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

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

ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: July 21, 2004 **Released:** August 20, 2004

Comment Date: [21 Days after publication in the Federal Register]
Reply Comment Date: [36 Days after publication in the Federal Register]

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

I. INTRODUCTION

1. Today, we issue a Notice of Proposed Rulemaking (Notice) in which we solicit comment on alternative unbundling rules that will implement the obligations of section 251(c)(3) of the Communications Act of 1934, as amended,[1] in a manner consistent with the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *United States Telecom Ass'n v. FCC*.[2] We also issue an Order in which we take several steps designed to avoid disruption in the telecommunications industry while these new rules are being written. The actions we take today are designed to advance the Commission's most important statutory objectives: the promotion of competition and the protection of consumers. If the Commission does not act, the $127 billion local telecommunications market will unnecessarily be placed at risk. To that end, we set forth a

---

[1] We refer to the Communications Act of 1934, as amended, *inter alia*, by the Telecommunications Act of 1996, as the Communications Act or the Act. *See generally* 47 U.S.C. § 151 *et seq*.

[2] 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004). *See also United States Telecom Ass'n v. FCC*, No. 00-1012, Order, (D.C. Cir. Apr. 13, 2004) (granting a stay of the court's mandate through June 15, 2004) (*USTA II Stay Order*). The *USTA II* mandate issued on June 16, 2004.

comprehensive twelve-month plan consisting of two phases to stabilize the market. First, on an interim basis, we require incumbent local exchange carriers (LECs) to continue providing unbundled access to switching,[3] enterprise market loops, and dedicated transport[4] under the same rates, terms and conditions that applied under their interconnection agreements[5] as of June 15, 2004.[6] These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements. Second, we set forth transitional measures for the next six months thereafter. Under our plan, in the absence of a Commission holding that particular network elements are subject to the unbundling regime, those elements would still be made available to serve existing customers for a six-month period, at rates that will be moderately higher than those in effect as of June 15, 2004.

2. The one-year transitional regime described above is designed to provide a reasonable timeframe for the Commission to complete its work while interim protections remain in place. Eight years after the initial implementation of the local competition provisions of the Act, the Commission continues to search for unbundling rules that identify where carriers are genuinely impaired and where overbroad unbundling works to frustrate sustainable, facilities-based competition. As the Commission has repeatedly recognized, our primary goal in implementing section 251 is to advance the development of facilities-based competition.[7] We believe that unbundling rules based on a preference for facilities-

---

[3] Throughout this Notice and Order, references to unbundled switching encompass mass market local circuit switching and all elements that must be made available when such switching is made available.

[4] The D.C. Circuit did not make a formal pronouncement regarding the status of the Commission's findings regarding enterprise market loops. Some carriers have taken the position that those rules have been vacated. *See, e.g.*, Letter from Jerry Hendrix, Assistant Vice President Interconnection Services, BellSouth, to Stephen G. Huels, Region Vice President, AT&T (Apr. 30, 2004) *in* Letter from David Lawson, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 at attach. 7 (filed May 7, 2004) ("The D.C. Circuit Order explicitly vacated the Federal Communications Commission's (FCC) national impairment finding for DS1, DS3 and dark fiber elements. As a result, once vacatur becomes effective, ILECs will no longer have an obligation under Section 251 of the Act to offer these elements and, at that time, BellSouth will pursue the legal and regulatory options available to it."); Verizon Reply, CC Docket Nos. 01-338, 96-98, 98-147 at 5 (filed Apr. 5, 2004) ("Once the mandate in *USTA II* issues, ILECs will have no obligation to make high-capacity facilities available on an unbundled basis at all."). We do not take a position on that question here; but to ensure a smooth transition governed by clear requirements, we assume *arguendo* that the D.C. Circuit vacated the Commission's enterprise market loop unbundling rules.

[5] Throughout this Notice and Order, references to an incumbent LEC's obligations under its interconnection agreements apply also to obligations set forth in the incumbent LEC's applicable statements of generally available terms (SGATs) and relevant state tariffs.

[6] These obligations apply irrespective of whether an incumbent LEC has taken steps before or after this date to relieve itself of such obligations.

[7] *See Implementation Of The Local Competition Provisions Of The Telecommunications Act Of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3701, para. 7 (1999) (*UNE Remand Order*); *see also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of*
(continued….)

based competition will provide incentives for both incumbent LECs and competitors to innovate and invest. Accordingly, as we initiate this remand proceeding, we renew our commitment to promoting the development of facilities-based competition and seek to adopt unbundling rules that will achieve this end.

