IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3212
(and consolidated cases)

ESCHELON TELECOM, INC., *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION TO JOINT MOTION FOR STAY AND EXPEDITION

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September 24, 2003

The Federal Communications Commission recently revised its rules governing the obligations of incumbent local exchange carriers ("ILECs") under 47 U.S.C. § 251(c)(3). The Bell companies and a trade association of ILECs have moved for a stay of portions of those rules pending judicial review. For the reasons discussed below, these petitioners have failed to justify their request for extraordinary relief. The Court should deny both the motion for stay and the request for expedited review.

BACKGROUND

The Telecommunications Act of 1996 ("1996 Act") comprehensively amended the Communications Act. Among other things, the 1996 Act adopted provisions that require ILECs to take steps to open their local markets to competition. One of those provisions imposes on ILECs a "duty to provide, to any requesting carrier for the provision of a telecommunications service, nondiscriminatory access" to unbundled network elements ("UNEs") on just and reasonable rates, terms, and conditions. 47 U.S.C. § 251(c)(3). For purposes of determining which network elements ILECs must provide to fulfill this statutory duty, the statute provides that the FCC "shall consider, at a minimum, whether" ILECs' "failure to provide access to [nonproprietary] network elements would impair the ability of the telecommunications carrier seeking to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(B). This statutory "impairment" standard lies at the heart of this case.

When the FCC adopted its initial rules for implementing the local competition provisions of the 1996 Act, it construed the impairment standard quite broadly, requiring wide-scale unbundling of numerous network elements. *Local Competition Order,* 11 FCC Rcd 15499, 15616-15775 (¶¶ 226-541) (1996). Although the Eighth Circuit upheld the agency's broad reading of the impairment standard, *Iowa Utilities Board v. FCC*, 120 F.3d 753, 810-12 (8th Cir. 1997), the Supreme Court reversed. *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 387-92 (1999). It found that the FCC, in assessing impairment, had improperly failed to consider whether competing local exchange carriers ("CLECs") could provide their own facilities or purchase equipment from non-ILEC sources. The Court held that the agency could not, "consistent with the statute, blind itself to the availability of elements outside the network." 525 U.S. at 389. The Court also faulted the Commission for assuming that "*any* increase in cost (or decrease in quality) imposed by denial of a network element" constituted an impairment under section 251(d)(2). *Id.* at 389-90 (emphasis in original). The Court directed the FCC, on remand, to construe section 251(d)(2) to apply some "limiting standard, rationally related to the goals of the Act." *Id.* at 388.

In response to the Supreme Court's remand, the Commission revised its interpretation of section 251(d)(2). Under its revised reading of the statute, the Commission determined that the failure to provide access to a non-proprietary UNE would "impair" a requesting carrier's ability to provide service if, "taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer." *UNE Remand Order*, 15 FCC Rcd 3696, 3725 (¶ 51) (1999). The Commission committed to reviewing the UNE obligations in three years, *id.* at 3704 (¶ 15), and it initiated the Triennial Review proceeding in December 2001, *Triennial Review NPRM*, 16 FCC Rcd 22781 (2001).

Five months after the FCC opened the Triennial Review, the D.C. Circuit on review of the *UNE Remand Order* rejected the FCC's second interpretation of section 251(d)(2) and remanded the matter for further consideration. *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"), *cert. denied*, 123 S. Ct. 1571 (2003). The Court in *USTA* found three defects in the agency's revised impairment analysis. First, it took issue with what it saw as the Commission's decision "to adopt a uniform national rule, mandating [an] element's 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 said that the agency should have adopted "a more nuanced concept of impairment than is reflected in findings … detached from any specific markets or market categories." *Id.* at 426. Second, the Court criticized the Commission for relying on "cost disparities that, far from being any indication that competitive supply would be wasteful, are simply disparities faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector." *Ibid.* Third, the Court set aside the FCC's decision to require "line sharing" – unbundling of the high frequency portion of the loop used by

CLECs to provide broadband services – because the agency "failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite)." *Id.* at 428.

