 271 Order*, 17 FCC Rcd 7625 (¶11) (2002); *Kansas-Oklahoma 271 Order*, 16 FCC Rcd 6237 (¶41), *aff'd in pertinent part*, *Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

impairment findings in the *Order* thus are not unexplained departures from the section 271 decisions. Those decisions did not conclude that CLECs “would not be impaired” if they were denied access to unbundled switching and “were required to rely on the hot cut process to serve all mass market customers.” *Order* n.1435 (JA ). Rather, a critical premise of the section 271 decisions was that the CLECs would have automatic access to UNE-P.<sup>12</sup>

The ILECs contend that the determination with respect to hot cuts was based on speculation. Br. 15-16. Ultimately, however, the Commission had to make a predictive judgment. *Order* ¶468 (JA ). In 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 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). And the record discussed above fully supported that predictive judgment. Indeed, the ILECs’ assertions below regarding their ability to improve hot cut performance were far more “conjectural” (Br. 20) than was the Commission’s contrary conclusion, which “ascribe[d] more weight to actual evidence of competitive entry ... than to predictive claims of incumbents’ ability to handle hypothetical volumes.” *Order* n.1437 (JA ).

**B. The FCC’s National Impairment Finding Was Based Upon Permissible Considerations.**

The ILECs also argue that the Commission’s impairment analysis rests on considerations that *USTA* proscribes and ignores factors that *USTA* requires the Commission to consider. The

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<sup>12</sup> See, e.g., *New York 271 Order*, 15 FCC Rcd 3953 (¶199) (1999), *aff’d*, *AT&T*, 220 F.3d 607; *Texas 271 Order*, 15 FCC Rcd 18354 (¶197) (2000); *Kansas-Oklahoma 271 Order* ¶105.

ILECs claim that the Commission found that hot cut costs are a separate and independent basis for the national impairment finding, and that such a finding would be legally improper because these costs were considered in isolation without considering other costs and revenues. But the ILEC claim rests on a false premise. Because these costs vary widely from location to location, the Commission did *not* find that these costs would invariably give rise to economic impairment if the operational impairments were eliminated. To the contrary, the Commission stated that these “costs *contribute* to a significant barrier to entry,” and that its “national finding of impairment is based on the *combined effect* of all [operational *and* economic] aspects of the hot cut process.” *Order* ¶¶470, 473 (JA , ) (emphasis added).

While all of the ILECs’ claims rest on this false premise, their specific objections to the Commission’s treatment of hot cut costs fail on their own merits. They contend that the FCC improperly based its finding of economic impairment with respect to the hot cut process on customer churn, which they allege is “an ordinary startup cost[]” that is “universal as between new entrants and incumbents in *any* industry.” Br. 18 (quoting *USTA*, 290 F.3d at 427 (emphasis in original)). But the FCC’s economic impairment analysis was based upon “the combined effect of all aspects of the hot cut process” (*Order* ¶473 (JA )), and it considered churn (a characteristic of serving mass market customers) as only one factor that “*exacerbates* the operational and economic barriers to serving mass market customers” with non-ILEC switches. *Id.* ¶471 (JA ) (emphasis added).

The barriers that result from the current hot cut process, moreover, are not cost disparities that an entrant into any market might face. 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.” *Order* ¶465 (JA ). Only CLECs that use their own switches to serve the mass market incur the substantial operational and economic costs associated with hot cuts. The Commission reasonably concluded that 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 *USTA* said the FCC could properly consider. 290 F.3d at 427.

The ILECs are wrong to assert (Br. 19-20) that the FCC considered hot cut costs in isolation, without regard to potential revenues or other countervailing factors. As pointed out above, the impairment finding did not rest on the costs of hot cuts in isolation. The Commission determined that “the inherent limitation” in the number of hot cuts that can be performed, in conjunction with operational features of hot cuts that make them unacceptable to mass market customers, “is likely to make entry into a market uneconomic.” *Order* ¶469 (JA ).

The ILECs also claim that the Commission’s reliance on the impact of “churn” was improper because churn is a “routine start up cost.” Br. 19. An intelligent assessment of the significance of existing hot cut costs or other economic barriers to entry must include “churn,” since whether up-front hot cut costs will foreclose entry depends critically on the length of time over which the costs can be recovered. *Order* ¶471 (JA ). Indeed, below, the ILECs acknowledged the relevance of churn in assessing hot cut costs, for they submitted cost studies that assumed that CLECs would keep customers an average of 18 to 24 months. *E.g., SBC Ex*

*Parte*, Jan. 14, 2003, Attachment 3, at 3 (JA ). The Commission 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.” *Order* ¶471 (JA ). These negative effects on potential revenues led the Commission to conclude that hot cuts would be “prohibitively expensive” in many areas. *Id.* ¶470 (JA ).

The Commission properly considered whether the cumulative effect of any barriers to entry with respect to switching “is likely to make entry uneconomic, *taking into account available revenues and any countervailing advantages that a requesting carrier might have.*” *Order* ¶85 (JA ) (emphasis added); *see also id.* n.1497 (JA ). That holistic approach is evident in the Commission’s reliance on aggregate data showing that very few CLECs were providing mass market service with their own switches even when they had switches already deployed to serve enterprise customers and that characteristics of hot cuts made CLEC service unacceptable to mass market customers. *Order* ¶¶437-440 & nn.1365, 1371 (JA - ). Such actual market experience – while properly subject to potential rebuttal in proceedings before state commissions – reflects more than an isolated examination of the burdens of the hot cut process.

Although the national impairment finding rested heavily on the effects of hot cuts, the Commission examined other operational and economic factors that bear on whether CLECs are impaired and directed states to consider these. *See Order* n.1405 (JA ). The FCC found that “record evidence indicates that in some markets, [CLECs] may face a lack of sufficient collocation space in the [ILEC’s] central office or offices,” which “may render competitive entry

uneconomic.” *Id.* ¶477 (JA ). The Commission also found that “in some cases,” ILEC “failure to provide cross-connections between the facilities of ... [collocated CLECs] on a timely basis” may result in impairment. *Id.* ¶478 (JA ). The Commission found, in addition, that backhaul and collocation costs – essential to create, in effect, the longer loops needed to get from the subscriber’s premises to the CLEC switch – “may make entry uneconomic without access to the incumbent’s switch.” *Id.* ¶484 (JA ); *see generally id.* ¶¶479-485 (JA - ).<sup>13</sup> All of these factors logically are accounted for – with advantages and disadvantages “netted out” (at least in a general way) – in the aggregate data upon which the Commission relied. *See id.* ¶¶437-440 & nn.1365, 1371 (JA - ). However, because the Commission found that the record with respect to any particular one of these additional factors was inadequate to form the basis of a national finding regarding impairment, the Commission enlisted the states to consider them on a more granular basis. *Id.* ¶476 & n.1405 (JA ).

The ILECs also contend (Br. 30-31) that the Commission improperly “discounted” the effect of intermodal competition.<sup>14</sup> The FCC considered intermodal competition with respect to voice services and reasonably found that the impact of such competition was minimal – and not just because intermodal alternatives are unavailable at wholesale. The Commission determined

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<sup>13</sup> Both ILECs and CLECs submitted studies purporting to show the effect of these and other economic factors on the viability of serving the mass market without unbundled switching. *Order* ¶¶481-482 (JA - ). Although the FCC found deficiencies in both sets of studies that led it not to rely upon them to make a nationwide finding with respect to impairment (*id.* ¶483 (JA )), even the ILEC studies indicated that it would be uneconomic for CLECs to serve mass market customers without unbundled switching in small wire centers (*id.* ¶484 (JA )).

<sup>14</sup> In fact, packet switches and other intermodal switches, used by competitors to provide voice service that is comparable to the service offered by the ILECs, count towards the competitive triggers for switching. *Order* nn.1365, 1549, 1560 (JA , , ); *see also id.*, App. B. (47 C.F.R. §§51.319(d)(2)(iii)(1) & (2)) (JA ), as corrected by *Errata* ¶39 (JA ).

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 (JA ); *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 only “three to five percent” of wireless 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 (JA ). Finally, and most importantly, because providers of cable telephony and wireless service supply their own loops (and therefore do not need hot cuts), their presence in the market does not refute the evidence that the hot cut process generally precludes CLECs from using their own switches in the mass market. *Id.* ¶446 (JA ).

The ILECs claim that the Commission ignored the allegedly harmful effects on facilities deployment that result from the availability of unbundled ILEC switching. Br. 11. In fact, the Commission recognized that the section 251(d)(2) “at a minimum” clause permits it to consider deployment incentives in evaluating UNEs; but it determined, on the basis of an inconclusive record, that “our findings of impairment are not overcome” by deployment incentive concerns in the local circuit switching context. *Order* ¶447 & n.1365 (JA , ).

The Commission pointed out that in the circuit switching context, its inquiry into the impact of unbundling on investment incentives “focuses primarily on the *competitive* LECs’ incentives to deploy alternative switching facilities.” *Id.* ¶448 (JA ).<sup>15</sup> The opposing parties had submitted conflicting evidence on the issue of investment incentives, and the Commission

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<sup>15</sup> The incumbents “already operate ubiquitous circuit switching networks” and would be relatively unaffected in their incentives to invest in such facilities. *Ibid.*

was “unable to conclude ... that the availability of unbundled local circuit switching either depresses or stimulates infrastructure investment.” *Id.* ¶449 (JA ). The Commission explained that the section 706 directive that it promote advanced telecommunications is not implicated in the decision to require unbundling of circuit switching, because such unbundling involves only “the legacy telephone network, and thus does not deter carriers’ investment in advanced telecommunications capabilities.” *Id.* ¶450 (JA ). Indeed, the Commission concluded that “incumbents have every incentive to deploy these [advanced packet switching networks], which is precisely the kind of facilities deployment we wish to encourage.” *Id.* n.1365 (JA ). Accordingly, the Commission concluded that the “at a minimum” language of section 251(d)(2) did not require it to override its impairment findings with respect to circuit switching. The Court should affirm that reasonable conclusion.

Finally, the ILECs maintain that the Commission should have addressed its hot cut concerns in a more “[n]arrowly-tailored” way. Br. 20-21 (citing *USTA*, 290 F.3d at 422-26). The FCC did address the impairment caused by hot cuts in a narrowly tailored way. The Commission directed the states to eliminate compulsory access to unbundled circuit switching if deployment-based triggers were satisfied. *Order* ¶¶498-505 (JA - ). After finding that incumbents do not now have efficient bulk hot cut processes (*id.* ¶474 (JA )), the Commission also directed states to develop batch cutover processes that could reduce hot cut burdens, make competitive entry more likely, and thereby increase the likelihood that the triggers would be satisfied. *See id.* ¶¶487-490 (JA - ). And the Commission directed states to examine whether, notwithstanding the absence of actual competition as reflected in the triggers, CLECs economically could deploy their own switches without impairment. *Id.* ¶¶506-520 (JA - ).



If, after all that, ILECs still had to provide mass market switching as a network element, the Commission required states to implement the very “rolling access” process that the ILECs claim to prefer (Br. 20) if such a process would eliminate the impairment. *Id.* ¶¶521-524 (JA - ). There is no basis for the ILECs to claim that the Commission failed to tailor its mass market switching unbundling obligations narrowly.

**C. The Impairment Analysis That The FCC Assigned To The States Is Reasonably Designed To Ensure Accurate Impairment Determinations On A Granular Basis.**

The Commission’s analysis of mass market switching “could [have] end[ed] with” its national finding of impairment – grounded in the “minimal deployment of [CLEC]-owned switches to serve mass market customers” and record evidence regarding hot cut burdens. *Order* ¶¶422, 423 (JA , ). But the Commission went further: It directed states to take steps that might alleviate the documented impairment; and it provided ILECs with an opportunity to rebut the national impairment finding before state commissions on a granular basis, first, through competitive triggers and, then, through more nuanced economic analysis. *Id.* ¶¶423-424 (JA - ).

As an initial matter, the ILECs appear to have abandoned their earlier position that the competitive triggers the FCC established cannot be met. *See* Verizon Petition for Mandamus, filed August 28, 2003, at 8. Indeed, they are arguing now in state proceedings throughout the country that the triggers have been satisfied. So far, the incumbents have argued that the triggers are met in places ranging from New York and Los Angeles to Kokomo, Indiana, and Wichita, Kansas,<sup>16</sup> covering an area that includes approximately 40.72% of the United States population.<sup>17</sup>

<sup>16</sup> *See, e.g.*, Initial Presentation of VZ-NY, Case OC-3-0821 Technical Conference at 5 (New York PSC Dec. 2, 2003); Curtis Hopfinger Testimony, *Rulemaking* 95-04-043, at 2 (Calif. P.U.C Dec. 12, 2003); SBC Indiana’s Prefiling, *Cause No. 42500*, at 1 (Indiana RUC Dec. 2, 2003);

In challenging the standards the FCC directed the states to apply, the incumbents now claim that the Commission gave the states too much discretion. That criticism is baseless. If the Commission had done nothing more than direct the states to apply its general impairment standard (which the ILECs do not challenge) to local markets, that delegation would have been lawful. Neither *AT&T* nor *USTA* requires further constraints. Those decisions did not purport to limit the Commission's authority to delegate discretion to states. And the limits the ILECs propose are flatly incompatible with the 1996 Act itself, which expressly gives states considerable decisionmaking authority.