II. BACKGROUND

3. The Act requires that incumbent LECs provide unbundled network elements (UNEs) to other telecommunications carriers. In particular, section 251(c)(3) requires incumbent LECs to provide to requesting telecommunications carriers "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and section 252."[8] Section 251(d)(2)(B) authorizes the Commission to determine which elements are subject to unbundling, and directs the Commission to consider, "at a minimum," whether access to proprietary network elements is "necessary" and whether failure to provide a *non*-proprietary element on an unbundled basis would "impair" a requesting carrier's ability to provide service.[9] Section 252, in turn, requires that those network elements that must be offered pursuant to section 251(c)(3) be made available at cost-based rates.[10]

4. The Commission first addressed the unbundling obligations of incumbent LECs in the *Local Competition Order*, which, among other things, adopted rules designed to implement the requirements of section 251, establishing a list of seven UNEs which incumbent LECs were obliged to provide.[11] In 1997, the U.S. Court of Appeals for the Eighth Circuit affirmed some parts of the *Local Competition Order* and reversed others.[12] The Commission, MCI, AT&T, and various incumbent LECs appealed different portions of that decision. In January 1999, the Supreme Court (1) affirmed the Commission's general authority to adopt unbundling rules to implement the 1996 Act, (2) vacated the specific unbundling rules at issue, (3) instructed the Commission to revise the standards under which the

(Continued from previous page)

1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16984, para. 3 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020, 19021, paras. 12-13, 15, 17 (2003) (*Triennial Review Order Errata*), *vacated and remanded in part, affirmed in part*, *USTA II*, 359 F.3d 554 (discussing "the difficulties and limitations inherent in competition based on the shared use of infrastructure").

[8] 47 U.S.C. § 251(c)(3).

[9] 47 U.S.C. § 251(d)(2)(B).

[10] *See id.* § 252(d)(1).

[11] The seven network elements set forth in the *Local Competition Order* were: (1) local loops; (2) network interface devices; (3) local and tandem switching; (4) interoffice transmission facilities; (5) signaling networks and call-related databases; (6) operations support systems; and (7) operator services and directory assistance. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15616-775 (1996) (*Local Competition Order*) (subsequent history omitted).

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

unbundling obligation is determined, and (4) required the Commission to reevaluate which network elements were subject to unbundling under the revised standard.[13]

5. In November 1999, the Commission responded to the Supreme Court's remand by issuing the *UNE Remand Order*, in which it reevaluated the unbundling obligations of incumbent LECs and promulgated new unbundling rules, pursuant to the Court's direction.[14] The D.C. Circuit granted petitions for review, and in *United States Telecom Ass'n v. FCC*, it vacated and remanded the portions of the *UNE Remand Order* interpreting the statute's "impair" standard and establishing a list of mandatory UNEs. The court also vacated and remanded the Commission's line sharing requirements.[15]

6. In December 2001, prior to the D.C. Circuit's issuance of *USTA I*, the Commission released the *Triennial Review NPRM*, seeking comment regarding how, if at all, the unbundling regime should be modified to reflect market developments since issuance of the *UNE Remand Order*.[16] Following *USTA I*, the Commission asked commenters responding to the *Triennial Review NPRM* to address the issues raised in that decision.[17] In the *Triennial Review Order*, based on the record compiled in response to the *Triennial Review NPRM*, the Commission adopted new unbundling rules implementing section 251 of the 1996 Act.[18] The *Triennial Review Order* reinterpreted the statute's "impair" standard and reevaluated incumbent LECs' unbundling obligations with regard to particular elements. Various parties appealed the *Triennial Review Order*, and, on March 2, 2004, the D.C. Circuit decided *USTA II*, vacating and remanding several of the *Triennial Review Order*'s unbundling rules.[19] The *USTA II* court directed that the decision's mandate would issue no later than the later of May 2, 2004 or the denial of any rehearing or rehearing *en banc*.[20]

7. On March 31, 2004, the Commission unanimously called on industry participants to engage in "good faith negotiations to arrive at commercially acceptable arrangements for the availability

[13] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). In reaching this conclusion, the Court held that the Commission had not adequately considered the "necessary" and "impair" standards of section 251(d)(2) in establishing the list of seven network elements. *Id*. at 387-92.

[14] *UNE Remand Order*, 15 FCC Rcd 3696 (1999).

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

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

[17] *See Wireline Competition Bureau Extends Reply Comment Deadline For The Triennial Review Proceedings*, CC Docket No. 01-338, Public Notice, 17 FCC Rcd 10512 (WCB 2002).

[18] *Triennial Review Order*, 18 FCC Rcd at 17155-75, 17199-223, 17263-79, paras. 298-327, 359-93, 459-79.

[19] *USTA II*, 359 F.3d at 564-76. In addition, the court upheld the Commission with respect to a number of elements, including broadband loops, hybrid loops, enterprise switching, as well as the section 271 access obligation.