When *USTA* was decided, the FCC already was in the midst of a triennial review of its UNE rules. After requesting and receiving comments on the impact of the *USTA* decision, the Commission issued its *Triennial Review Order*. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* FCC 03-36 (released Aug. 21, 2003) ("*Order*"). This *Order* substantially modified the FCC's UNE rules. In response to *USTA*, the Commission again revised its definition of impairment, finding that a CLEC is impaired if 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." *Order* ¶ 84. The agency also took steps to ensure that its impairment analysis responded to the *USTA* decision. It undertook a more "granular" analysis of impairment, taking into account customer classes, geography, and service categories; and, where the record did not permit the FCC itself to make such detailed findings, the agency delegated this fact-finding task to state commissions. *Id.* ¶¶ 118, 123-124, 130. In addition, the Commission's impairment analysis focused on cost disparities that economists have historically associated with barriers to entry (as opposed to cost disparities that any new entrant might face in any industry). *Id.* ¶¶ 85-91.

Application of the FCC's revised impairment standard resulted in a significant reduction of ILECs' unbundling obligations, including lifting obligations relating to most ILEC broadband facilities. *See generally Order* ¶¶ 4, 7. Nonetheless, petitioners maintain that the Commission should have cut back on unbundling even further. Primarily, they complain that CLECs that serve the mass market continue to have access to the "UNE platform" (or "UNE-P") – *i.e.*, all of the key elements (loops, transport, and switching) that are needed to provide basic local phone service. As we explain below, the decisions that petitioners challenge rest on an analysis of impairment that is consistent with the statute, responsive to the *USTA* decision, and supported by substantial evidence.

ARGUMENT

To obtain a stay, petitioners must demonstrate that: (1) they will likely prevail on the merits; (2) they will suffer irreparable harm without a stay; (3) a stay will not harm other interested parties; and (4) grant of a stay is consistent with the public interest. *Packard Elevator v. ICC,* 782 F.2d 112, 115 (8th Cir. 1986). Petitioners have not satisfied any of these requirements.

I. Petitioners Are Not Likely To Prevail On The Merits

Petitioners primarily challenge portions of the *Order* that address (1) mass market switching; (2) high-capacity facilities; and (3) enhanced extended links ("EELs"). None of petitioners' claims has merit.

Mass Market Switching. Before a CLEC can use its own switch to serve a residential or small business customer, the ILEC must perform a "hot cut," manually disconnecting the customer's loop from the incumbent switch and reconnecting the loop to the CLEC's switch. *See Order* ¶ 465; *AT&T Corp. v. FCC,* 220 F.3d 607, 625 (D.C. Cir. 2000). On the basis of substantial record evidence, the FCC determined that the current hot cut process poses substantial operational and economic barriers to competitive entry in the mass market. *Order* ¶¶ 464-475. In the Commission's judgment, given the characteristics of this market, these barriers combine to "create an insurmountable disadvantage" to CLECs that seek to serve the mass market by using their own switches. *Id.* ¶ 475. The Commission found that the best evidence of lack of impairment was actual deployment of CLEC switching, and the record showed very little deployment of mass market switching. The Commission thus found that CLECs generally are impaired in their ability to serve mass market customers without unbundled switching.

1. Petitioners claim that the Commission's finding of impairment ignored the ILECs' past success in performing more than one million hot cuts for mass market customers. Motion at 6. But those hot cuts involved only a small fraction of the mass market. Moreover, the assertion that ILECs have completed a million hot cuts over a period of several years is hardly compelling evidence that ILECs could efficiently execute the *multiple* millions of hot cuts that they would have to perform in a matter of *days* or *weeks* if CLECs had to make a flash-cut transition from UNE-P to self-provisioned switching.

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

Petitioners counter that when the FCC granted Bell companies' long-distance applications under 47 U.S.C. § 271, it repeatedly found that those companies could handle reasonably foreseeable volumes of hot cuts. Motion at 6. At the time of the section 271 proceedings, however, "reasonably foreseeable" volumes of hot cuts were low, because most CLECs were using unbundled switching to serve the mass market. The Commission in this case focused on a different issue: whether ILECs could handle the explosive increase in hot cut volumes that would result 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." *Order* at n.1435. Meanwhile, state commissions "have found difficulties regarding hot cut performance" at higher demand volumes. *Id.* at n.1437. In New York, the first state where a Bell company won section 271 approval, the state commission has found that Verizon's processing of hot cuts would need to accelerate dramatically if CLECs could no longer obtain unbundled switching. At its present pace, the state commission said, Verizon would take *more than 11 years* to switch all current UNE-P customers in New York to CLECs' switches. *Id.* ¶ 469 (quoting New York Comments at 4 n.18).