In any event, the Commission provided the states with detailed guidance that easily meets any test of reasonableness. The Commission provided significant guidance on market definition, directing that states "*must* take into consideration 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 (JA ) (emphasis added); 47 C.F.R. §51.319(d)(2)(i). Under this standard, the self-provisioning trigger would be met, at a minimum, not only at locations in which three competitive providers are *actually serving* mass

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SBC's Identification of Final Position, *Docket No. 03-GIMT-1063-GIT* at 1 (Kansas Corp. Comm. Dec. 12, 2003).

<sup>17</sup> Population estimates are based on Census 2000 PHC-T-3, Ranking Tables for Metropolitan Areas: 1990 and 2000; Table 1 (<http://www.census.gov/population/cen2000/phc-t3/tab01.pdf>).

market customers with non-ILEC switching, but also at locations where three competitive providers are “*holding out*” the availability of such service to mass market customers.<sup>18</sup>

The Commission cautioned states against defining the market “so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market.” *Order* ¶495 (JA ). **Thus, subject to the proviso that each state must have at least two markets for purposes of evaluating compliance with the trigger (*ibid.*), states should consider whether – on the basis of costs, retail rates, hot cut performance, and other economically meaningful factors – the markets in question should be expanded further. *See Order* ¶¶495-496 (JA - ).<sup>19</sup> Finally, “a party aggrieved by a state commission determination, including a decision on the appropriate market definition, may seek a declaratory ruling from the Commission.” *Order* n.1552 (JA ) (as corrected by *Errata* ¶21 (JA )); *see also Order* ¶426 (JA ).**

The ILECs assert that the self-provisioning trigger, which the FCC set at three competitors, is too high. Br. 29-30. 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

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<sup>18</sup> This focus on the locations in which customers face similar competitive choices is consistent with Commission precedent analyzing geographic markets in the merger context. *See, e.g., Application of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985 (¶54) (1997); *Application of EchoStar Communications Corp.* 17 FCC Rcd 20559 (¶¶119-120) (2002).

<sup>19</sup> The ILECs do not contend that the record supported a better approach on market definition. Nor could they. As the Commission found, “there was no credible evidence in the record” establishing how to draw geographic markets for switching. *Order* n.1536 (JA ).

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 (JA ) (quoting *USTA*, 290 F.3d at 427).

While petitioners may have preferred a lower threshold, the line drawn by the FCC is reasonable, particularly because the FCC made clear that “the existence of even one [self-provisioned] switch might in some cases justify a state finding of no impairment” under the more nuanced economic analysis that states must conduct if the triggers are not met. *Order* ¶510 (JA ).<sup>20</sup>

Curiously – in light of their (incorrect) claim that the Commission improperly based its national impairment finding solely on an analysis of hot cuts – the ILECs also criticize the Commission for permitting the states to look broadly at other factors in the event that the switching triggers are not met. Br. 27-28. Contrary to their argument, the Commission did not give the states unconstrained discretion to decide whether CLECs are able to deploy their own switches. In evaluating impairment, states must apply the same impairment test that the FCC adopted 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 (JA ). That test, which the ILECs do not challenge, satisfies *USTA*. The FCC has provided extensive additional guidance on the evidence the states must consider, 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.*

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<sup>20</sup> Contrary to the ILECs’ assertion (Br. 30), the *AT&T Non-Dominance Order*, 11 FCC Rcd 3271 (1995), does not compel a lower trigger. The Commission there considered various facts that are not present here, including the existence of two other national end-to-end networks, additional competition from regional networks, and dramatic reductions in AT&T’s national market share.

¶¶85-104, 476-485, 506-520 (JA - , - , - ). In short, the FCC's standards "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 (JA ).

The ILECs contend that the Commission violated the *USTA* mandate in permitting states to find impairment where retail prices have been set below cost. Br. 29. This claim mischaracterizes *USTA*. The Court in *USTA* found that the FCC had failed to consider how universal service subsidies might affect the impairment analysis in markets where retail rates are set "below cost" or "above cost," but it did not compel a particular outcome. *USTA*, 290 F.3d at 422-23. The FCC filled the gap in its earlier analysis. It found that the various provisions of sections 251 (dealing with local competition) and 254 (dealing with universal service) give the Commission "considerable discretion to address the relationship between implicit support flows and ... impairment analysis." *Order* ¶163 (JA ). It noted that its revised impairment standard – which considers not only costs and operational burdens but also potential revenue opportunities – takes account of both the disadvantages and the potentially offsetting *advantages* that CLECs face. *Id.* ¶164 (JA ). Thus, the new standard addresses the Court's concern in *USTA* (290 F.3d at 422-23) that the Commission's impairment analysis reflect the competitive advantage CLECs may face in areas where state regulators require incumbents to charge above-cost rates in order to subsidize below-cost charges elsewhere. *See Order* ¶166 (JA ) (noting that such above-cost areas are most likely already to have facilities-based competition in place and are "most likely to warrant a finding of no impairment").

The Commission also made clear that CLECs might not be impaired in areas where ILECs charge below-cost rates. The Commission stressed that, even in such areas, CLECs still

may find it economic to compete with their own facilities by selling a broader array of services or by using more efficient alternative technologies. *Order* ¶168 (JA ). And to the extent that ILEC retail rates truly are *below* cost, the availability of UNEs at *cost*-based rates may have little competitive impact in any event. *Ibid.* What the ILECs urge is an unprincipled asymmetrical application of the impairment standard that relies on CLEC advantages to negate the existence of impairment in subsidizing areas while ignoring the disadvantages CLECs face in subsidized areas. The Commission reasonably rejected that approach.

**D. The CLECs' Challenges Regarding Switching And Database Access Lack Merit.**

The CLECs complain that the Commission unbundled switching to an insufficient degree. Specifically, they claim that the triggers the states will use are arbitrary. They also claim that the rules governing the eventual transition from UNE switching to self-provisioned switching are arbitrary, as is the agency's decision not to require unbundling of call-related databases.

1. Triggers. The CLECs claim that the self-provisioning trigger for mass market switching "bear[s] no rational relationship" to impairment because the Commission's finding of impairment rested on problems with ILEC hot cuts, yet the trigger counts self-provisioning by carriers, such as cable companies, that can provide telephone service using their own loops and do not need ILEC hot cuts. Br. 37. The point of the trigger, however, is much broader than assessing the hot cut process. Rather, the Commission established the trigger to determine whether all "existing barriers to entry" are "[s]urmountable," such that it is technically and economically feasible for an entrant to serve the mass market with its own switch. *Order* ¶501

(JA 100).<sup>21</sup> The Commission explicitly recognized that where the trigger counts a carrier deploying its own loops, the evidence might bear less heavily on the ability of a CLEC to access the incumbent's loops. *See id.* n.1560 (JA 100). "Nevertheless," the FCC concluded, "the presence of three competitors in a market using self-deployed switching and loops shows the feasibility of an entrant serving the mass market with its own facilities" (*ibid.*), which is the ultimate point of the statutory impairment criterion.

The CLECs next contend that the trigger unlawfully "does not address ... sources of impairment" other than hot cut issues. Br. 37. But the Commission reasonably concluded that satisfaction of the trigger would show that multiple, competitive supply is possible and that there likely is no entry barrier reaching the level of impairment from any source. *Order* ¶¶498, 501 (JA 100, 101). In any event, the Commission also allowed states to petition for waiver if they "identify specific markets that facially satisfy the self-provisioning trigger, but in which some significant barrier to entry exists such that service ... is foreclosed even to carriers that self-provision switches." *Id.* ¶503 (JA 101).

The CLECs also claim that the trigger points themselves – three, in the case of self-provisioning competitors; two, in the case of switching wholesalers – are arbitrary because "the numbers appear to have been made up out of thin air." Br. 37. This claim fares no better than the ILECs' similar challenge to the FCC's line drawing, which was reasonably designed to ensure that unbundling is required only where the market cannot "support 'multiple, competitive'

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<sup>21</sup> The Commission also specifically targeted impairment caused by hot cuts by directing the states to develop batch cut processes. *See Order* ¶¶487-490 (JA 100).

local exchange service providers using their own switches.” *Order* ¶501 (JA ) (quoting *USTA*, 290 F.3d at 422); *see also id.* ¶505 (JA ).<sup>22</sup>

2. Transition Rules. The Commission recognized that CLECs must have time to transfer their existing customers to their own switches from the ILEC switches once a state finds no impairment. It provided that existing customers be migrated on a phased-in basis, with one third of them each transferred within 13, 20, and 27 months of the no-impairment finding. *Order* ¶532 (JA ). The Commission determined that CLECs “may no longer request access to unbundled local circuit switching” for new customers five months after a finding of no impairment. Thus, new customers must be served from the CLEC’s own switch by that deadline. *Ibid.* The CLECs claim that the five-month termination point is “internally inconsistent, and thus arbitrary” in light of the longer transition for existing customers. Br. 38-39. That claim is based upon a misreading of the *Order*.

As the CLECs tell it (Br. 38), the Commission established a 13-month minimum period to implement a transition to their own switches, and found that the CLECs needed “this interim period” to continue customer acquisition. In fact, the Commission found only that CLECs needed “sufficient time” to change their operations, and it recognized that CLECs would need access to the ILEC switch for “some limited period” after a no-impairment finding to maintain their customer acquisition activities. *Order* ¶529 (JA ). At the same time, the Commission had

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<sup>22</sup> The CLECs claim that the Commission in other contexts has found that five firms are necessary to show a competitive market, which renders the two and three firm triggers arbitrary. Br. 38. That claim fails because it compares apples with oranges. It is clear from the quotation relied on by the CLECs, which comes from an FCC order in a different context, that the Commission there faced the question of creating a “structurally competitive market.” That situation has no bearing on the one presented here, which has to do not with creating a fully competitive market, but with determining when market conditions are such that new entrants are not *impaired* in *entering* the market.



to be particularly careful in order to “avoid significant disruption to the *existing customer base*,” which it found to be the “most critical aspect” of the transition plan. *Ibid.* (emphasis added). The Commission thus implemented a longer transition period for existing customers than the “limited period” with respect to new customers. There was no error in the Commission’s approach.

3. Enterprise Switching. The Commission determined that CLECs were not impaired in providing their own switching for business or “enterprise” customers. The agency gave the states 90 days within which to petition for a waiver of that finding, on the basis of conditions in particular local markets. *Order* ¶¶454-455 (JA - ). The CLECs argue that the state review procedure is “obviously irrational, since the evidence necessary to make the appropriate judgment will be available only after nine months.” Br. 39.

The CLECs have confused the *mass market* impairment review process, under which states have nine months to define geographic markets, with the *enterprise* impairment review process, which allows either a petition for waiver within 90 days or a later petition within six months of a specific request to a state regulator. *See Order* ¶455 & n.1398 (JA ). The geographic boundaries of the two markets may be entirely different – just as the two markets themselves differ substantially – and nothing in the *Order* makes the *enterprise* impairment showing dependent upon market definitions derived in the *mass market* context.

Nor is the procedure an “inadequate safety valve.” CLEC Br. 39. States have 90 days within which to seek a waiver of the finding of no impairment for a particular market. After that window closes, a state may petition for such a waiver upon a CLEC’s request. *Order* ¶455 (JA ). Petitioners offer no good reason why those procedures are inadequate. That is particularly so,

given that the Commission anticipated few instances in which a waiver would be warranted: It acknowledged that impairment “could possibly” exist, but believed that conditions that would justify a waiver were likely to exist only in rural areas. *Id.* ¶454 (JA ).

4. Database Access. The telephone system relies on databases to provide carriers with billing and other information. The Commission identified six such databases, including the database that provides name identification for Caller ID service (called the “CNAM” database) and the database that contains information on calling cards (called the “LIDB” database). With the exception of a database used for 911 services, the Commission found that CLECs that supply their own switches are not impaired without access to ILEC call-related databases.<sup>23</sup> The CLECs claim that the Commission’s finding “cannot be squared with the record evidence that shows that most of the content of these databases must, of necessity, come from the ILECs.” Br. 40.