[20] *Id.* at 595.

of unbundled network elements."[21] To help facilitate this period of negotiations, the Commission requested, and subsequently received, an extension of the *USTA II* mandate from the D.C. Circuit through June 15, 2004.[22] To date there have been numerous commercial agreements reached between incumbent LECs and competing carriers.[23] The court later denied a Commission request to further stay the mandate, and, on June 14, 2004, Supreme Court Chief Justice Rehnquist denied competitive LECs' petitions for stay of the D.C. Circuit mandate.[24] The *USTA II* mandate thus issued on June 16, 2004.[25] In letters sent to the Commission in the days leading up to June 16, each of the four Bell Operating Companies (BOCs) indicated its willingness to take limited action to protect the market as the Commission fashions new rules, though these commitments differ both in their scope and in their duration.[26]

---

[21] *Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein on Triennial Review Next Steps* (rel. Mar. 31, 2004).

[22] *See generally USTA II Stay Order*.

[23] *See, e.g.*, MCI, *MCI and Qwest Reach Commercial Agreement for Wholesale Services*, Press Release (May 31, 2004), available at http://global.mci.com/news/news2.xml?newsid=10710&mode=long&lang=en&width=530&langlinks=off; SBC, *SBC, Sage Telecom Reach Wholesale Telecom Services Agreement*, Press Release (Apr. 3, 2004), available at http://www.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=21080; *BellSouth in Deals with Four Carriers; CLEC Group Cries Foul on Deadline*, TR DAILY (May 5, 2004) (describing BellSouth's commercial agreements with ABC Telecom, INET, KingTel, and WebShoppe); BellSouth, *BellSouth Signs Contracts for Long-Term Commercial Agreements with Three Wholesale Carriers*, Press Release (Apr. 29, 2004), available at http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=45448 (describing BellSouth's commercial agreements with Dialogica Communications Inc., International Telnet, and CI2); Verizon, *Verizon and Granite Telecommunications Sign Binding Letter of Intent for Commercial Agreement on Wholesale Services*, Press Release (June 15, 2004), available at http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=85517; Verizon, *Verizon Entering Into Commercial Agreement With A Wholesale Customer*, Press Release (June 18, 2004), available at http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=85593 (describing Verizon's commercial agreement with Sterling Telecommunications); *Verizon Reaches Tentative Pact with CLEC for Network Access*, TR DAILY, (Apr. 23, 2004) (describing Verizon's commercial agreement with DSCI); *Wireline*, COMMUNICATIONS DAILY (May 19, 2004) (describing Verizon's commercial agreement with InfoHighway).

[24] *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases) (June 4, 2004) (order denying stay of mandate).

[25] Several parties have sought Supreme Court review of the *USTA II* decision. *See* National Association of Regulatory Utility Commissioners and the Arizona Corporation Commission, Petition for a Writ of Certiorari, No. 04-12 (June 30, 2004); AT&T Corp., *et al.*, Petition for a Writ of Certiorari, No. 04-15 (June 30, 2004); People of the State of California, *et al.*, Petition for a Writ of Certiorari, No. 04-18 (June 30, 2004).

[26] SBC states that it will "continue providing to [its] wholesale customers the mass market UNE-P, loops and high-capacity transport between SBC's offices and will not unilaterally increase the applicable state-approved prices for these facilities at least through the end of this year." Letter from Edward E. Whitacre Jr., Chairman and CEO, SBC, to Michael K. Powell, Chairman, FCC (filed June 9, 2004) (*SBC Commitment Letter*). BellSouth states that it "will not unilaterally increase the prices it charges for the mass market UNE-Platform or high-capacity loop or transport UNEs before January 1, 2005 for those carriers with current interconnection agreements." Letter from F. Duane Ackerman, Chairman and CEO, BellSouth Corp., to Michael K. Powell, Chairman, FCC (filed June 10, 2004) (*BellSouth Commitment Letter*). Verizon asserts that until it "will continue to provide wholesale access to [its]
(continued….)