Petitioners fault the Commission for "hypothesiz[ing]" about the ILECs' ability to satisfy increased demand for hot cuts in the absence of unbundled switching. Motion at 6. Ultimately, however, in deciding whether ILECs could efficiently perform the unprecedented volumes of hot cuts that would result from the elimination of unbundled switching, the Commission had to make a predictive judgment. In these circumstances, where "complete factual support in the record for the Commission's judgment is not possible or required," the Commission's predictive judgment in its area of expertise is entitled to particularly deferential review. *FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 813-14 (1978); *see also FCC v. WNCN Listeners Guild,* 450 U.S. 582, 595-96 (1981); *Southwestern Bell Tel. Co. v. FCC,* 153 F.3d 523, 537, 547 (8th Cir. 1998). Under this highly deferential standard, this Court is likely to uphold the FCC's predictive assessment of the operational barriers erected by the hot cut process.

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

Petitioners also attack the Commission's finding that the hot cut process creates economic barriers to entry. First, they assert that the agency improperly considered hot cut costs in isolation, without regard to potential revenues or other countervailing factors. That is incorrect. As a general rule, in analyzing impairment, the Commission considered whether the cumulative effect of any barriers to entry "is likely to make entry uneconomic, *taking into account available revenues and any countervailing advantages that a requesting carrier might have*." *Order* ¶ 85 (emphasis added). Applying this standard to mass market switching, the Commission reasonably found that the operational and economic cost barriers imposed by hot cuts outstripped any potential revenues or CLEC advantages.

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

The Commission also found substantial differences in potential revenues and costs between the mass market and the "enterprise" market (for larger businesses). The Commission reasonably found – and petitioners do not dispute – that CLECs in the enterprise market are *not* impaired without access to unbundled switching because differences in network architecture for that market obviate the need for hot cuts, and because enterprise customers with long-term contracts offer greater revenue opportunities than mass market customers do. *Order* at n.1354; *id.* ¶ 452. It was also reasonable for the Commission to conclude that CLECs in the mass market *are* impaired without unbundled switching. Unlike CLECs in the enterprise market, mass market CLECs must bear the costs of hot cuts; and they must somehow recover those additional costs in a market that offers far fewer revenue opportunities and a less stable customer base. Under the circumstances, the Commission reasonably distinguished between "specific … market categories" when it found impairment in the mass market and no impairment in the enterprise market with respect to unbundled switching. *See USTA*, 290 F.3d at 426.

Petitioners claim that "the FCC never tried to explain" how hot cut costs "were 'linked' to 'natural monopoly.'" Motion at 7 (quoting *USTA*, 290 F.3d at 427). That is simply wrong. The Commission noted that incumbents do not have to perform hot cuts for themselves 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. Only CLECs that use their own switches to serve the mass market incur the substantial operational and economic costs associated with hot cuts. Consequently, the Commission concluded: "The barriers associated with the manual hot cut process are directly associated with [ILECs'] historical local monopoly, and thus go beyond the burdens universally associated with competitive entry." *Ibid.* These barriers are precisely the types of costs – "linked (in some degree) to natural monopoly" – that the Court in *USTA* said the Commission could properly consider in assessing impairment. *USTA*, 290 F.3d at 427.

Petitioners assert that the FCC cannot make a "*national* finding of economic impairment" because hot cut charges vary among states. Motion at 7. But the Commission's finding of national impairment did not rest on economic factors alone. Rather, the Commission reasonably determined that "the combined effect of all aspects of the hot cut process" – including not only economic costs, but also operational impediments – impairs CLECs' ability to serve the mass market without unbundled switching "in the large majority of locations," even in areas where hot cut charges are relatively low. *Order* ¶ 473.[1]

2. Petitioners also claim that the FCC lacked statutory authority to delegate any impairment determinations to the states. Motion at 8. They wrongly assert that the statute's plain language bars such a delegation. To the contrary, nothing in the statute expressly prohibits the FCC from involving the states in the impairment analysis. The statute simply directs the Commission to "establish regulations to implement the requirements" of section 251, 47 U.S.C. § 251(d)(1), and does not foreclose the possibility that FCC regulations could provide a role for states in assessing impairment. Indeed, the Act explicitly

[1] Petitioners maintain that the Commission could have addressed its hot cut concerns in a more "tailored" way by requiring a 90-day "rolling" cut-over or by making unbundled switching available on a transitional basis unless and until an ILEC performs the necessary hot cut for each particular line. Motion at 7-8. These piecemeal fixes, however, would not remedy the basic problem with the current hot cut process: the inability of ILECs to complete large volumes of hot cuts seamlessly in a short period of time. To address this problem directly, the Commission directed state commissions, within nine months, to develop a batch hot cut process in collaboration with incumbents and competing carriers. *Order* ¶¶ 487-490. The Commission reasonably concluded that this sort of systemic overhaul was required to create the kind of "seamless, low-cost batch cut process" that "is necessary, at a minimum, for carriers to compete effectively in the mass market." *Id.* ¶ 487.