The Commission found that “there are a substantial number of competitive suppliers of call-related databases that [CLECs] can reliably utilize as an alternative to the [ILEC’s] services.” *Order* ¶551 (JA ). The Commission listed several such providers (*id.* ¶553 (JA )), and it noted that some CLECs are constructing their own databases as well, *id.* ¶554 & n.1710 (JA ). The Commission thus determined that CLECs are not impaired without access to ILEC databases. The CLECs are wrong that third-party database vendors “exist only because the FCC had heretofore required the ILECs to provided unbundled access to the content of *their* databases.” Br. 41. In fact, third-party vendors, such as Illuminet, are not telecommunications carriers, *see* Comments of Illuminet at 3 (JA ), and thus did not have access to ILEC databases as UNEs. The CLECs’ argument that it is “impossible to develop a database ... without access

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<sup>23</sup> “[C]arriers that purchase switching as a UNE will also obtain unbundled access to the [ILEC’s] call-related databases.” *Order* ¶552 (JA ).

to the ILEC's information" (Br. 40) is beside the point. Third-party vendors apparently have such access through arrangements of their own, and as long as they do, there is no impairment.

In a single sentence appended to the end of their database argument, the CLECs assert: "Similar errors infect the FCC's decision not to unbundle signaling systems." Br. 41. That sentence is insufficient to raise or preserve an argument that concerns an area entirely separate from (although related to) database access. The argument is wrong in any event. Although we cannot say what the CLECs had in mind when they complain of "similar errors," the Commission found, and the CLECs do not dispute, that "there are sufficient alternatives in the market available to [ILEC] signaling networks and [CLECs] are no longer impaired without access to such networks as UNEs for all markets." *Order* ¶544 (JA ).

### **III. THE COMMISSION REASONABLY LIMITED UNBUNDLING OBLIGATIONS FOR BROADBAND LOOPS.**

The Commission reasonably concluded that mandatory unbundling generally could not be justified in the emerging market for broadband services. The *USTA* Court said that unbundling under section 251(c) should generally be restricted to situations "linked ... (in some degree) to natural monopoly," and that the Commission must weigh the disincentive to investment and other social costs. *USTA*, 290 F.3d at 424-429. Taking account of such costs, as well as the significant degree of intermodal broadband competition, the Commission did not require unbundling of most broadband capabilities of mass market loops. This decision is consistent with the directives of the Supreme Court and this Court to place reasonable limits on unbundling. The Commission's generally deregulatory treatment of broadband loops also advances the critical goal of section 706 of the 1996 Act: "to encourage the deployment ... of advanced telecommunications capability to all Americans." 1996 Act, §706(a).

As a threshold matter, the Commission reasonably found, on the basis of an extensive record, that lack of access to the broadband capabilities of most ILEC loops would not impair requesting carriers. *See id.* ¶¶258-260 (JA - ) (CLECs are not impaired without line sharing); *id.* ¶¶273-276 (JA - ) (CLECs are not impaired without access to the broadband capabilities of “fiber-to-the-home” (“FTTH”) loops). The Commission found some evidence of impairment with respect to “hybrid” loops, which combine copper and fiber elements. *Id.* ¶286 (JA ). But the agency noted that “this impairment at least partially diminishes with the increasing deployment of fiber” loops. *Ibid.* Moreover, the Commission determined that unbundled access to ILECs’ copper subloops “adequately addresses” any impairment that CLECs face without unbundled access to hybrid loops. *Id.* ¶291 (JA ). The record thus belies the CLECs’ claims (Br. 16-17) that the Commission ignored evidence of widespread impairment in the broadband context.

In addition to the sparse evidence of impairment in broadband markets, the Commission also considered the incentives for new investment in broadband deployment and the presence of alternative broadband platforms. Taking these factors into account, the Commission reasonably concluded that the costs of broadband unbundling outweighed its potential benefits. *Order* ¶¶263, 288, 295 (JA , , ). Heeding the *USTA* Court’s concern about the “disincentive effect” of unbundling, 290 F.3d at 425, the Commission found that refraining from imposing broadband unbundling obligations in the mass market would stimulate broadband investment and innovation by both ILECs and CLECs. *Order* ¶¶260-261, 272, 278, 288, 290 (JA , , , , ). The agency justifiably gave these considerations particular prominence in light of its duty under section 706 to promote widespread broadband deployment.

In addition, the Commission reasonably determined that unbundling generally was not justified as a means of advancing broadband competition. Consistent with the Court's directive in *USTA*, 290 F.3d at 428-29, the Commission paid particular attention to intermodal competition in the broadband market. It noted that cable companies have by far the largest share of the market for high-speed Internet access, exceeding the market share for the ILECs' digital subscriber line ("DSL") service by a wide and growing margin. *Order* ¶¶262, 292 (JA , ). The Commission reasoned that the benefits of broadband unbundling were "obviated to some degree by the existence of a broadband service competitor with a leading position in the marketplace." *Id.* ¶292 (JA ); *see also id.* ¶263 (JA ) (the availability of "intermodal alternatives in the residential market lessens the benefits of unbundling").

The agency also pointed to the "potential of other platforms and technologies, such as third generation wireless, satellite, and power lines," to stimulate additional broadband competition. *Order* ¶263 (JA ). In the Commission's considered judgment, "the fact that broadband service is actually available through another network platform [*i.e.*, cable] and may potentially be available through additional platforms helps alleviate any concern that competition in the broadband market may be heavily dependent upon" line sharing or other forms of unbundled access to ILECs' broadband facilities. *Ibid.*

The Commission modified its broadband unbundling rules in three ways. First, the Commission concluded that requesting carriers are not impaired without access to the broadband capabilities of FTTH loops because ILECs and CLECs face similar obstacles in deploying these facilities and because the revenue opportunities are greater for FTTH than for other loops. *Order* ¶¶274-276 (JA - ). Second, to promote the statutory goal of rapid deployment of advanced

telecommunications capability, the Commission declined to require ILECs to unbundle the packet capabilities of their hybrid loops. *Id.* ¶¶286, 288 (JA - ). Third, the Commission eliminated line sharing, subject to grandfathering and a transition period. It found that competitors may economically lease the entire loop by themselves or offer broadband services through a “line splitting” arrangement with another CLEC. *Id.* ¶¶258-259 (JA - ). The record and the law amply support all three of these decisions.

The CLECs maintain that limitations on broadband unbundling will stifle the growth of broadband competition. Br. 17. Under the new FCC rules, however, CLECs retain significant opportunities to compete in the broadband market. In addition to offering broadband service over their own facilities, CLECs can provide broadband services using ILEC facilities. They can lease entire copper loops as UNEs and use them to offer DSL service over the high frequency portion of the loop.<sup>24</sup> The *Order* also preserves ILECs’ obligation to unbundle the portions of their hybrid loops that are not used to transmit packetized information. Consequently, CLECs can lease the non-packetized portion of ILECs’ high-capacity loops to provide broadband service. *Order* ¶289 (JA ).

Contrary to the CLECs’ claims, the FCC’s broadband unbundling rules are reasonably designed to promote both competition and innovation in broadband markets. The agency’s expert assessment of how best to implement section 251 and to promote broadband competition is entitled to substantial deference. In deciding to eliminate most broadband unbundling

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<sup>24</sup> Copper loops account for roughly 70 percent of loops in service. *See Order* ¶224 & n.681 (JA ). The *Order* also grandfathers existing line sharing arrangements and permits CLECs to offer data services through line splitting arrangements with other CLECs. *Id.* ¶¶259-260, 264 (JA - ). Indeed, Covad, the largest CLEC provider of DSL service, has already contracted to offer DSL to AT&T’s 50 million customers nationwide via line splitting. *Id.* ¶259 (JA ).

requirements for mass market loops, “the Commission considered the relevant evidence and made a policy judgment concerning the development of a nascent technology”: “Such decisions are well within the purview of the responsible agency.” *Sioux Valley Rural Television v. FCC*, 349 F.3d 667, 679 (D.C. Cir. 2003).

**A. The Commission Properly Considered Whether Unbundling Discourages Investment In Advanced Telecommunications Capability.**

At the outset, the CLECs contend that the Commission improperly considered the extent to which unbundling acts as a disincentive to broadband deployment. Br. 16-22. The contention is wrong as a matter of law.

The pertinent statute requires the Commission to “consider, at a minimum,” whether failure to provide access will “impair” the ability of carriers to provide the services they seek to offer. 47 U.S.C. §251(d)(2). The “at a minimum” clause authorizes the Commission to consider factors other than impairment, and, indeed, contemplates that it will. *See USTA*, 290 F.3d at 425. The Supreme Court’s decision in *AT&T* reinforces this view. The Court held that the Commission must “apply *some* limiting standard, rationally related to the goals of the Act.” *AT&T*, 525 U.S. at 388 (emphasis in original). And in *USTA*, this Court expressly directed the Commission to balance the benefits of unbundling against its costs, including “the disincentive to invest in innovation.” *USTA*, 290 F.3d at 427; *see also id.* at 429.

The disincentive effects of unbundling pose an especially pernicious problem in the broadband context, where the need for investment is great and the risks are high. *See Order* ¶¶288, 295 (JA , ). This compelling concern, considered as part of a record that showed *no* impairment for line sharing or the broadband capabilities of FTTH loops and minimal impairment for hybrid loops, amply justified the FCC’s deregulatory approach to broadband

unbundling. The Commission reasonably concluded that avoiding the disincentives associated with unbundling in this context would best promote broadband deployment. *Id.* ¶¶272, 278, 288, 297 (JA , , , ).<sup>25</sup>

Promoting broadband deployment is an explicit goal of the Act. Congress adopted the 1996 Act to “promote competition and reduce regulation ... and encourage the rapid deployment of new telecommunications technologies.” Preamble, 1996 Act. Section 706(a) of the 1996 Act requires the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing ... regulating methods that remove barriers to infrastructure investment.” 1996 Act, §706(a).<sup>26</sup> This requirement echoes section 7 of the Communications Act, which states, “It shall be the policy of the United States to encourage the provision of new technologies and services to the public.” 47 U.S.C. §157(a). The Commission properly considered these important statutory objectives in limiting its unbundling requirements.

Deriding section 706 as “some general public policy ‘goal,’” Br. 20, the CLECs suggest that a finding of impairment must override consideration of Congress’s other objectives.<sup>27</sup> But when a statute directs the FCC to “consider” certain factors, the provision “means only that [the

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<sup>25</sup> The Commission found the broadband context to be very different from that of circuit switching. Circuit switches are legacy equipment, which many carriers are now replacing with more advanced equipment. *See Order* n.1365 (JA ).

<sup>26</sup> The Act defines “advanced telecommunications capability” as “high-speed, switched, broadband telecommunications capability.” *Id.* §706(c)(1).

<sup>27</sup> The CLECs argue that section 706 carries little weight because it does not appear as a separate section in the United States Code. But the fact that a provision of the 1996 Act is “not codified in the United States Code does not detract from [its] legal authority.” *Building Owners & Managers Ass’n International v. FCC*, 254 F.3d 89, 94 n.6 (D.C. Cir. 2001).



agency] must reach an express and considered conclusion about the bearing of a factor, but is not required to give any specific weight to it.” *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995) (internal quotations omitted), *cert. denied*, 516 U.S. 1112 (1996). The FCC properly and extensively considered impairment, but it was not required to give that factor dispositive weight in deciding whether to mandate unbundling where other statutory considerations were implicated.

In any event, the record here did not establish conclusively that CLECs would be impaired. The Commission found *no* impairment with respect to line sharing and the broadband capabilities of FTTH loops. *Order* ¶¶258-260, 273-276 (JA - , - ). And although the agency found *some* evidence of impairment regarding hybrid loops, it determined that any such impairment would diminish as fiber deployment increased. *Id.* ¶286 (JA ). The Commission also concluded that unbundled access to ILECs’ copper subloops “adequately addresses” any impairment caused by the unavailability of unbundled hybrid loops. *Id.* ¶ 291 (JA ). In the absence of convincing evidence of impairment, the Commission reasonably took account of other important statutory goals in its analysis of broadband unbundling, including the mandate of section 706 to encourage broadband deployment.