III. NOTICE OF PROPOSED RULEMAKING

8. The *USTA II* court, *inter alia*, vacated the Commission's delegation of authority to state commissions to engage in further granular impairment analyses;[27] vacated the Commission's distinction between "qualifying" and "non-qualifying" services;[28] vacated and remanded the nationwide impairment findings for mass market switching and dedicated transport;[29] and, in the context of reviewing the Commission's findings on dedicated transport, vacated and remanded the failure by the Commission to consider alternative network access arrangements, such as tariffed offerings, offered by incumbent LECs.[30] Importantly, the D.C. Circuit also remanded, but did not vacate, other portions of the *Triennial Review Order*, including the exclusion of entrance facilities from an impairment analysis.[31] Moreover, the D.C. Circuit called into question certain aspects of the Commission's unbundling framework, including the "open-endedness" of the Commission's "touchstone" of impairment – uneconomic entry – and the Commission's treatment of impairment in relation to universal service cross-subsidies.[32]

9. We seek comment on how to respond to the D.C. Circuit's *USTA II* decision in establishing sustainable new unbundling rules under sections 251(c) and 251(d)(2) of the Act.[33] As an initial matter, we seek comment on the changes to the Commission's unbundling framework that are necessary, given the guidance of the *USTA II* court. To that end, we seek comment on how various incumbent LEC service offerings and obligations, such as tariffed offerings and BOC section 271 access obligations, fit into the Commission's unbundling framework.[34] Moreover, we seek comment on how best to define relevant markets (*e.g.*, product markets, geographic markets, customer classes) to develop rules that account for market variability and to conduct the service-specific inquiries to which *USTA II*

(Continued from previous page)

narrowband network" and will "not unilaterally increase the wholesale price [it] charge[s] for UNE-P arrangements that are used to serve" customers with three lines or fewer before November 11, 2004. Letter from Ivan Seidenberg, Chairman and CEO, Verizon, to Michael K. Powell, Chairman, FCC (filed June 11, 2004). Finally, Qwest "pledge[s] not to raise UNE-P rates for the remainder of the year." Letter from Richard C. Notebaert, Qwest, to Michael K. Powell, Chairman, FCC (filed June 14, 2004). All letters cited in this Order have been filed in CC Docket No. 01-338.

[27] *USTA II*, 359 F.3d at 565-68, 573-74, 594.

[28] *USTA II*, 359 F.3d at 591-92, 594.

[29] *USTA II*, 359 F.3d at 568-71, 574-75, 594. As stated above, for purposes of this proceeding, we assume *arguendo* that the D.C. Circuit also vacated the Commission's findings regarding enterprise market loops. *See supra note* 4.

[30] *USTA II,* 359 F.3d at 577 ("We therefore hold that the Commission's impairment analysis must consider the availability of tariffed ILEC special access when determining whether would-be entrants are impaired."); *see also id.* at 575-77, 592, 594.

[31] *USTA II*, 359 F.3d at 585-86, 594.

[32] *USTA II*, 359 F.3d at 571-73.

[33] 47 U.S.C. §§ 251(c), (d)(2).

[34] *See, e.g.*, *USTA II*, 359 F.3d at 575-77, 588-90, 592, 594 (discussing the relevance of incumbent LEC service offerings to unbundling determinations, as well as BOC section 271 access obligations).

refers.[35] Also, we seek comment on how to respond to the D.C. Circuit's guidance on other threshold factors, including the relationship between universal service support and UNEs.

10. Below, we set forth a two-phase plan to govern the provision of unbundled switching, dedicated transport and enterprise market loops over the next twelve months.[36] In the absence of such a plan, existing UNE arrangements might be terminated prematurely without an orderly transition mechanism in place. Such an abrupt result would be inimical to competition and its benefits for consumers, and thus would be inconsistent with the public interest. Thus, we set forth below a plan that (1) ensures continued availability over the next six months of elements provided under interconnection agreements as of June 15, 2004 and (2) mitigates, during the next six-month period thereafter, the disruption that might otherwise ensue in the absence of a Commission finding that any or all of those elements are subject to unbundling.[37] Are there circumstances in which particular final rules would necessitate additional transition mechanisms apart from or beyond this second six-month phase? For example, we seek comment on what additional transition mechanisms, if any, would help to prevent service disruptions during cut-overs from UNE facilities to a carrier's own (or third-party) facilities, or for conversions to tariffed or other service arrangements, and would be consistent with the court's decision.

11. Moving beyond the threshold unbundling issues, we seek comment on how to apply the Commission's unbundling framework to make determinations on access to individual network elements. Thus, we seek comment, including evidence at a granular level, on which specific network elements the Commission should require incumbent LECs to make available as UNEs in which specific markets, consistent with *USTA II*, and how the Commission should make these determinations. Further, we invite parties to comment on any other issues the Commission should address in light of *USTA II*.[38] We also incorporate into this Notice the Commission's 2001 *Triennial Review NPRM*, rather than restating

---

[35] *See, e.g.*, *USTA II*, 359 F.3d at 575-577, 591-92 (requiring Commission to analyze impairment for all "telecommunications services" and suggesting that the impairment analysis must account for specific characteristics of the market in which a particular requesting carrier operates).

[36] *See generally infra* Section IV.

[37] *See infra* paras. 29-30.