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. *Id.* § 251(d)(3).[2]

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

Petitioners contend that, since Congress authorized delegation expressly in other provisions of the statute, its silence on the subject in section 251(d) must be construed to prohibit delegation. This flawed argument places unjustified reliance on "the expressio unius maxim – that the expression of one is the exclusion of others." *Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1404 (D.C. Cir.), *cert. denied*, 519 U.S. 823 (1996). This maxim has little force in the administrative setting, where the courts must defer to an agency's reasonable statutory interpretation unless Congress has directly spoken to the

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

precise question at issue. *Id.* at 1404-05; *see also Chevron USA v. NRDC*, 467 U.S. 837, 842 (1984); *Bailey v. Federal Intermediate Credit Bank*, 788 F.2d 498, 500-01 (8th Cir. 1986).[3]

Petitioners alternatively argue that the FCC's delegation does not impose meaningful standards on the states. Motion at 9-11. In fact, the Commission established objective competitive "triggers" that would require a state to find no impairment in those markets where the triggers are satisfied. *Order* ¶¶ 498-505. Petitioners contend that the FCC gave the states too much discretion to define the relevant markets for assessing whether the triggers are met. To the contrary, the Commission provided significant guidance on market definition, directing the states to consider "the locations of customers actually being served (if any) 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." *Id.* ¶ 495; 47 C.F.R. § 51.319(d)(2)(i). The FCC also made clear that a state commission cannot define a market as encompassing an entire state. *Order* ¶ 495. Furthermore, the Commission said, states should assess variations in impairment among customer classes and geographic areas, and "should attempt to distinguish among markets where different findings of impairment are likely." *Ibid.*

Petitioners also contend that the self-provisioning trigger, which the FCC set at three competitors, is too high. Motion at 10. This is a challenge to agency line-drawing. Courts generally are "unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn … are patently unreasonable, having no relationship to the underlying regulatory problem." *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (internal quotations omitted). The Commission reasonably

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[3] Petitioners make much of the contrast between section 251(d), which does not mention delegation, and section 251(e), which expressly authorizes the FCC to delegate any or all of its jurisdiction over numbering administration to the states. *See* 47 U.S.C. § 251(e)(1). This difference is easily explained. Section 251(e)(1) gives the FCC "exclusive jurisdiction" over numbering administration. *Ibid.* Congress felt the need to clarify that the FCC could cede all or part of its exclusive jurisdiction to the states. No such clarification was necessary for section 251(d). That provision did not vest exclusive jurisdiction in the FCC; instead, it explicitly preserved the authority of states to adopt and enforce their own unbundling rules, so long as those rules do not conflict with federal law. 47 U.S.C. § 251(d)(3).

concluded that three self-provisioning competitors marked "the appropriate threshold in order to be assured that the market can support 'multiple, competitive' local exchange service providers using their own switches." *Order* ¶ 501 (quoting *USTA*, 290 F.3d at 427). While petitioners may have preferred a lower threshold, the line drawn by the FCC is reasonable: "The agency's choice of a reasonable solution from a number of acceptable alternatives is within the agency's discretion and is not arbitrary or capricious." *Southwestern Bell*, 153 F.3d at 553. In any event, the Commission has declared that the presence of even one self-provisioning competitor in a market will increase the likelihood of a finding of no impairment. The FCC directed the states to give "particularly substantial weight" to a CLEC's use of a self-deployed switch to serve the mass market: "[T]he existence of even one such switch might in some cases justify a state finding of no impairment, if [the state] determines that the market can support 'multiple, competitive supply.'" *Order* ¶ 510 (quoting *USTA*, 290 F.3d at 427).[4]

There is no longer any basis for petitioners' objection that "a facilities-based competitor counts for purposes of the switching test only where it is 'operationally ready and willing to provide service to *all* customers in the designated market.'" Motion at 9 (quoting *Order* ¶ 499). In a recent erratum, the Commission corrected paragraph 499 of the *Order*, clarifying that *wholesale* service providers must "be operationally ready and willing to provide wholesale service to all competitive providers in the designated market." *Errata*, FCC 03-227, ¶ 21 (released Sept. 17, 2003) (Attachment A). The corrected paragraph