The CLECs and the states contend that the Commission in effect exercised its forbearance authority under section 10, 47 U.S.C. §160, without conforming to that statute’s requirements. CLEC Br. 19; State Br. 15. But this is not a forbearance case. The issue of forbearance cannot arise until the Commission has, in the first instance, defined the scope of the unbundling obligation under section 251(d)(2), which “requires the Commission to determine on a rational basis *which* network elements must be made available.” *AT&T*, 525 U.S. at 391-92

(emphasis in original). That is precisely what the Commission did here. It did not exercise its forbearance authority.<sup>28</sup>

The CLECs assert that the Commission should have modified its UNE pricing rules instead of limiting unbundling. This argument erroneously assumes that the burdens of unbundling are purely related to UNE prices. As this Court noted in *USTA*, unbundling rules create “complex issues of managing shared facilities.” 290 F.3d at 427; *see also id.* at 429 (noting “the tangled management inherent in shared use of a common resource”). Modifying UNE pricing rules would not address these costs and burdens associated with unbundling. In any event, courts generally do not disturb an agency’s policy judgment “when the agency is called upon to weigh the costs and benefits of alternative policies.” *Sioux Valley Rural Television*, 349 F.3d at 679 (internal quotations omitted). Even assuming that revisions to the UNE pricing rules could address some of the concerns identified by the Commission, the Court must uphold the agency’s alternative solution so long as it is “not irrational.” *Loyola University v. FCC*, 670 F.2d 1222, 1227 (D.C. Cir. 1982). The FCC’s decision to restrict broadband unbundling easily passes that test.<sup>29</sup>

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<sup>28</sup> The CLECs rely on *ASCENT v. FCC*, 235 F.3d 622 (D.C. Cir. 2001), but that case is inapposite. It held that an ILEC may not avoid its statutory resale obligations for advanced communications services by providing them through a separate subsidiary. The Court reasoned that section 272 identified the only circumstances in which an incumbent could avoid the Act’s strictures by offering services through a subsidiary. Because section 272 does not apply to advanced services, the Court found that “Congress did not intend for §251(c)’s obligations to be avoided by the use of such an affiliate.” *Id.* at 688. In this case, there is no comparable provision to section 272. Congress addressed the scope of the unbundling obligation in section 251(d)(2) alone, and gave the Commission authority to consider factors other than impairment.

<sup>29</sup> Revisions to the UNE pricing rules are the subject of a separate FCC proceeding. *See TELRIC NPRM*, 18 FCC Rcd 18945 (2003).

The CLECs and the states contend that the Commission erred by applying its broadband rules nationwide. CLEC Br. 22; State Br. 9. The Commission adopted national rules in those instances where “a separate analysis of each geographic market” would produce a uniform result. *Order* ¶130 (JA ). The Commission reasonably concluded that the factors it considered in deciding whether to require broadband unbundling – including the effects of unbundling on investment incentives – do not vary from region to region.

**B. The Commission Reasonably Concluded That Requesting Carriers Are Not Impaired Without Access To The Broadband Capabilities Of Fiber-To-The-Home Loops.**

The Commission found no impairment with respect to the broadband capabilities of fiber-to-the-home loops. *Order* ¶273 (JA ). In the case of “greenfield” FTTH deployment in new residential developments, ILECs are new entrants in those markets and have no natural monopoly. Therefore, “entry barriers appear to be largely the same for both [ILECs] and [CLECs].” *Id.* ¶275 (JA ). Likewise, for “brownfield” overbuild deployment, “[CLECs] and [ILECs] largely face the same obstacles.” *Id.* ¶276 (JA ). Although ILECs have the advantage of an established customer base, “the potential rewards for deploying overbuild FTTH are distinctly greater than those associated with deploying copper loops and thus present a different balance when weighed against the barriers to entry.” *Ibid.* The market reflects that reality: CLECs actually have deployed more FTTH than ILECs. *Id.* ¶227 (JA ).<sup>30</sup>

The CLECs nonetheless challenge the Commission’s finding of no impairment. Br. 27-29. That challenge is insubstantial. Because CLECs and ILECs face similar barriers to entry in

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<sup>30</sup> The CLECs suggest (Br. 29) that this evidence is suspect because two firms account for most CLEC deployment of FTTH (and one of them apparently regrets the investment). But that does not change the fact that CLECs have deployed more FTTH than ILECs.

the FTTH mass market, the Commission properly found no impairment with respect to the broadband capabilities of FTTH. Costs faced by all market entrants do not constitute impairment. *See USTA*, 290 F.3d at 427.<sup>31</sup>

The CLECs mix apples and oranges in claiming (Br. 28) that the Commission “*a fortiori*” should have found FTTH impairment in the mass market in light of its separate finding of impairment for high-capacity DS3 loops in the enterprise market. In contrast to its finding that ILECs and CLECs face similar entry barriers in the broadband mass market, the Commission concluded that ILECs have a “first mover advantage” in the enterprise market and do not face the same entry barriers that CLECs do. *Order* ¶306 (JA ). Moreover, because ILECs already have extensive networks serving the enterprise market, concerns about investment incentives are less compelling in that market than in the mass market. Finally, whereas cable operators are the leading providers of broadband services in the mass market, they are largely absent from the enterprise market.

**C. The Commission Reasonably Refused To Require Unbundling Of The Packet-Based Capabilities Of Hybrid Loops.**

The Commission found that “[h]ybrid loops represent an important step towards the deployment of a fiber-based network capable of supporting a wide array of advanced telecommunications and other services.” *Order* ¶285 (JA ). In deciding whether to require unbundling of hybrid loops, the Commission considered the costs of unbundling, alternatives to unbundling the whole loop, and intermodal competition. *Id.* ¶286 (JA ). **The Commission** decided not to require ILECs to unbundle the packet capabilities of hybrid loops or related

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<sup>31</sup> The Commission did require unbundling of the narrowband capabilities of FTTH in limited circumstances. *See Order* ¶277 (JA ).

electronics. *Id.* ¶288 (JA ). It concluded that “applying section 251(c) unbundling obligations to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by [ILECs] and the incentive for [CLECs] to invest in their own facilities.” *Ibid.* It further determined that CLECs had adequate alternatives to the packet capabilities of hybrid loops, including access to ILECs’ copper subloops and the non-packetized, high-capacity portion of ILECs’ hybrid loops. *Id.* ¶219 (JA ). The Commission also considered the status of broadband competition and found that the benefit of unbundling “appears to be obviated to some degree” by competition from cable modem service. *Id.* ¶292 (JA ).

The CLECs contend that the Commission’s concern about disincentive effects on hybrid loop deployment was unwarranted because the record showed that ILECs already deploy hybrid loops for the provision of narrowband service. Br. 23. This argument ignores two key points. First, “[a]lthough [ILECs] have been deploying fiber feeder plant for some time, such deployment was generally limited to the purpose of increasing network efficiency for the provision of narrowband services.” *Order* ¶290 (JA ). The CLECs do not claim – nor could they – that this kind of deployment is sufficient to provide the broadband services that the Commission seeks to encourage.

Second, ILECs incur costs beyond the cost of fiber when they use hybrid loops to provide broadband services: They must install sophisticated electronics. *Order* ¶288 (JA ). The CLECs assert that these electronics cost less than fiber deployment, Br. 23-24, but investment in optical electronics entails substantial expense, particularly if ILECs seek to provide a ubiquitous broadband offering. As the Commission found, “[ILECs] have not widely deployed the next-

generation networking equipment ... needed to deliver broadband services to mass market customers served by hybrid loops.” *Id.* ¶290 (JA ).

The Commission drew a reasonable distinction between “next-generation” packet-switched technology and the legacy technology known as time division multiplexing (“TDM”), which does not use packet switching. While the revised rules for hybrid loops require unbundling of TDM-based capabilities, they do not require unbundling of packet-based capabilities. *See Order* ¶¶288, 291, 293, 296 (JA , , , ). **The CLECs suggest a different line that would require unbundling in “geographic areas where ILECs have already deployed or committed to deploy DSL-capable hybrid loops.”** Br. 25. But that approach would invite disputes over whether an ILEC may avoid the unbundling obligation by deploying a small increment of additional fiber. The Commission’s technology-based distinction has the virtue of establishing a “bright line” that should minimize future disputes: “[T]he technical characteristics of packet-switched equipment versus TDM-based equipment ... are well-known and understood by all members of the industry.” *Order* ¶293 (JA ). This “easily verifiable, bright-line” distinction was reasonably designed “to avoid excessive administrative burdens.” *See WorldCom*, 238 F.3d at 457 (upholding a similar bright-line rule).

Contrary to the CLECs’ assertion (Br. 25), the FCC did not find that “CLECs cannot economically deploy their own fiber feeder to carry broadband traffic.” Indeed, the Commission found that “revenue opportunities are significantly greater for fiber-based construction,” *Order* ¶240 (JA ), and that “subloop access promotes [CLEC] investment in next-generation network equipment,” *id.* ¶291 (JA ). While hybrid loops may not provide the same revenue opportunities as FTTH, CLEC Br. 26, CLECs have the same financial incentives as ILECs to

build out fiber toward the home; and in this market, ILECs and CLECs face similar entry barriers. *Order* ¶¶240, 275-276 (JA , ).

Finally, the CLECs quarrel with the FCC's assessment of intermodal competition. They discount the impact of such competition, noting that many residential and small business customers do not have access to cable modem service. Br. 26. But a significant majority of residential customers *do* have access to cable modem service, and cable modem lines greatly outnumber DSL lines. *See Order* ¶292 & n.841 (JA ). **On the basis of that evidence, the Commission reasonably concluded that competition from cable modem service obviates "to some degree" the benefit of any additional competition that unbundled access to hybrid loops might spawn. *Id.* ¶292 (JA ). That conclusion finds support in the Court's discussion of intermodal competition in *USTA*, 290 F.3d at 428-29.**

**D. The Commission Reasonably Decided To Phase Out Line Sharing.**

In *USTA*, this Court vacated the Commission's line sharing rules, which required ILECs to unbundle and lease the high frequency portion of the loop to CLECs. The Court concluded that the Commission had failed to consider the relevance of competition from cable modem service providers and the costs of unbundling. *USTA*, 290 F.3d at 428-29. On remand, the Commission considered those factors and concluded that CLECs are not impaired without line sharing. *See Order* ¶¶255-263. (JA - )

The CLECs and the states argue that the Commission did not adequately explain its change in course. CLEC Br. 31; State Br. 16. But as Judge Posner has observed, an agency need not explain why it adopted a court's rationale on remand: "If ... an agency is persuaded by a court's reasoning to alter its course, it can adopt that reasoning, and then the adequacy of the

agency's new position will depend on the adequacy of the adopted reasoning." *Capital Cities/ABC v. FCC*, 29 F.3d 309, 313 (7<sup>th</sup> Cir. 1994); *see also Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078, 1082-83 (D.C. Cir. 1997). In this case, the Commission agreed with the *USTA* Court that the availability of broadband services from other providers alleviates any concern "that competition in the broadband market may be heavily dependent" upon line sharing. *Compare USTA*, 290 F.3d at 428-29 with *Order* ¶¶262-263 (JA - ).

In any event, the Commission adequately explained its decision. In addition to recognizing the presence of substantial intermodal competition, the FCC fundamentally altered its definition of impairment in response to *USTA*. That in turn led the Commission to re-evaluate its position on line sharing. Under the former definition of impairment, a CLEC was impaired if its inability to obtain a UNE would hinder its provision of a specific type of service, such as DSL. That definition virtually required line sharing. But the Court found that making the impairment inquiry turn on a specific service was "quite unreasonable" because it "disregard[ed] ... the competitive context." *USTA*, 290 F.3d at 429. Under its new definition of impairment, the Commission assesses "all potential revenues from entering a market," rather than just examining the particular service a competitor wishes to provide. *Order* ¶258 (JA ) (emphasis in original). Applying that definition, the Commission found that a CLEC that wants to provide data service will not be impaired in the absence of line sharing because leasing the entire loop "enables a [CLEC] to offer and recover its costs from all of the services that the loop supports." *Id.* ¶255 (JA ).

The CLECs argue that section 251(d)(2) requires the Commission to focus on the specific service the requesting carrier seeks to offer. Br. 32-33. But the Court rejected that argument in



*USTA*, 290 F.3d at 429. Contrary to the CLECs' contention, the Court's subsequent opinion in *CompTel*, 309 F.3d 8, did not reach a different conclusion. In *CompTel*, the Court held that the Commission may adopt service-specific limitations on unbundling pursuant to section 251(d)(2). The *CompTel* Court did *not* hold, as the CLECs suggest, that the Commission *must* focus on the specific services that an individual CLEC wishes to offer. See *CompTel*, 309 F.3d at 12-13. That approach would foreclose consideration of the larger "competitive context," contrary to the *USTA* decision. See *USTA*, 290 F.3d at 429.

In addition to the factors identified by the *USTA* Court, other considerations justified the Commission's conclusion concerning line sharing. In light of Covad's success in negotiating a line splitting agreement with AT&T, the Commission reasonably concluded that it could "no longer find that [CLECs] are unable to obtain the high frequency portion of the loop from other [CLECs] through line splitting." Order ¶259 (JA ).<sup>32</sup> The Commission found that, as the market matures and competition develops, CLECs will have increasing opportunities to partner with other CLECs that are providing basic local phone service. Order ¶259 (JA ). In short, the FCC reasonably determined that circumstances in the industry have changed since 1999, and that line splitting is now a viable option.