[38] For example, because the Commission's hybrid loop unbundling rules changed the extent to which and the ways in which requesting carriers may access subloops pursuant to section 251(c)(3), we invite parties to refresh the record assembled in response to the *Second Further Notice* in the *Advanced Services* proceeding regarding collocation at remote incumbent LEC premises. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Reconsideration and Second Further Notice of Proposed Rulemaking and Fifth Further Notice, 15 FCC Rcd 17806, 17851-54, paras. 103-12 (2000) (*Second Further Notice*) (subsequent history omitted). Similarly, we seek comment on whether and how we should clarify our rules regarding access to customers served by integrated digital loop carrier equipment in a manner that promotes facilities-based deployment. *See, e.g.*, Letter from Tina M. Pidgeon, Vice President, Federal Regulatory Affairs, GCI, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed July 1, 2004). Furthermore, because we have received petitions regarding the details of the independent section 271 unbundling obligations, we seek comment on whether these obligations need to be clarified or modified in light of *USTA II*. *See* BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action, WC Docket No. 04-245 (filed July 1, 2004) (petitioning the Commission to assert exclusive jurisdiction over the enforcement of section 271 and preempt a state commission ruling asserting jurisdiction).

similar proposals and questions, to the extent that they remain relevant.[39] Commenters should address the questions posed in the *Triennial Review NPRM* to the extent the questions remain valid after *USTA I* and *USTA II*.

12. We intend to draw on our experiences with both the 1996 Act and the rules adopted in the *Triennial Review Order* to inform our unbundling analysis. Since the Commission released the *Triennial Review Order*, parties have identified many interrelated issues through petitions, requests for waivers, and *ex parte* communications. We describe these proceedings below and we hereby incorporate the pleadings, comments, and *ex parte* communications of these proceedings into this docket. We first incorporate the record generated by the petitions for reconsideration and clarification of the *Triennial Review Order*, including discussion of issues such as broadband unbundling requirements, section 271 access obligations, and access to signaling.[40] Next, we incorporate the record developed in response to a petition by BellSouth for temporary waiver of the Commission's rules regarding enhanced extended links (EELs).[41]

13. Additionally, we incorporate three petitions regarding incumbent LEC obligations to file commercial agreements, under section 252 of the Act, governing access to network elements for which there is no section 251(c)(3) unbundling obligation.[42] To that end, should we properly treat commercially negotiated agreements for access to network elements that are not required to be unbundled pursuant to section 251(c)(3) under section 252, section 211, or other provisions of law?

14. Finally, we incorporate into the record a petition filed by Qwest for rulemaking to adopt interim unbundling rules following the *USTA II* decision.[43] The issues raised in these various proceedings are suitable for consideration in this proceeding because the information we receive or have

---

[39] *Triennial Review NPRM*, 16 FCC Rcd 22781. For example, the Commission sought comment on the relationship between UNEs and tariffed offerings, as well as BOC section 271 access obligations. *See id.* at 22801-02, 22814-15, paras. 44, 72, 75. The Commission also sought comment on various market definitions including service and geographic markets. *See id.* at 22797-802, paras. 34-46. On May 30, 2002, the Commission extended the reply comment due date to allow parties to respond to the D.C. Circuit's analysis in *USTA I*. *See Wireline Competition Bureau Extends Reply Comment Deadline for the Triennial Review Proceedings*, CC Docket No. 01-338, Public Notice, 17 FCC Rcd 10512 (WCB 2002). We do not, however, incorporate the record from the *Triennial Review* proceeding.

[40] *See Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, Report No. 2635 (Oct. 9, 2003); 68 Fed. Reg. 60391 (2003).

[41] BellSouth Telecommunications, Inc., Petition for Waiver, CC Docket Nos. 01-338, 96-98, 98-147 (filed Feb. 11, 2004).

[42] SBC Communications, Inc., Emergency Petition for Declaratory Ruling, Preemption, and Standstill, WC Docket No. 04-172 (filed May 3, 2004); BellSouth, Emergency Petition for Declaratory Ruling (filed May 27, 2004); BellSouth, Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Section 252 with Respect to Non-251 Agreements (filed May 27, 2004).

[43] Petition of Qwest Communications International Inc. for Rulemaking (filed March 29, 2004) (proposing a set of interim rules, including pricing limitations, for unbundled switching, shared transport, dedicated transport, and enterprise loops for the time period between vacatur of some of the Commission's unbundling rules and adoption of final rules).

received associated with these proceedings will help inform our analysis of incumbent LEC unbundling obligations.