[4] Petitioners claim that the FCC did not adequately account for intermodal competition because it discounted the impact of cable telephony on its impairment analysis. Motion at 10. But the FCC did direct states to consider cable telephony when assessing whether the switching triggers are met. *Order* at n.1549. At the same time, the Commission reasonably explained that the small fraction of the market served by cable telephony and the very limited availability of that service could not justify a national finding of no impairment. *Order* ¶¶ 443-444. The minuscule market penetration by cable telephony does not resemble the intermodal competition that the Court identified in *USTA*: the competition provided in the broadband market by cable operators, who serve more than half of all broadband subscribers nationwide. *See USTA*, 290 F.3d at 428-29. Moreover, because providers of cable telephony provide their own loops (and therefore do not need hot cuts), their presence in the market does nothing to refute the evidence that the hot cut process generally precludes CLECs from using their own switches in the mass market. *Order* ¶ 446.

does *not* require that, for purposes of the switching triggers, self-provisioning competitors must be ready and willing to serve all retail customers in the market.[5]

Petitioners wrongly suggest that if the triggers are not met, states will have unconstrained discretion to decide whether CLECs could deploy their own switches in a given market. Motion at 10-11. In evaluating impairment where the triggers are not met, states must ask the same question that the FCC posed in the *Order*: "whether all potential revenues from entering a market exceed the costs of entry, taking into consideration any countervailing advantages that a new entrant may have." *Order* ¶ 84. The FCC has given the states extensive guidance on the evidence that they should consider, 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. *Order* ¶¶ 85-104, 476-485, 506-520. The FCC's standards will "ensure that the states implement their delegated authority "in the same carefully targeted manner" as the FCC's federal determinations. *Order* ¶ 189.

Lastly, petitioners complain that the agency failed to assert reviewing authority over state unbundling decisions. Motion at 11. In fact, the FCC will entertain petitions for declaratory ruling from parties who contend that state impairment determinations do not comport with federal standards. *Order* ¶ 426; *see also Errata* ¶ 21. In addition, Congress in the 1996 Act created a review process to ensure that state unbundling decisions comply with federal law. Whenever a state commission resolves a disputed issue under section 252, any aggrieved party may bring an action in federal district court to determine whether the state's ruling meets the requirements of sections 251 and 252. 47 U.S.C. § 252(e)(6). Federal district courts have addressed complaints concerning state compliance with federal law in areas such as the pricing of UNEs. *See generally Verizon Maryland Inc. v. Public Service Commission of*

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[5] Petitioners are wrong to assert that the FCC failed to consider that CLECs "focus their efforts on … high-volume, high-revenue customers who present the most potential profit." Motion at 10. The Commission observed that areas that present high revenue opportunities "have generally been the first areas to attract competitive entry." *Order* ¶ 166. In those areas, the Commission found, "marketplace evidence of facilities-based competitive entry is most likely to warrant a finding of no impairment." *Ibid.*

Maryland, 535 U.S. 635 (2002). Those courts can likewise ensure that states comply with the FCC's standards for analyzing impairment. *Order* ¶ 427.

High-Capacity Facilities. Petitioners challenge the FCC's impairment analysis of high-capacity facilities and its delegation of certain matters to the states. These claims cannot withstand scrutiny.

1. Petitioners fundamentally mischaracterize the FCC's analysis of high-capacity facilities. They assert that the FCC "ordered unbundling everywhere because it could not rule out the possibility that CLECs might be impaired somewhere." Motion at 12. In the first place, the FCC did not order unbundling of high-capacity facilities "everywhere." Indeed, the agency cut back on unbundling requirements affecting many high-capacity facilities, finding no impairment with respect to certain types of facilities. *Order* ¶¶ 315-317, 324, 388-389.

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

2. Petitioners claim that the FCC cannot delegate this task to the states. Motion at 12. But as we explained in the switching section above, this delegation was both lawful and reasonable. Petitioners also argue that the high-capacity self-provisioning triggers are too high. Motion at 14. The Court should reject this claim because petitioners have failed to show that the lines drawn by the FCC "are patently unreasonable, having no relationship to the underlying regulatory problem." *Cassell*, 154 F.3d at 485.

The Commission reasonably concluded that the presence of three self-provisioning competitors provided a proper threshold for mandating a finding of no impairment in the absence of unbundled transport.