The Commission "expressly reject[ed]" its prior finding that line sharing would "level the competitive playing field." Order ¶261 (JA ). It found, after four years' experience, that line sharing in fact had created "skew[ed] competitive ... incentives" that could have deleterious effects on the market. *Ibid.* Because most states set the rate for line sharing at zero rather than a

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<sup>32</sup> The Covad example also undermines the CLECs' claim (Br. 34) that there are technical barriers to line splitting. In the *Order*, the Commission found that commenters had not argued that line splitting was "technically infeasible." Order ¶255 (JA ).

certain percentage of the loop rate, CLECs often paid nothing for their use of the high frequency portion of the ILEC's line. *Id.* ¶¶ 260-261 (JA - ).

Unwilling to disrupt users' line sharing arrangements abruptly, however, the Commission adopted a plan to phase out line sharing over three years. *Order* ¶¶264-269 (JA - ). Under this transition plan, existing arrangements are grandfathered at least until the next biennial review, which begins in 2004. *Id.* ¶264 (JA ). The grandfather clause will remain in place unless the Commission determines that the clause "is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." 47 U.S.C. §161(a)(2). CLECs also may solicit new customers during the first year after the effective date of the *Order*, and may lease the high frequency portion of the loop for those customers at less than the full loop price during the three-year transition. *Order* ¶265 (JA ).

The states challenge the FCC's authority to set line sharing rates during the three-year transition. Br. 11-12. But the Supreme Court has upheld the FCC's authority to adopt a pricing methodology for UNEs. *AT&T*, 525 U.S. at 377-85. Like the methodology at issue in *AT&T*, the Commission's transitional rules for line sharing do not set specific rates. Rather, they require that line sharing rates reflect a certain percentage of the full loop rate. They are thus fully consistent with the statutory division of responsibilities between the Commission and the states. Moreover, the Commission is entitled to substantial deference when (as in this case) it adopts interim rules to prevent market disruption during a transition to a new regulatory regime. *See ACS of Anchorage v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002); *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984).

**IV. THE ORDER'S ANALYSIS OF TRANSMISSION FACILITIES WAS REASONABLE.**

**A. The FCC's Impairment Analysis With Respect To Dedicated Transport, High-Capacity Loops, And Dark Fiber Was Reasonable.**

The ILECs challenge the Commission's rules with respect to high-capacity loop and dedicated transport facilities – including “unlit” or “dark fiber” facilities. The Commission applied its general impairment analysis in a reasonable manner, finding that competitors are not impaired with respect to the highest capacity transmission facilities, but are impaired with respect to certain other categories of high-capacity transmission facilities. And, as with mass market switching, the Commission enlisted the states to gather and address more detailed information relevant to whether impairment exists in specific markets.

In the *UNE Remand Order*, the FCC had ordered the ubiquitous unbundling of loops, dedicated transport facilities, and dark fiber at all capacity levels. *See UNE Remand Order* ¶¶165, 176, 323, 326. The Commission in the *Triennial Review Order* undertook a more “nuanced” impairment analysis (*USTA*, 290 F.3d at 426), which resulted in a substantial curtailment of unbundling obligations with respect to these elements. The FCC concluded that loop and transport facilities at *all* capacity levels are characterized by similar – and substantial – fixed and sunk costs of deployment (*e.g.*, the costs of digging up streets to lay cable), and by similar – and potentially substantial – operational barriers (*e.g.*, those associated with the need to obtain rights of way and/or access to multi-unit dwellings). *Order* ¶¶205-206, 360, 371 (JA - , , ). Accordingly, the potential revenue stream that could be generated at each capacity level was a crucial determinant of impairment with respect to these elements. *Order* ¶¶206, 303, 371 & n.1133 (JA , , ). The Commission determined on a national basis that the highest capacity loops and transport facilities (or leases of multiple lower-capacity facilities above a

certain aggregate capacity) could generate sufficient revenues to the carrier to overcome the cost and operational burdens associated with deployment, and the Commission removed unbundling obligations with respect to those facilities (or groups of facilities). *Order* ¶¶315-316, 324, 359, 388-389 (JA - , , - ).

In their attack on the Commission's impairment analysis, the ILECs do not even acknowledge the Commission's findings with respect to these highest capacity transmission facilities. The ILECs instead cite record evidence of facilities deployment *undifferentiated by capacity level*, and fault the Commission for not sweeping different classes of customers and facilities into one generalized impairment finding. Br. 31-32. The Commission identified meaningful distinctions among different capacity levels of transmission facilities, *Order* ¶¶206, 303, 371 & n.1133 (JA , , ), and reasonably concluded – on the basis of an absence of competitive deployment on most routes and because deployment is generally uneconomic – that CLECs generally were impaired without access to certain mid-level capacity elements as well as dark fiber. *Id.* ¶¶320, 381, 386, 390-391 (JA , , , - ). The existence of *some* competitive deployment on *some* routes does not render this national finding unreasonable.

The ILECs also argue that the Commission's attention to detail, and consideration of factors that affect individual routes, was impermissible under *USTA*. Br. 33 (citing 290 F.3d at 427). Nothing in that opinion requires the Commission automatically to infer that deployment is feasible on routes where it has not yet taken place, simply because there has been deployment elsewhere. To the contrary, *USTA* held that granular, "nuanced" analysis was warranted. 290 F.3d at 425-26. The *Order* reflects just such nuanced analysis in recognizing that the degree of the cost and operational burdens may vary with the characteristics of particular routes, *Order*

¶¶205-206, 376 (JA - , ), and in directing the states to evaluate impairment on a route-specific basis.

Nor is there a conflict between a route-specific analysis of impairment and the *Pricing Flexibility Order*, 14 FCC Rcd 14221 (1999), *petitions for review denied*, *WorldCom*, 238 F.3d 449. Although the Commission established pricing flexibility triggers on a Metropolitan Statistical Area (“MSA”) basis, rather than a route-by-route basis, it did so largely for reasons of administrative convenience. *See Pricing Flexibility Order* ¶74. The FCC realized that the satisfaction of those triggers did not establish that competitors “are not impaired outside of a few highly concentrated wire centers.” *Order* ¶397 (JA ); *see also Pricing Flexibility Order* ¶90 (noting that the triggers were not designed to establish a lack of market power). This Court recognized that the pricing flexibility reforms were established in a context in which unbundled transport was, in fact, available as a network element. In that context, the Court found nothing inconsistent about having a more detailed analysis with respect to impairment than with respect to pricing flexibility, since the former “concern[s] the conditions upon which local service providers are given access to unbundled transport in the first place, *not* whether deregulatory measures are warranted once providers have used such access to gain a foothold in a given market.” *WorldCom*, 238 F.3d at 460.

While the record did not support a blanket national finding of impairment for all categories of loops and transport, neither did it contain sufficient detail to allow the FCC to identify those locations where self-provisioning had occurred. As it did with respect to mass market switching, the Commission enlisted the states to collect and analyze more specific evidence of facilities deployment on a customer location basis. *Order* ¶¶314, 321, 384, 387, 392

(JA , , , , ). The Commission established very specific self-provisioning and wholesale triggers, *id.* §§328-331, 394-404 (JA - , - ), to identify “multiple, competitive” supply (*USTA*, 290 F.3d at 427) where it exists. The ILECs argue that states are walled off from playing this role. Br. 34. As with mass market switching, however, engaging states in this manner is reasonable, is consistent with the statutory scheme, and allows for precisely the type of detailed analysis the *USTA* court required.

Finally, the Court should affirm the triggers as a reasonable exercise of line-drawing, designed to curtail unbundling obligations where multiple, competitive supply is established. *Cassell*, 154 F.3d at 485. And as with switching, the Commission reasonably directed states to evaluate evidence of whether competitive deployment of loops and transport is *possible* even where the deployment triggers are not met. *Order* §§335, 410 (JA , ).

The Commission’s treatment of high capacity loops, transport, and dark fiber was reasonable and should be affirmed.

**B. The Commission’s Restrictions On Competing Carriers’ Use Of Enhanced Extended Links Are Lawful And Reasonable.**

In its initial rules implementing the 1996 Act, the FCC did not limit the types of telecommunications services that CLECs could provide by using UNEs. Once the agency determined that a network element was subject to unbundling, competing carriers could use that UNE to provide any telecommunications services they chose to offer. *See Order* ¶134 (JA ). The Commission modified that policy when it restricted the use of loop/transport combinations known as “enhanced extended links” or “EELs.” As an interim measure, the Commission determined that, pending further study, ILECs need not provide EELs to an interexchange carrier (“IXC”) as a substitute for special access service (used to originate and terminate long-distance

calls) unless the IXC would use the EELs to provide “a significant amount of local exchange service ... to a particular customer.” *Supplemental Order* ¶5. The Commission established three “safe harbors” that effectively required CLECs to ascertain and certify local traffic percentages in order to qualify for EELs. *Supplemental Order Clarification* ¶22; *see also Order* ¶570 (JA - ). The Commission also adopted a “commingling” restriction that prevented IXCs from connecting loops or EELs to tariffed special access services. *See Supplemental Order Clarification* ¶28; *Order* ¶570 (JA - ).

In adopting those interim restrictions, the Commission reasoned that section 251(d)(2) allowed it to make service-specific distinctions. *See CompTel*, 309 F.3d at 13-14. The Commission also concluded that local usage requirements for EELs would help avert possible harm to facilities-based competitive access providers and avoid disruption of certain access charge reform and universal service policies. *Id.* at 14-16. This Court upheld the interim rules. *Id.* at 13, 16-18.

In the *Order*, the Commission adopted more general restrictions on the use of UNEs. It concluded that sections 251(c)(3) and 251(d)(2), while ambiguous, were best read to “center on those telecommunications services that competitors provide in direct competition with the [ILECs’] core services.” *Order* ¶139 (JA - ). The Commission dubbed those services “qualifying services.” It amended its rules to bar a carrier from gaining access to a particular UNE unless the carrier uses that UNE to provide at least one “qualifying” service. *Id.* ¶¶135-142 (JA - ). If a carrier satisfies this “qualifying service” condition, it may use the UNE to provide non-qualifying services as well. *Id.* ¶¶143-148 (JA - ).

The Commission established its “qualifying service” requirement “to restrict unbundled network access to bona fide providers of qualifying service.” *Order* ¶591 (JA ). It sought to prevent “a provider of exclusively non-qualifying service” from “obtaining UNE access in order to obtain favorable rates or to otherwise engage in regulatory arbitrage.” *Ibid.* The Commission found that such “gaming” was “uniquely possible” with high-capacity EELs “because of the technical characteristics of these facilities.” *Ibid.*

To guard against the prospect that requesting carriers might use high-capacity EELs to circumvent the “qualifying service” requirement, the Commission also adopted eligibility criteria that apply only to high-capacity EELs. *See Order* ¶¶591, 595-597 (JA , - ). Those criteria require a requesting carrier to: (1) have a state certification of authority to provide local voice service; (2) have at least one local telephone number (providing 911 or E911 capability) assigned to each DS1 circuit; and (3) implement circuit-specific network architectural safeguards, including collocation arrangements, interconnection trunks adequate for the meaningful exchange of local traffic, and switching capable of providing local voice service. *Id.* ¶¶597, 601-611 (JA , - ). **These criteria, which require the completion of “substantial regulatory and commercial measures” to provide local voice service, “will ensure that the requesting carrier is indeed a provider of qualifying services.”** *Id.* ¶598 (JA ).

The permanent EELs restrictions serve essentially the same function as the old temporary ones: ensuring that EELs are not simply used by IXC’s as a substitute for ILEC’s access services to reach long-distance customers. The eligibility criteria replace the interim “safe harbor” rules, which had “proved to be unworkable and susceptible to abuse by the [ILEC’s].” *Order* ¶596 (JA ). The Commission lifted its temporary restriction on commingling, *id.* ¶579 (JA ), concluding



that a commingling restriction was “no longer necessary” in light of the new eligibility qualifications. *Id.* ¶583 (JA ).

Both the ILECs and the CLECs challenge the new rules governing access to high-capacity EELs. The CLECs contend that the rules are too restrictive (CLEC Br. 9-15), while the ILECs maintain that the rules are not restrictive enough (ILEC Br. 36-40).

**ILEC Challenges.** The ILECs fault the Commission for deviating from its earlier restrictions on EELs. The FCC’s interim rules had required requesting carriers to demonstrate – through compliance with “safe harbors” – that they would use EELs to provide a “significant amount of local exchange service.” *Supplemental Order Clarification* ¶22. Under the revised rules, if a carrier meets certain criteria establishing that “it is a bona fide provider of qualifying services,” it “is entitled to order high-capacity EELs.” *Order* ¶597 (JA ). **The ILECs argue** that the Commission should have continued to require requesting carriers to show that they would use EELs to provide a “significant amount” of local exchange service.