15. Given that our inquiry raises complex issues, and proceedings that state commissions initiated to implement the *Triennial Review Order* developed voluminous records containing information potentially relevant to our inquiry, we anticipate that parties might wish to submit much of that same factual evidence to support their positions here. To be sure, the state commissions' dedication in executing the difficult tasks set out for them in our *Triennial Review Order* was impressive, and we appreciate their efforts. To make the records from state proceedings more usable, we encourage state commissions and other parties to file summaries of the state proceedings, especially highlighting factual information that would be relevant under the guidance of *USTA II*. Similarly, we encourage state commissions and other parties to summarize state commission efforts to develop batch hot cut processes. To avoid duplicative filings, we encourage parties (particularly the state commissions and parties participating in the state proceedings) to coordinate with one another regarding the filing of that information. Otherwise, parties generally shall not incorporate merely by reference entire documents or significant portions of documents that were filed in other proceedings in this or other dockets, or in state proceedings or elsewhere. Rather, the parties must provide a complete recitation in their current filings of any arguments or data that they wish the Commission to consider.[44] Moreover, parties making factual submissions shall provide the underlying data, analysis and methodologies necessary to enable the Commission and commenters to evaluate the factual claims meaningfully, including a discussion of the basis upon which data were included or excluded.[45] Further, to minimize the burden and time associated with determining parties' positions, we require parties to make all substantive legal and policy arguments in their comments, reply comments, or *ex parte* filings, rather than only raising them in supporting materials.[46] We explicitly warn parties that these requirements are being put into place to ensure that the issues in this proceeding are fully and fairly presented within the severe constraints placed on the Commission by the necessity of formulating permanent rules quickly.

IV. ORDER

16. Although we initiate a new proceeding to craft final unbundling rules that address the requirements of *USTA II*, we find that the pressing need for market certainty until we issue final unbundling rules warrants the implementation of a plan that will preserve for six months certain obligations as they existed on June 15, 2004, and then, during a subsequent six-month period, permit competitive LECs to access from incumbent LECs certain network elements at increased rates. Specifically, we conclude that the appropriate interim approach here is to require incumbent LECs to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place until the earlier of the effective date of

[44] *Cf. Updated Filing Requirements for the Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 17 FCC Rcd 14670, 14674 (Com. Car. Bur. 2001) (discussing requirements for filings made in section 271 proceedings).

[45] *Cf. id*. at 14675 (discussing the requirements for performance data submitted in support of a section 271 application).

[46] *Cf. id*. at 14673.

final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements. Our plan further contemplates a second six-month period during which competitive carriers would retain access to network elements that the Commission has not subjected to unbundling, but only for existing customers and at transitional rates that are modestly higher than those available on June 15, 2004.

17. We emphasize at the outset that the twelve-month transition described herein is essential to the health of the telecommunications market and the protection of consumers. While carriers can address short-term instability through negotiated modification of interconnection agreements, it appears that the change of law provisions found in carriers' interconnection agreements vary widely. While some agreements provide for periods of renegotiation in which parties would work to amend them, others immediately invalidate the affected provisions while renegotiations are proceeding.[47] There is credible evidence before us that some incumbents have informed competitive LECs of their intention to initiate proceedings to curtail their UNE offerings,[48] and that at least one BOC has announced its intention to withdraw certain UNE offerings immediately.[49] While such actions are permitted under the court's holding in *USTA II*, they would likely have the effect of disrupting competitive provision of telecommunications services to millions of customers.[50] Moreover, whether competitors and incumbents would seek resolution of disputes arising from the operation of their change of law clauses here, in federal court, in state court, or at state public utility commissions, and what standards might be used to

[47] *See* Letter from John Windhausen, Jr., President, ALTS, to Michael Powell, Chairman, FCC at 1-2 (filed June 23, 2004) (*ALTS June 23 Letter*).

[48] *See ALTS June 23 Letter* at 2 (noting that BellSouth has informed state commissions of its intent to immediately invoke change of law provisions and to eliminate language concerning certain UNEs, and that Qwest has provided competitive LECs with "formal notice" that it had begun formal processes to discontinue its provision of mass market switching, DS1, DS3, and dark fiber loops; and DS1, DS3, and dark fiber dedicated transport as UNEs); *see also* Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 3-4 (filed May 7, 2004) (asserting that BellSouth is attempting to repudiate its obligation to provide dedicated transport without first complying with the requirements of change of law provisions of existing interconnection agreements).

[49] *See ALTS June 23 Letter* at 1-2 (claiming that "[o]n June 18, Verizon began informing state commissions that, pursuant to the change of law' provisions of its interconnection agreements, Verizon can begin discontinuing providing loops, switching and transport immediately"). We note that this action is inconsistent with written representations made by the BOCs before the D.C. Circuit and the Supreme Court when opposing a further stay of the *USTA II* mandate. In that context, the BOCs argued that the change of law provisions in existing contracts contained "orderly procedures . . . to transition away from the current regime of maximum unbundling." Joint Opposition of ILECs to Motions to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 at 15 (June 1, 2004). *See also* Opposition of ILECs to Applications for Stay, *NARUC v. USTA*, Sup. Ct. Nos. 03-A1008 & 03-A1010 at 30-32 (June 14, 2004).