Petitioners complain that the FCC required application of the high-capacity transport triggers on a "route-by-route" basis. They suggest that the agency should have applied triggers that mirror the pricing flexibility triggers, which cover broader geographic areas. Motion at 13-14. But the Commission reasonably explained why the pricing flexibility triggers would not make a good gauge for assessing impairment. It noted that the revenue trigger for pricing flexibility, which "requires only a single collocated competitor and the purchase of substantial amounts of special access in a concentrated area," would offer "little indication that competitors have self-deployed alternative facilities, or are not impaired outside of a few highly concentrated wire centers." *Order* ¶ 397. Similarly, the Commission found that the other pricing flexibility trigger, based on alternative transport-based collocation, shed little light on whether CLECs have deployed facilities beyond a single collocation. *Ibid.* Therefore, the Commission rightly reasoned, route-by-route implementation of the transport triggers offered the most effective means of determining a lack of impairment.

Petitioners incorrectly assert that the FCC instructed the states to focus only on specific locations where competitive deployment of facilities has already happened. Motion at 13. To the contrary, the Commission has also directed states to evaluate evidence of whether self-provisioning is *possible* in areas where the triggers are not met. *Order* ¶¶ 335, 410. Petitioners claim that this second part of the states' impairment analysis is "standardless." Motion at 15. That is not true. While the Commission has identified a variety of factors for the states to consider, the ultimate objective of the impairment analysis is the same in each state: to determine "whether entry would be profitable without the UNE in question" – *i.e.*, whether the cumulative effect of barriers to entry "is likely to make entry uneconomic, taking into account available revenues and any countervailing advantages that a [CLEC] may have." *Order* ¶ 85.

Enhanced Extended Links. In prior orders, the FCC's unbundling determinations generally applied without regard to the particular services for which a CLEC intended to use a network element.

See Order ¶ 134. The Commission's treatment of high-capacity loop/transport combinations – commonly referred to as "enhanced extended links" or "EELs" – departed from that general policy. The Commission had provided as an interim measure that, pending further study, ILECs need not provide EELs to an interexchange carrier ("IXC") as a substitute for special access service unless the IXC would use them to provide "a significant amount of local exchange service." *Id.* ¶ 570. The Commission had established three "safe harbors" that effectively required IXCs to ascertain and certify local traffic percentages in order to qualify for EELs. *Ibid.*; *see also Order* ¶¶ 612-614. In adopting those interim restrictions, the Commission reasoned that section 251(d)(2) allowed it to make service-specific network element unbundling distinctions, and 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. *See Competitive Telecommunications Ass'n v. FCC*, 309 F.3d 8, 13-16 (D.C. Cir. 2002) ("*CompTel*"). The D.C. Circuit upheld the interim rules. *Id.* at 13, 16-17.

The *Order* on review – issued after the D.C. Circuit's *USTA* decision and after further study of the EELs issue by the Commission – alters the network element unbundling framework in several ways that bear on the availability of high-capacity EELs. First, 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 markets into account. *See Order* ¶¶ 197-202 (separately analyzing impairment with respect to mass market and enterprise loops, and permitting location-by-location impairment determinations with respect to high-capacity enterprise loops); *id.* ¶¶ 359-360 (separately analyzing transport impairment by capacity level and permitting route-by-route impairment findings). Thus, the EEL's separate components will not be available to serve customer or geographic market segments where their absence will not impair CLECs. Second, the Commission revised its impairment analysis to take into account "*all* the revenue opportunities that a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could reasonably expect to sell." *Id.* ¶ 100 (emphasis in original). Consequently, a finding of impairment with respect to a loop or transport element would not logically be confined to a particular service, but rather would extend to *all* of the services that a CLEC reasonably could expect to offer (including both local and long-distance services). Third, once an impairment finding has been made with respect to a network element, the Commission's revised rules require that the CLEC use the network element to provide at least one "qualifying" service (local exchange or exchange access service) in addition to any non-qualifying services that the carrier offers. *Id.* ¶¶ 135-153. The Commission reasoned that sections 251(c)(3) and 251(d)(2), while ambiguous, were best read to "center on those [qualifying] telecommunications services that competitors provide in direct competition with the [ILECs'] core services." *Id.* ¶ 139.

Finally, to avert the possibility that requesting carriers might use high-capacity EELs to "game" the new "qualifying service" requirement, the Commission adopted eligibility criteria that apply only to EELs. *See Order* ¶¶ 591, 595-597. Under those criteria, a requesting carrier must: (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 requiring collocation arrangements, interconnection trunks adequate for the meaningful exchange of local traffic, and switching capable of providing local voice traffic. *Id.* ¶ 597. The Commission determined that these criteria, demonstrating substantial regulatory and commercial steps to provide local voice service, "will ensure that the requesting carrier is indeed a provider of qualifying services." *Id.* ¶ 598.