The Commission found substantial evidence that the interim “safe harbor” regime – “requiring competitors to ascertain and certify to” local traffic percentages – was “burdensome and difficult to administer.” *Order* ¶614 (JA ). CLECs complained that they lacked “sufficient information to make the necessary certification” that their anticipated use of EELs would satisfy the “safe harbor” thresholds. *Ibid.* The record also contained allegations that ILECs had “misconstrued the auditing process and improperly denied competitors’ self-certifications.” *Ibid.*

The Commission concluded that requiring carriers to monitor traffic over individual circuits imposed “overly intrusive and onerous compliance requirements” that would “serve as a drag on competitive entry.” *Order* ¶596 (JA ). Specifically, “measuring minutes of use is

antithetical to the Act's goals of encouraging ... new technologies and advanced services." *Id.* ¶613 (JA ). Accordingly, the Commission replaced its interim "safe harbor" rules with a set of "architectural" criteria and other "bright-line" eligibility conditions that would "avoid the difficulties and unwanted effects of measuring usage." *Id.* ¶596 (JA - ). It made sense for the Commission to stop tying the availability of EELs to the measurement and certification of local usage volumes.

The ILECs assert that none of the new criteria compels carriers to provide any local service in using EELs. Br. 38-39. Although the Commission recognized that "no single requirement can prevent gaming," it reasonably found that its criteria were "*collectively* sufficient to restrict the availability of [EELs] to legitimate providers of local voice service." *Order* ¶600 (JA ). As the Commission explained, "[t]he cost of taking the steps necessary to meet these criteria – especially collocation and network re-configuration – outweighs the benefits of lowering [a carrier's] special access rate to a UNE rate," and thus "would deter a carrier of non-qualifying services from re-designing its operations to subvert [FCC] rules." *Ibid.*

The ILECs also challenge the elimination of the commingling restriction. Br. 39. They wrongly suggest that the Commission originally considered this restriction indispensable to enforcing the use restrictions. To the contrary, the agency's adoption of the interim ban on commingling expressly did "not prejudice any final resolution on whether [UNEs] may be combined with tariffed services." *Supplemental Order Clarification* ¶28. The Commission here found that the commingling restriction was "no longer necessary" because the new qualifications for EELs eligibility effectively addressed the agency's universal service and access charge concerns. *Order* ¶583 (JA ).

Contrary to the ILECs' assertion (Br. 37-38), the fact that AT&T and MCI now provide local service nationwide does not mean that those IXCs – “the nation’s largest purchasers of special access” – are “now broadly entitled” to use EELs as a substitute for special access. Even if IXCs currently provide “qualifying” local services, they cannot obtain high-capacity EELs unless they meet the separate eligibility criteria for those facilities. And the record showed that 75 percent of AT&T’s special access circuits would not now satisfy the collocation criterion for EELs eligibility because they terminate at an IXC point of presence (“POP”). *See Order* n.1841 (JA ).

In any event, under the FCC’s new UNE rules, EELs will not be as widely available as before. The Commission revised its threshold impairment inquiry with respect to the EEL’s constituent (loop and transport) elements to take customer classes, capacity levels, and geographic variations into account. *See Order* ¶¶ 197-202, 359-360 (JA - , - ). As a result, the EEL’s components – and, therefore, the EELs themselves – will not be available to serve customer classes or geographic areas where their absence will not impair CLECs.

Finally, the ILECs contend that when a competing carrier converts special access services to EELs, it is not impaired without access to EELs because it “already is using special access services to provide the services that it seeks to offer.” Br. 39. Under the ILECs’ theory, their offering of special access services as an alternative to EELs should preclude a finding of impairment under section 251(d)(2). That reading of the statute would allow ILECs to evade the Act’s pricing standard for UNEs. The Act provides that when a network element satisfies the statutory impairment test, ILECs must make that element available to competitors at rates determined pursuant to section 252(d)(1)(A)(i). If the Act were construed to permit ILECs to

avoid a finding of impairment by providing equivalent services as a substitute for network elements, ILECs would wield the “unilateral power to avoid unbundling *at TELRIC rates* [reflecting forward-looking cost] simply by voluntarily making elements available [as services] *at some higher price.*” *Order* ¶102 (JA ) (emphasis added). The Eighth Circuit rejected a similar statutory interpretation that would have allowed ILECs to circumvent unbundling obligations by offering network elements as services subject to resale under section 251(c)(4). *Iowa Utilities Board*, 120 F.3d at 809-10. The FCC rightly declined to find that competing carriers would not be impaired without EELs simply because they could use ILEC-provided special access to provide their retail service. *Order* ¶102 (JA ).

**CLEC Challenges.** The CLECs contend that the *Order* improperly restricts the legitimate use of EELs. They attack both the “qualifying service” requirement, which applies to UNEs generally, and the eligibility criteria that apply solely to high-capacity EELs.

First, the CLECs argue that the Act does not permit a “qualifying service” condition on access to UNEs. Br. 11-12. The CLECs assert that whenever impairment exists, the Act unambiguously authorizes a requesting carrier to use UNEs to provide *any* telecommunications service it seeks to offer, including long-distance service.

The CLECs made a similar argument when they challenged the Commission’s interim use restrictions on EELs. In that case, they contended that the Act barred the FCC from “making a service-by-service distinction in deciding under what circumstances an ILEC is required to lease UNEs.” *CompTel*, 309 F.3d at 12. This Court rejected the CLECs’ contention. It found the statute’s language ambiguous, and it held that the Commission had reasonably interpreted the Act to permit service restrictions on the use of UNEs. *CompTel*, 309 F.3d at 12-13. The Court

should likewise reject the CLECs' assertion that the statute precludes the Commission's "qualifying service" requirement.

The Court found in *CompTel* that the statutory language does not unambiguously forbid the Commission to impose service restrictions on UNEs. Similarly, the Commission in this case found that "section 251(d)(2) is ambiguous concerning the scope of the impairment inquiry." *Order* ¶138 (JA ). As this Court observed in *CompTel*, the statute's reference "to the 'services that [the requesting carrier] seeks to offer' ... seems to invite an inquiry that is specific to particular carriers and services." 309 F.3d at 12-13 (quoting 47 U.S.C. §251(d)(2)(B)). Because the text of the 1996 Act does not unambiguously address this question, the Commission properly turned to the statute's history for guidance.

The conference report on the legislation makes clear that Congress adopted the 1996 Act for the purpose of "opening all telecommunications markets to competition." *Joint Explanatory Statement* at 113. Specifically, Congress sought to bring competition to the local markets that had historically been closed to competition. Congress envisioned that UNEs would play a key role in opening these local bottlenecks. The conference report on the 1996 Act recognized that "it is unlikely that competitors will have a fully redundant network in place when they initially offer *local* service," and that some "facilities and capabilities (*e.g.*, central office switching) will likely need to be obtained from [ILECs] as network elements pursuant to new section 251." *Id.* at 148 (emphasis added).

In view of Congress's predominant concern with introducing competition into local markets, the Commission found that "a reasonable interpretation of the statute is that [the] impairment inquiry should center on those telecommunications services that competitors provide

in direct competition with the LECs' core services, which we call 'qualifying services.'" *Order* ¶139 (JA ). The Commission explained: "Given that unbundling is one of the most intrusive forms of economic regulation – and one of the most difficult to administer – it is unlikely that Congress intended to apply unbundling more generally absent an unambiguous mandate." *Id.* ¶141 (JA ). The Act's purposes support the Commission's interpretation. The principal congressional objective identified in the legislative history – "opening" markets to competition – contemplates a focus on local markets where competition was virtually non-existent before the 1996 Act.

The CLECs claim that the "qualifying service" restriction on access to UNEs is inconsistent with congressional intent. They maintain that "when Congress wanted to limit statutory rights to telecommunications 'exchange services and exchange access services,' it did so expressly." Br. 12 (quoting 47 U.S.C. §251(c)(2)(A)). This argument rests on "the expressio unius maxim – that the expression of one is the exclusion of others." *Mobile Communications*, 77 F.3d at 1404. That maxim carries little weight in this context, where the Court must defer to the FCC's statutory construction unless Congress has directly addressed the precise question at issue. *Id.* at 1404-05; *see also Chevron*, 467 U.S. at 842. Congress did *not* clearly specify the scope of the impairment inquiry under section 251(d)(2). *USTA*, 290 F.3d at 422. Lacking clear direction on this issue, the FCC limited the inquiry to services that carriers seek to provide in competition with the services that have traditionally been "within [ILECs'] exclusive or primary domain." *Order* ¶140 (JA ).

A "qualifying service" requirement is consistent with this Court's understanding of impairment under section 251(d)(2). In *USTA*, the Court "linked" impairment "(in some degree)

to natural monopoly.” 290 F.3d at 427. And “natural monopoly” conditions prevail **only in** those local bottleneck markets where competing carriers might seek to provide “qualifying services.” Thus, the Commission’s “qualifying service” condition reflects a reasonable reading of the statute. The Court should affirm.

The CLECs also challenge the eligibility criteria for high-capacity EELs. They complain that these criteria effectively preclude carriers from using EELs even to provide certain “qualifying” services, including stand-alone exchange access. Br. 13-15.

The EELs eligibility criteria are entitled to deferential review because they involve administrative line-drawing. *See Cassell*, 154 F.3d at 485. The Commission faced the difficult task of reconciling two somewhat conflicting goals: protecting “the ability of bona fide providers of qualifying service to obtain access to high-capacity EELs while simultaneously addressing the potential for gaming.” *Order* ¶595 (JA ). The Commission acknowledged that selecting the criteria was “not an exact science, but a determination based on agency expertise,” the agency’s review of the record, “and a desire to provide an easily implemented and reasonable bright-line rule to guide the industry.” *Id.* ¶600 (JA ). After its experience with the interim safe harbors, the Commission rejected the option of assessing eligibility by measuring traffic volumes as infeasible and burdensome. *Id.* ¶¶596, 612-614 (JA , - ). The agency also considered and rejected other proposed eligibility tests, including some proposals advocated by CLECs. *Id.* ¶¶615-619 (JA - ). Thus, there is no basis for the CLECs’ claim (Br. 15) that the FCC failed to consider alternatives.

In any event, “[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*, 670 F.2d at 1227. In



this case, the FCC reasonably found that its EELs eligibility criteria were “superior to the various alternatives proposed” during the rulemaking. *See WorldCom*, 238 F.3d at 459. In the agency’s expert judgment, these criteria constitute “the most probative and administratively reasonable indicia of providing qualifying service.” *Order* ¶618 (JA ). They “focus on local voice service due to its verifiability and its role as the core competitive offering ... in direct competition” with traditional ILEC service. *Id.* ¶595 (JA ). The Commission found that none of its eligibility requirements would be “overly burdensome for a requesting carrier to satisfy.” *Id.* ¶600 (JA ). At the same time, it reasonably concluded that these requirements, “[w]hen applied in their totality,” would “ensure that the requesting carrier is indeed a provider of qualifying services.” *Id.* ¶598 (JA ).

“[T]he Commission has wide discretion to determine where to draw administrative lines.” *AT&T*, 220 F.3d at 627. And this Court is “generally 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.” *WorldCom*, 238 F.3d at 462 (quoting *Cassell*, 154 F.3d at 485). In this case, the eligibility line was reasonably tailored to address the problem identified by the Commission: the prospect that providers of exclusively non-qualifying service might evade the “qualifying service” restriction on UNE access. As the Commission explained, its eligibility criteria offer adequate protection against such “gaming.” *Order* ¶¶597-600 (JA - ).

The criteria need not be a perfect proxy for the provision of qualifying service. The CLECs contend that providers of some qualifying services will be unable to satisfy the separate requirements for EELs eligibility. But any criteria that the Commission might have selected



would likely have been somewhat overinclusive or underinclusive (or both). The fact that “the FCC chose to rely upon an admittedly imperfect measure” of eligibility “does not render its use arbitrary and capricious.” *See WorldCom*, 238 F.3d at 459. Nor was it impermissible for the FCC “to make ease of administration and enforceability a consideration in setting its standard.” *Ibid.* The eligibility criteria serve as a reasonable and easily administrable proxy for the provision of qualifying service. They also are an effective safeguard against gaming. There is no reason for the Court to disturb them.<sup>33</sup>

**C. The Commission Reasonably Authorized The Use Of Unbundled Transport To Provide Wireless Service.**

Providers of Commercial Mobile Radio Services (“CMRS” or wireless services) may “qualify for access to UNEs, subject to the limitations described” in the *Order*. *Order* ¶140 (JA ). The ILECs contend that the Commission made this decision without examining whether wireless carriers are impaired without access to UNEs. Br. 41. They specifically object to the unbundling of dedicated transport for wireless providers.