[50] As of December 2003, competitive LECs served 19.4 million local customers using UNEs. IATD, *Local Telephone Competition: Status as of December 31, 2003*, Table 4 (rel. June 2004), available at <http://www.fcc.gov/wcb/iatd/stats.html>. Total revenues from local telecommunications service for 2002 were $127 billion. IATD, *Telecommunications Industry Revenue Report*, Table 1 (rel. Mar. 17, 2004).

resolve such disputes, is a matter of speculation. What is certain, however, is that such litigation would be wasteful in light of the Commission's plan to adopt new permanent rules as soon as possible. Therefore, consistent with our statutory mandate to protect the public interest, we adopt the following interim and transition requirements.

A. Interim Requirements

18. Our plan to issue revised unbundling rules on an expedited basis does not alone provide the requisite market stability in the near term. The absence of clear rules, as stated above, threatens to disrupt the business plans of competitive carriers and their service to millions of customers that rely on competitive service offerings. This is a risk to the public interest too great to bear unheeded.[51] The public interest is best served by clarity with regard to the rates, terms and conditions under which network elements must be made available to requesting carriers.

19. The BOC commitment letters mentioned above themselves acknowledge the importance of "ensur[ing] stability and continuity" during this period and confirm the importance of "an orderly transition for consumers."[52] Although the BOCs have voluntarily agreed to many of the legal obligations imposed by this Order, we find that their commitment letters alone will not provide the requisite stability as the Commission works on permanent rules consistent with *USTA II*. First, the letters commit to different types of arrangements. For example, while SBC and BellSouth make commitments regarding transport and enterprise market loops, Verizon and Qwest do not, and in fact have declared their intentions to raise prices for these inputs. Second, the letters commit to differing time periods. While SBC, BellSouth and Qwest note that their commitments remain effective through the close of this year, Verizon's commitment expires on November 11, 2004. Third, the commitments are expressed in terms subject to differing interpretations. For example, it is not clear whether the BOCs' commitments not to raise rates "unilaterally" require the negotiated consent of the competitor, or merely a state commission's invalidation of previous rates or terms in accordance with the relevant interconnection agreement's change of law provisions. Similarly, it is unclear whether the BOCs' commitments not to raise prices in the short term also preclude retroactive rate increases (*i.e.*, true-ups) upon the Commission's issuance of

---

[51] We note that many industry participants and the U.S. Department of Commerce (Department of Commerce) have recognized the need for interim action to ensure market stability pending the issuance of permanent rules. Specifically, the Department of Commerce has asked the Commission to "act promptly using all methods at [its] disposal to protect consumers and ensure appropriate competitive access to local networks, including the rapid adoption of interim rules that will accomplish these goals," and urged us to prevent "wholesale rate increases for those network elements subject to the vacatur of the DC Circuit Court" for "the maximum legally sustainable transition period." Letter from Michael D. Gallagher, Acting Assistant Secretary for Communications and Information, United States Department of Commerce, to Michael K. Powell, Chairman, FCC (filed June 16, 2004). At least some competitive LECs have predicted "massive chaos" if BOCs "cease providing service to facilities-based providers and their customers." ALTS, *ALTS Not Satisfied with RBOC Letters to FCC Claiming to Maintain Status Quo*, Press Release (June 14, 2004), *available at http://206.161.82.210/NewsPress/061404%20PR%20on%20RBOC%20Letters.pdf*.

[52] *SBC Commitment Letter* at 1; *BellSouth Commitment Letter* at 1.

final rules.[53] Finally, we note that the letters bind only the BOCs, and not those non-BOC incumbent LECs that must provide unbundled network elements pursuant to the Act.[54]

20. Thus, while we credit the BOCs' voluntary efforts, we must adopt a plan that will prevent a gap in the Act's federal unbundling regime in the period leading up to the effective date of the permanent rules that the Commission will promulgate later this year, and, will ease the transition to whatever new rules we adopt. As the D.C. Circuit has held, "[a]voidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule."[55] Our interim requirements will, during the first six months of our year-long plan, maintain existing unbundling obligations to minimize disruptive effects and marketplace uncertainty that otherwise would result from the abrupt elimination of particular unbundling requirements. As the D.C. Circuit has held, "[s]ubstantial deference must be accorded an agency when it acts to maintain the *status quo* so that the objectives of [related proceedings] will not be frustrated."[56] Here, the disruption that would accompany a chaotic transition period would undermine the very competition that was the objective of *USTA II*, and we thus exercise our authority to take interim action to protect the market during this transition period for a limited period lasting until no later than six months after Federal Register publication of this Order.