Petitioners contend that these revised EELs restrictions unlawfully permit the use of UNEs for non-local service. Motion at 15-18. Their claim, however, is based largely on misreadings of both the FCC's *Order* and the D.C. Circuit's *CompTel* decision. It provides no basis for a stay.

First, contrary to petitioners' suggestion (Motion at 16-17), the Court in *CompTel* did not require continuation of either the "local service standard" or the safe harbors that were reviewed in that case. Rather, the Court rejected arguments that the FCC could not *restrict* the uses of EELs, holding that the agency's reasoning was sufficient to justify its interim rules. *See CompTel*, 309 F.3d at 13 (rejecting the view that the FCC was "lock[ed] ... into" a reading of section 251(d)(2) that prohibited service-specific impairment analysis); *id.* at 16 (noting that "the FCC has only issued an interim rule while it further studies the issues," and finding the FCC's justifications "adequate" in those circumstances).

Petitioners aggressively misread the *Order* in asserting that the new service qualification rules broadly permit CLECs to use EELs for "*any* purpose … with *no* practical limitation." Motion at 16, 17. The new permanent rules, in fact, serve a function similar to that of the old temporary ones – *i.e.*, ensuring that EELs are not simply used by long-distance carriers as a substitute for the ILEC access services to reach long-distance customers. The main difference between the two sets of rules is that the new regulations eschew requirements that CLECs directly measure local and non-local traffic percentages – which experience under the interim safe harbor regime showed to be "overly intrusive and onerous" (*Order* ¶¶ 596, 612-615) – in favor of "architectural solutions" and other "bright-line" conditions that, taken as a whole, would make it uneconomic for IXCs to buy EELs solely as a substitute for access service. *Order* ¶¶ 596-600. The analysis set forth in the *Order* (¶¶ 595-611) fully justifies the Commission's decision to adopt the new rules and rebuts petitioners' claims that they will be ineffective.[6]

Petitioners also argue that EELs should not be available at all because the long-time presence of facilities-based competitive access providers demonstrates that the requisite impairment does not exist. Motion at 15-16. But the Commission's unbundling rules *do* require that the presence of competitive access providers and other potential competitors be taken into account on location- and route-specific bases when assessing whether the loop and transport elements that comprise the EEL must be made available. *See Order* ¶¶ 197-202 (enterprise loops), 359-360 (transport). In places where the presence of facilities-based competitors reflects a lack of impairment, EELs will not be available. Where impairment

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[6] Petitioners also claim that the *Order* exacerbates CLECs' allegedly limitless freedom to use EELs by permitting carriers to "'convert' special access services to the lower price for EELs." Motion at 17. But such "conversion" is permitted only if the CLEC meets the reasonable service eligibility criteria discussed above. And the Commission expressly declined to allow IXCs to "supersede or dissolve existing contractual arrangements [*e.g.,* for tariffed access services] through a conversion request." *Order* ¶ 587. Thus, insofar as IXCs have entered into long-term contracts for access services, the availability of EELs does not allow them to escape the penalty provisions for premature termination of such arrangements.

is found, that finding necessarily reaches all of the (local and non-local) services that the requesting carrier reasonably might seek to offer, consistent with the Commission's revised impairment standard that considers "*all* revenue opportunities" that the requesting carrier reasonably could expect to obtain from "all possible services." *Id.* ¶ 100 (emphasis in original).

Finally, petitioners contend that the availability of their own access services as a substitute for EELs negates any impairment. Motion at 15-16. But the Commission reasonably explained that the availability of such substitute services simply is not relevant to the impairment inquiry. *Order* ¶ 102. Section 251(d)(2) requires ILECs to make network elements available if the unavailability of those elements would cause impairment. And section 252(d)(1) establishes the pricing standard for network elements that meet the impairment test. If the statute were read to permit ILECs to avoid a finding of impairment by providing equivalent services as an alternative to 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 (emphasis added). Consistent with the Eighth Circuit's prior treatment of a closely related argument, the FCC properly rejected a reading of the statute that would permit such evasion. *See Iowa Utilities Board*, 120 F.3d at 809-10 (rejecting a similar interpretation urged by ILECs that would have allowed them to circumvent unbundling obligations by choosing to offer network elements as services subject to resale under section 251(c)(4)), *aff'd in pertinent part*, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366.[7]