The ILECs cannot seriously dispute that wireless carriers typically are unable to provide service without access to ILEC interoffice transmission facilities. Wireless carriers “have traditionally purchased” access to those facilities in the form of “special access” service. ILEC Br. 40. If the ILECs mean to suggest that the availability of special access service eliminates any impairment regarding interoffice transport, they are mistaken. They cannot avoid unbundling obligations simply by offering a higher-priced service as a substitute for UNEs. *See Order* ¶102 (JA ). Aside from special access, the ILECs do not identify any real alternative to unbundled

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<sup>33</sup> Even if the providers of some qualifying services cannot satisfy the eligibility criteria for high-capacity EELs, FCC rules permit those carriers to lease and use other UNEs to provide exchange access or other qualifying services.

transport for wireless carriers. The record indicated that all CLECs – including wireless providers – have few feasible substitutes for ILEC transport. Self-deployment of transport facilities is not a practical option because this “expensive and time-consuming process” entails “substantial fixed and sunk costs” that would be no less substantial for wireless providers than for other CLECs. *Id.* ¶371 (JA ). Because wireless carriers (like CLECs generally) would be impaired without access to ILEC transport facilities, they qualify to obtain unbundled transport.<sup>34</sup>

**D. The Commission Reasonably Determined That The Dedicated Transport UNE Does Not Include Entrance Facilities.**

The Commission reconsidered its existing definition of “dedicated transport,” which included ILEC transmission facilities dedicated to a CLEC, and found it “overly broad.” *Order* ¶365 (JA ). Under the old definition, entrance facilities qualified as dedicated transport because they link ILEC and CLEC networks. The Commission concluded that “a more reasonable and narrowly-tailored definition of the dedicated transport network element includes only those transmission facilities *within* an [ILEC’s] transport network, that is, the transmission facilities between [ILEC] switches.” *Id.* ¶366 (JA ).

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<sup>34</sup> Wireless providers satisfy the “qualifying service” condition for obtaining UNEs because wireless services “compete against telecommunications services that have been traditionally within [ILECs’] exclusive or primary domain.” *Order* ¶141 (JA ). The ILECs argue that this finding – which they do not appear to dispute – is inconsistent with the agency’s determination that wireless service does not offer an intermodal alternative to unbundled switching. Br. 40-41. Both of these conclusions are reasonable in their respective contexts, and they are not inconsistent. While wireless services unquestionably compete against ILECs’ local voice service, the record supported the FCC’s conclusion that the extent of such competition was not yet sufficient to establish wireless service as “a suitable substitute” for unbundled switching. *See Order* ¶445 (JA ) (only three to five percent of wireless subscribers use their service as a replacement for wireline voice service).

The Commission pointed out that “transmission facilities connecting [ILEC] switches and wire centers are an inherent part of the [ILEC’s] local network [that] Congress intended to make available to competitors under section 251(c)(3).” *Order* ¶366 (JA ). Entrance facilities, on the other hand, “are transmission facilities that exist *outside* the [ILEC’s] local network. Accordingly, such transmission facilities are not appropriately included in the definition of dedicated transport.” *Ibid.* Nonetheless, to the extent that CLECs need facilities in order to “interconnect[] with the [ILEC’s] network,” section 251(c)(2) provides for that, as the Commission noted. *Ibid.* (quoting 47 U.S.C. §251(c)(2)). As a result, “all telecommunications carriers have the ability to access transport facilities *within* the [ILEC’s] network, pursuant to section 251(c)(3), and to interconnect for the transmission and routing of telephone exchange service and exchange access, pursuant to section 251(c)(2).” *Id.* ¶368 (JA ).

The CLECs challenge these findings. Br. 8-9. The Commission, however, based its new definition of dedicated transport on a reasonable conclusion that Congress in section 251(c)(3) intended the “network” to include only those facilities that are within the ILECs’ own telecommunications network. The ILECs’ dedicated transport network simply does not include entrance facility links to CLECs.<sup>35</sup> The Commission adopted a reasonable definition of “dedicated transport” that is entirely consistent with the statutory term “network element.” This new definition will not deprive CLECs of access to entrance facilities in appropriate circumstances. The Commission simply recognized that facilities deployed between ILEC and

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<sup>35</sup> The CLECs assert that this “makes no more sense than saying that the loop is not an ‘inherent’ part of the network.” Br. 8. Their argument ignores an important distinction. Loops are an essential part of ILEC networks because they connect to end users. Without loops, the network would serve no purpose. In contrast, entrance facilities are not an inherent part of the network because they connect to competitors.

CLEC networks need not be provided as UNEs under section 251(c)(3). Rather, ILECs' obligation to provide facilities needed for interconnection is governed by section 251(c)(2).

**E. The Order's Treatment Of Shared Transport Was Reasonable.**

Shared transport consists of transmission facilities shared by multiple carriers, including the ILEC. *Order* ¶533 (JA ). In the *Order*, the Commission found that “requesting carriers are impaired without access to unbundled shared transport only to the extent that ... they are impaired without access to unbundled switching.” *Id.* ¶534 (JA ). It did not decide whether CLECs were impaired without shared transport for “transiting” – “a means of indirectly interconnecting with other competing carriers for the purpose of terminating local and intraLATA traffic.” *Id.* n.1640 (JA ). The agency said that it planned to address transiting in a pending rulemaking on intercarrier compensation. *Ibid.*

The CLECs argue that the Commission could not lawfully postpone resolution of the transiting issue. Br. 15-16. But the Commission is not obligated to address all issues related to a particular regulatory scheme “in one fell swoop.” *United States Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001) (internal quotations omitted). The Communications Act grants the FCC substantial discretion to organize its proceedings as it sees fit. *See* 47 U.S.C. §154(j); *Global Crossing Telecommunications v. FCC*, 259 F.3d 740, 748 (D.C. Cir. 2001). In particular, the statute authorizes the agency to determine “the scope of the inquiry” in any given proceeding and to decide whether to resolve various issues “contemporaneously or successively.” *FCC v.*

*Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). This Court has repeatedly affirmed the FCC's broad discretion to defer consideration of certain issues to subsequent proceedings.<sup>36</sup>

The CLECs cannot credibly claim that the record here established that they are impaired without shared transport for transiting. Their argument rests entirely on a single paragraph buried deep in AT&T's reply comments. Br. 15 (citing AT&T Reply Comments at 306-07 (JA - )). AT&T's terse allusion to transiting was not nearly "forceful enough to have obliged the Commission to squarely confront" the issue. *MCI WorldCom v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000). Given the scant attention that the parties devoted to transiting in this proceeding, it was reasonable for the Commission to choose to address the subject in another proceeding with a more extensive record on transiting. *Cf. CompTel*, 309 F.3d at 14 (FCC declined to address a question concerning impairment because it needed to gather more evidence).

**F. The Order's Treatment Of Digital Loop Carrier Systems Was Reasonable.**

The CLECs contend that the Commission "failed to provide any explanation" for allowing ILECs to provide CLECs with unbundled loops known as "UDLC" rather than requiring them to provide service over "IDLC" loops. Br. 29-30. UDLC loops can result in dial-up Internet access that is slower than service provided on IDLC loops.<sup>37</sup> In fact, the Commission reasonably explained its decision.

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<sup>36</sup> See, e.g., *Telecommunications Resellers Ass'n v. FCC*, 141 F.3d 1193, 1196-97 (D.C. Cir. 1998); *GTE Service Corp. v. FCC*, 782 F.2d 263, 273-74 (D.C. Cir. 1986); *Nader v. FCC*, 520 F.2d 182, 195-98 (D.C. Cir. 1975).

<sup>37</sup> The CLECs claim that "the record unambiguously established that UDLC substantially degrades the speed and quality of dial-up Internet access," Br. 30, but they cite nothing in the record that supports that claim. We agree that UDLC can, in some circumstances, negatively affect data transmission speed, but we do not accept the CLECs' characterization of the severity of the impact.

IDLC (“integrated digital loop carrier”) loops are integrated into the ILEC’s switch, while UDLC (“universal digital loop carrier”) loops are not. *Order* ¶297 (JA ). Because IDLC loops cannot be easily separated from ILEC switches, ILECs that have installed IDLC loops may need to “implement policies, practices, and procedures different from those used to provide access to loops served” by UDLC-based networks. *Ibid.* In other words, technology limits ILECs’ abilities to provide CLECs with unbundled IDLC loops. The Commission “recognize[d] that it is technically feasible ... to provide unbundled access” to IDLC loops; but it noted that doing so requires implementation of specialized equipment and is “not always desirable for either carrier.” *Id.* n.855 (JA ). The Commission thus allowed ILECs to provide CLECs with UDLC loops where appropriate. That decision reflects the technological realities of the telephone system, which was not engineered for an environment of network sharing. For the same reasons, there was no “unexplained departure from the FCC’s prior decisions” that allegedly require technological neutrality and competitive parity between services. CLEC Br. 30.

In any event, the IDLC/UDLC distinction is likely to have little practical consequence. Because IDLC loops are integrated into the ILEC’s switch, when a CLEC purchases both loop and switching UNEs from the ILEC, it will ordinarily receive the same facilities that the ILEC uses to provide service to itself, *i.e.*, an IDLC loop. That arrangement is far easier and cheaper for the ILEC. In that regard, the Commission warned incumbents against “engineering the transmission capabilities of their loops in a way that would disrupt or degrade the local loop UNEs ... provided to [CLECs],” and against “disrupting or degrading access to ... features, functions, and capabilities of hybrid loops.” *Order* ¶294 (JA ); *see also* 47 U.S.C. §251(c)(3)

(terms and conditions must be “just, reasonable and nondiscriminatory”). In other words, an incumbent cannot deliberately degrade a competitor’s service if it is practicable to provide service equivalent to its own. Those practical realities underscore the reasonableness of the Commission’s decision.

**V. THE ORDER DOES NOT REQUIRE INCUMBENTS TO BUILD A “SUPERIOR QUALITY” NETWORK FOR COMPETITORS.**

The FCC’s original unbundling rules required ILECs to provide their competitors with “access or unbundled elements of higher quality” than incumbents provided to themselves when that was requested and was technically feasible. *Local Competition Order* ¶314. On review, the Eighth Circuit vacated these “superior quality” rules. *Iowa Utilities Board*, 120 F.3d at 812-13. That court read the statute to bar the Commission from compelling incumbents to make substantial network alterations to give CLECs “superior quality” access. But the Eighth Circuit distinguished between substantial alterations and minor modifications. It agreed with the Commission that section 251(c)(3) requires ILECs to make “modifications to [their] facilities to the extent necessary to accommodate interconnection or access to network elements.” *Id.* at 813 n.33 (JA ) (quoting *Local Competition Order* ¶198).<sup>38</sup>

The ILECs assert that the *Order* resurrected some of the “superior-quality mandates” that the Eighth Circuit had struck down. Br. 41-43. In fact, the *Order* merely requires ILECs “to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility has already been constructed.” *Order* ¶632 (JA ). This is the kind of modification the Eighth Circuit approved. In this context, the FCC’s new

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<sup>38</sup> Following a Supreme Court remand on other grounds, the Eighth Circuit reaffirmed its ruling that the superior quality rules were unlawful. *Iowa Utilities Board*, 219 F.3d at 757-58.

rules define a “routine network modification” as “an activity that the [ILEC] regularly undertakes for its own customers.” *See* 47 C.F.R. §§51.319(a)(8)(ii), (e)(5)(ii); *see also Order* ¶632 (JA ). Mandating such routine modifications is not the same thing as forcing an ILEC to provide CLECs with superior quality access. As the Commission explained, “requiring an [ILEC] to modify an existing transmission facility in the same manner it does ... for its own customers provides competitors access only to a functionally equivalent network, rather than one of superior quality.” *Id.* ¶639 (JA ).<sup>39</sup>

The statute not only permits such CLEC-requested modifications; properly read, it requires them. Section 251(c)(3) commands ILECs to provide “*nondiscriminatory* access” to UNEs. 47 U.S.C. §251(c)(3) (emphasis added); *see also Iowa Utilities Board*, 219 F.3d at 758 (“it is self-evident that the Act prevents an ILEC from discriminating between itself and a requesting competitor with respect to the quality of the interconnection provided”). If an ILEC regularly makes certain network modifications to serve its own customers, it must perform those same modifications for requesting CLECs to avoid discrimination. *Cf. Verizon*, 535 U.S. at 538 (FCC may require ILECs to provide new combinations of UNEs to competitors because they make such combinations available to themselves).

The ILECs complain that they may not receive appropriate compensation for these modifications. Br. 42. In addressing the compensation issue, the Commission said that state commissions would “decide in the first instance whether a particular cost” attributable to network modifications “should be recovered from a [CLEC] through a recurring charge, a non-

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<sup>39</sup> For the same reason, there is no basis for the ILECs’ claim (Br. 43 n.40) that the FCC’s line conditioning rules unlawfully mandate superior quality access for CLECs. Line conditioning is “a routine network modification that [ILECs] regularly perform in order to provide [DSL] services to their own customers.” *Order* ¶643 (JA ).



recurring charge, or not at all,” in accordance with TELRIC principles. *Order* ¶¶641 (JA ).