II. The Balance Of Equities Weighs Against A Stay

To demonstrate the sort of irreparable injury that would justify a stay, petitioners must establish that the harm they would suffer in the absence of a stay would be "both certain and great," "actual and not theoretical." *Packard Elevator*, 782 F.2d at 115; *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). They must also show that the harm would be truly "irreparable" – *i.e.*, that no "adequate

[7] This reasoning also provides a complete answer to petitioners' undeveloped assertion (Motion at 18) that CMRS carriers (*i.e.*, wireless providers) should not have access to network elements because of the availability of tariffed special access services.

compensatory or other corrective relief will be available at a later date." *Sampson v. Murray,* 415 U.S. 61, 90 (1974) (internal quotations omitted). Petitioners have failed to carry this heavy evidentiary burden.

Basically, petitioners argue that they will lose many customers if a stay is not granted. Motion at 18-19. But "revenues and customers lost to competition which can be regained through competition are not irreparable." *Central & Southern Motor Freight Tariff Ass'n v. United States,* 757 F.2d 301, 309 (D.C. Cir.), *cert. denied,* 474 U.S. 1019 (1985). The Eighth Circuit has previously rejected the ILECs' claims that local competition would seriously harm them: "To the extent that some incumbent LEC customers decide to switch to competing carriers, … this result is entirely consistent with the Act's purpose to promote competition in local phone markets." *Iowa Utilities Board,* 120 F.3d at 815 n.34.

In any event, it is far from certain that the *Order* will have a major adverse impact on petitioners. Indeed, the ILECs unquestionably are better off under this *Order* than they were under any previous UNE regime. At least one independent market analyst has predicted that the *Order*'s effect on the ILECs will not be nearly as dire as petitioners would have the Court believe. According to Legg Mason, the *Order* has created a process that ILECs will successfully use to obtain significant relief from UNE-P unbundling obligations within the next few years. Legg Mason, UNE-P Quarter-Loaf: Bells Lost, Still Likely to Gain Some Relief (Sept. 17, 2003) (Attachment B).[8]

Furthermore, even assuming that petitioners must continue to make UNE-P available, it is hard to take their claims of harm seriously. Although petitioners have already been providing UNE-P to their competitors under prevailing FCC rules for the past several years, they have continued to dominate local markets and to register handsome profits. For example, in 2002, Verizon, BellSouth, and SBC each earned an interstate rate of return in excess of 15 percent. *See* Attachment C (spreadsheet); *see also* Industry Analysis & Technology Division, FCC's Wireline Competition Bureau, *Trends in Telephone*

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[8] Petitioners also assert that they will face "massive harm" from "widespread conversion of special access services to UNEs." Motion at 19. This claim is groundless. As we explained above at pages 16-17 & n.6, the FCC's eligibility criteria for EELs and the existence of long-term contracts for tariffed access services will sharply constrain CLECs' ability to convert special access services to UNEs. The extent of such conversions will not remotely approach the scale hypothesized by petitioners.

Service, Table 4.1 (Aug. 2003) (from 1997 to 2002, the Bell companies typically earned an annual interstate rate of return ranging from 15 to 20 percent). Meanwhile, even with access to UNE-P, many CLECs have struggled to stay afloat, and a number have gone out of business. A stay in this case would likely deal a crippling blow to many CLECs, whose ability to provide service would (in the FCC's expert judgment) be impaired without access to certain core UNEs. Simply put, a stay of the *Order* would harm CLECs much more substantially than denial of a stay would harm petitioners.

A stay also can be expected to make further entry into local markets uneconomic, in derogation of the purposes of sections 251 and 252. Thus, a stay would harm the public interest in competition. The *Order* in this case strikes a sensible policy balance: It "maintains appropriate incentives" for the ultimate transition to facilities-based competition "without throwing away the competition that exists today." *Order* at n.1365. A stay would disturb that delicate balance. Not only would it imperil existing sources of local competition; it would also jeopardize the transition to facilities-based competition by creating insurmountable obstacles to market entry for competing carriers. In short, a stay would severely hamper the continued development of local competition – one of Congress's principal objectives in passing the 1996 Act. Therefore, on balance, the equities in this case militate against a stay.

CONCLUSION

The Court should deny the motion for stay. For the same reasons, it should also deny the request for expedited review. In any event, the briefing schedule should not commence until sometime after November 3, 2003 – the last day on which parties can file timely petitions for review of the Order. And any schedule should take account of the fact that the Commission will have to respond to disparate arguments made by multiple petitioners on all sides of the issues.

Respectfully submitted,

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September 24, 2003