When a state decides how much an ILEC may charge for a network modification, the ILEC will have an opportunity to challenge the state-set rate in federal district court. *See* 47 U.S.C. §252(e)(6). Until the states act, ILEC objections to the pricing of network modifications are not ripe for review. *See AT&T Corp. v. FCC*, 349 F.3d 692, 700-02 (D.C. Cir. 2003). In the meantime, the FCC did not act improperly when it directed states to set network modification charges on the basis of TELRIC, a pricing methodology whose use the Supreme Court has affirmed. *See Verizon*, 535 U.S. at 497-528.

#### **VI. THE ORDER REASONABLY CONSTRUED SECTION 271.**

Section 271 of the Act provides that Bell operating companies (“BOCs”) must meet certain conditions before they can enter the long-distance market in states where they have dominated the local exchange market. Among other things, they must fully implement a 14-point “competitive checklist.” 47 U.S.C. §271(c)(2)(B). The second item on the checklist requires BOCs to provide “[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).” *Id.* §271(c)(2)(B)(ii). Checklist items four, five, six, and ten separately require access to a BOC’s loops, transport, switching, and signaling; but those provisions do not cross-reference checklist item two or sections 251 or 252. *Id.* §§271(c)(2)(B)(iv)-(vi), (x).

The FCC construed checklist items four, five, six, and ten to “establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling” even if those network elements are not designated as UNEs under the section 251 impairment standard. *Order* ¶¶653 (JA ). Concluding otherwise would have rendered these later checklist items redundant and duplicative of checklist item two. The agency discerned two differences between the

unbundling required under checklist item two (which incorporates the requirements of sections 251 and 252) and the independent unbundling obligations imposed by subsequent checklist items (which do not). First, although the Commission has interpreted section 251 to require ILECs to combine UNEs for requesting carriers, the Commission found that section 271 does not require BOCs “to combine network elements that no longer are required to be unbundled under section 251.” *Id.* n.1990 (JA ). Second, the Commission determined that the cost-based standard for pricing UNEs that are leased under section 251 would not apply to network elements that BOCs provide solely to satisfy section 271. In that circumstance, the agency said, the just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 would govern network element prices. *Id.* ¶¶656-664 (JA - ).

The Court should affirm the Commission’s determination not to require ILECs to combine network elements made available pursuant to checklist items four, five, six, and ten. The CLECs suggest that the Commission’s decision not to apply this rule to the later checklist items nullifies a “clear statutory requirement” contained in checklist item two and runs afoul of case law interpreting section 251. Br. 42. That argument fundamentally mischaracterizes the Commission’s decision, which was based on the simple observation that the later checklist items *do not incorporate* the “clear statutory requirement[s]” of checklist item two and section 251. They “contain no mention of ‘combining’ and ... do not refer back to the combination requirement set forth in §251(c)(3).” *Order* n.1990 (JA ). It was entirely reasonable, and within the Commission’s discretion, to interpret these later checklist items in a manner that does not mandate that the ILECs combine separate elements. That interpretation of section 271 is entitled to “substantial deference.” *AT&T*, 220 F.3d at 621.

The Court also should affirm the Commission's decision not to apply the pricing standard prescribed by section 252(d)(1) to network elements that BOCs provide solely to satisfy section 271. By its terms, section 252(d)(1) sets the pricing standard "for network elements *for purposes of [section 251(c)(3)]*." 47 U.S.C. §252(d)(1) (emphasis added). That provision does not purport to govern network elements that are not subject to unbundling under section 251. Moreover, unlike checklist item two, the separate checklist items requiring access to loops, transport, switching, and signaling do not mention section 252(d)(1).

The CLECs claim that checklist item two mandates the use of section 252(d)(1) to set rates for *all* network elements that BOCs provide to fulfill the checklist. Br. 43. But checklist item two does not say that. It requires BOCs to provide nondiscriminatory "access to network elements *in accordance with* the requirements of sections 251(c)(3) *and* 252(d)(1)." 47 U.S.C. §271(c)(2)(B)(ii) (emphasis added). The language of this provision ties the pricing standard of section 252(d)(1) to the unbundling duty created by section 251(c)(3). And that duty applies only to those network elements without which competitors would be impaired. If section 251(c)(3) does not apply to a particular network element, neither does section 252(d)(1).

The Commission reasonably decided that the rates for UNEs that are required only by section 271 must comply with "the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202." *Order* ¶663 (JA ). **Adherence to that standard will ensure that the** BOCs "provide meaningful access to network elements" that are required by section 271 but do not meet the impairment test under section 251. *Ibid.* Since lack of access to those UNEs would

not impair competitors in any event, the CLECs cannot legitimately complain about those UNEs' availability at just, reasonable, and nondiscriminatory rates.<sup>40</sup>

Finally, the states assert that the Commission undercut their pricing authority by stating that it would consider whether a particular checklist element's rate satisfies the just and reasonable pricing standard in an enforcement proceeding brought pursuant to section 271(d)(6). Br. 12-14 (citing *Order* ¶664 (JA )). But "Congress quite clearly gave the Commission the primary responsibility to make delicate judgments" concerning BOC compliance with section 271. *SBC Communications v. FCC*, 138 F.3d 410, 421 (D.C. Cir. 1998); *see also* 47 U.S.C. §271(d). If and when the FCC reviews a BOC's prices for loops unbundled pursuant to section 271(c)(2)(B)(iv), the Commission will be fulfilling its own statutory duty, not usurping state authority.

**VII. PETITIONERS' CHALLENGES TO FCC PREEMPTION OF STATE AUTHORITY TO REQUIRE UNBUNDLING ARE UNRIPE.**

The states (and, to a lesser extent, the CLECs) challenge the *Order* on grounds that the FCC unlawfully preempted state authority to impose unbundling requirements on ILECs. State Br. 4-9, 17-22; CLEC Br. 44-45. The CLECs acknowledge, however, that this "preemption issue is not ripe." CLEC Br. 44.

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<sup>40</sup> The CLECs argue that even if the "just and reasonable" standard applies, the FCC must mandate cost-based rates "because §252(d)(1) states that 'the just and reasonable rate for network elements' is a cost-based rate, and no different standard could plausibly apply under §201(b)." Br. 43. But section 252(d)(1) prescribes a "just and reasonable" UNE rate *only* "for purposes of [section 251(c)(3)]." 47 U.S.C. §252(d)(1). The "just and reasonable" standard under sections 201 and 202 does not require the FCC "to establish purely cost-based rates." *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996). In any event, the just and reasonable rates established for section 271 network elements may well reflect some cost-based methodology, since that is the easiest way for a carrier to justify its rates under the traditional test.

Although the states suggest otherwise, the *Order* did *not* preempt states from adding to the unbundling requirements that the FCC adopted. In the *Order*, the Commission simply observed that section 251(d)(3) “preserves states’ authority to impose unbundling obligations ... *only if*” such obligations are “consistent with the Act” and do “not substantially prevent the implementation” of the federal regime. *Order* ¶193 (JA ) (emphasis added); *see also* 47 U.S.C. §§251(d)(3)(B)–(C). The agency also said that parties could petition the FCC for a declaratory ruling that a particular state unbundling obligation exceeds the statutory limits on state authority. *Id.* ¶195 (JA ). On this subject, the Commission stated: “If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has ... declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and ‘substantially prevent’ implementation of the federal regime, in violation of section 251(d)(3)(C).” *Ibid.*

The FCC’s “announcement of its intent to preempt inconsistent state regulations should they arise does not constitute reviewable final action by the agency.” *Alascom v. FCC*, 727 F.2d 1212, 1219 (D.C. Cir. 1984). By inviting parties to seek rulings on specific state actions, the Commission “has expressed its willingness to consider on an individualized basis whether any state rule that might in the future be adopted is inconsistent with national policy.” *Id.* at 1220. Any future proceedings of this sort will likely revolve around specific factual issues. “The presence of such fact-intensive inquiries mandates deferral of review until an actual preemption of a specific state regulation occurs.” *Ibid.* In view of these considerations, the Court should dismiss the states’ preemption claim as unripe.

Even if this claim were ripe, it is unfounded. It rests largely on section 251(d)(3), which preserves state authority to adopt unbundling rules so long as they are “consistent with the requirements” of section 251 and do “not substantially prevent implementation of the requirements” of section 251 “and the purposes of this part.” 47 U.S.C. §251(d)(3). But section 251(d)(3) authorizes preemption of state requirements that “substantially prevent implementation of the requirements” of section 251; and it recognizes the FCC’s power to prescribe and enforce “regulations to implement the requirements” of section 251. *Ibid.* Thus, by the statute’s own terms, any state law that undermines the FCC’s implementing rules would “substantially prevent implementation of the requirements” of section 251. In that circumstance, the Act permits preemption.

Contrary to the states’ contention, Congress has explicitly defined “the requirements of section 251” to incorporate the FCC’s implementing rules. Section 252(c)(1) requires state commissions to resolve interconnection disputes in accordance with “the requirements of section 251, *including* the regulations prescribed by the Commission pursuant to section 251.” 47 U.S.C. §252(c)(1) (emphasis added). This language leaves no doubt that FCC regulations are “requirements of section 251.”

To be sure, an implementing regulation in some circumstances might be permissive rather than mandatory; and a state rule requiring something that the federal agency permits but does not require would not necessarily undermine a federal statutory requirement. In the UNE context, however, a decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a “balance” struck by the agency between the costs and benefits of

unbundling that element. *USTA*, 290 F.3d at 427; *Order ¶¶ 4-5*, 235 (JA , ). Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption.<sup>41</sup>

The states' contrary position ignores a long line of Supreme Court precedent. The federal government has the power to preempt any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In assessing whether such a conflict exists, the Supreme Court has emphasized that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). "The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988). Unless Congress expressly states otherwise, a statutory "saving clause" that preserves some state authority does not diminish the preemptive force of federal regulations. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-74 (2000).<sup>42</sup>

### VIII. NASUCA LACKS STANDING.

The Court should dismiss NASUCA's petition for lack of standing. A party invoking federal jurisdiction bears the burden of establishing Article III standing. *Lujan v. Defenders of*

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<sup>41</sup> For example, this Commission declined to unbundle the packetized functionality of ILEC loops. A state requirement to reverse that decision would substantially prevent implementation of the Act.

<sup>42</sup> The Supreme Court's recognition of the preemptive force of federal regulations casts serious doubt on the Eighth Circuit's ruling that section 251(d)(3) does not permit the FCC to preempt state rules that are "merely" inconsistent with FCC regulations. *See Iowa Utilities Board*, 120 F.3d at 806-07 (cited in States Br. 7-8). That legally dubious conclusion does not bind this Court in any event. The Eighth Circuit's ruling rested in part on that court's flawed assumption that Congress intended to confine FCC regulation of local telecommunications competition to a few expressly designated areas. The Supreme Court firmly rejected that premise. *See AT&T*, 525 U.S. at 378 n.6.

*Wildlife*, 504 U.S. 555, 561 (1992). This Court has declared that “a petitioner whose standing is not self-evident should establish its standing” by submitting arguments, affidavits, and other relevant evidence “at the first appropriate point in the review proceeding” (in this case, in the petitioner’s opening brief). *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002). NASUCA has not satisfied this threshold requirement. Its brief never explains how the agency actions it challenges have injured the consumer interests it represents. Having failed to demonstrate any concrete or particularized injury, NASUCA lacks standing. *Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539 (D.C. Cir. 2003).

In any event, NASUCA’s arguments lack merit. Contrary to NASUCA’s assertion (Br. 6-11), there is nothing unlawful about the Commission’s sensible plan to improve hot cut performance. That initiative was reasonably designed to advance the statute’s procompetitive goals by removing a significant barrier to market entry. *Order* ¶¶460, 487 (JA , ). NASUCA also is wrong to suggest (Br. 11-12) that the FCC’s revised impairment test eliminated any real distinction between the two access standards prescribed by section 251(d)(2). The “necessary” standard for unbundling proprietary network elements under section 251(d)(2)(A) requires a determination that lack of access would “preclude a requesting carrier from providing the services it seeks to offer.” *UNE Remand Order* ¶44 (emphasis in original); see also *Order* ¶¶170-171 (JA - ). **By contrast, the Commission’s impairment test under section 251(d)(2)(B) requires a finding that lack of unbundled access would “likely” make market entry “uneconomic.”** *Id.* ¶84 (JA ) (emphasis added).



**CONCLUSION**

The Court should deny the petitions.

Respectfully submitted,

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December 31, 2003

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

UNITED STATES Telecom Association, et al., )

PETITIONERS, )

V. )

FEDERAL COMMUNICATIONS COMMISSION AND UNITED )  
STATES OF AMERICA, )

RESPONDENTS. )

No. 00-1012 (AND  
CONSOLIDATED CASES)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 27844 words.

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