21. Specifically, we require that between the effective date of this Order and the effective date of the permanent unbundling rules that the Commission plans to issue before the close of 2004, incumbent LECs shall continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.[57] These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements,[58] (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with

---

[53] It is also unclear whether the commitment letters extend only to the prices at which elements will be offered or, alternatively, whether the other terms and conditions that are inherent to the UNE regime are contemplated under those letters. We note that our UNE rules do not just encompass pricing terms but also other important terms and conditions that are important to the stability of the telecommunications market in the short term.

[54] Section 251(f) exempts many, but not all, non-BOC incumbent LECs from the unbundling obligations set forth in section 251(c)(3). *See* 47 U.S.C. § 251(f).

[55] *CompTel v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) (citing *MCI v. FCC*, 750 F.2d at 141; *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002)).

[56] *MCI v. FCC*, 750 F.2d at 141.

[57] For purposes of evaluating carriers' obligations under this interim regime, we do not draw distinctions between obligations resulting from an interconnection agreement that was in effect on June 15, 2004 and obligations that were set forth in an expired agreement but that nevertheless still applied on June 15, 2004 (as a result, for example, of a contractual provision rendering the agreement's provisions enforceable after expiration in the absence of some other event, such as the execution of a new agreement).

[58] As noted above, *see supra* note 23, several parties have successfully negotiated agreements governing interconnection. We support such negotiations, and thus specifically craft these interim requirements to minimize the risk that they might nullify existing agreements or foreclose any future agreements.

respect to rates only) a state public utility commission order raising the rates for network elements.[59] These interim requirements will only remain in place for six months after Federal Register publication of this Order, by which time we intend to issue permanent rules.

22. In order to allow a speedy transition in the event we ultimately decline to unbundle switching, enterprise market loops, or dedicated transport, we expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements. To that end, we do not restrict such change-of-law proceedings from presuming an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements, but under any such presumption, the results of such proceedings must reflect the transitional structure set forth below.[60] In no instance, however, shall the rates, terms or conditions resulting from any such proceeding take effect before the earlier of (1) Federal Register publication of this Order or (2) the effective date of our forthcoming final unbundling rules. We also hold that competitive LECs may not opt into the contract provisions "frozen" in place by this interim approach. The fundamental thrust of the interim relief provided here is to maintain the *status quo* in certain respects without expanding unbundling beyond that which was in place on June 15, 2004. This aim would not be served by a requirement permitting new carriers to enter during the interim period.

23. Our approach here is, in several meaningful respects, different from a mere reinstatement of our vacated rules. Most significantly, the interim approach forecloses the implementation and propagation of the vacated rules. For various reasons, the vacated rules had generally not yet been translated into contractual agreements. Thus, by freezing in place carriers' obligations as they stood on June 15, 2004, we are in many ways preserving contract terms that *predate* the vacated rules. Moreover, if the vacated rules were still in place, competing carriers could expand their contractual rights by seeking arbitration of new contracts, or by opting into other carriers' new contracts. The interim approach adopted here, in contrast, does not enable competing carriers to do either. Further, as described above, while we require incumbents to continue providing the specified elements at the June 15, 2004 rates, terms and conditions, we do *not* prohibit incumbents from initiating change of law proceedings that presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport, so long as they reflect the transition regime set forth below, and provided that incumbents continue to comply with our interim approach until the earlier of (1) Federal Register publication of this Order or (2) the effective date of our forthcoming final unbundling rules. Thus, whatever alterations are approved or deemed approved by the relevant state commission may take effect quickly if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order.[61]

---

[59] During this interim period, and only during this six-month interim period, these rates, terms and conditions must also be made available for provision of service to a competitive LEC's new customers.

[60] *See infra* paras. 29-30.

[61] *See infra.* para. 29. We also note that the interim regime imposes unbundling obligations that are no greater than the requirements incumbent LECs currently operate under – and, in many cases, have voluntarily agreed to continue. Indeed, the BOCs themselves have argued to the D.C. Circuit and the Supreme Court that existing change of law provisions contain "orderly procedures . . . to transition away from the current regime of maximum unbundling." Joint Opposition of ILECs to Motions to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012, June 1, 2004, at 15; *see also* Opposition of ILECs to Applications for Stay, *NARUC v. USTA*, Sup. Ct. Nos. 03-A1008 & 03-A1010, June 14, 2004, at 30-32.

24. Incumbent LECs and competitive LECs recently have both agreed that the Commission has the authority to adopt some form of interim rules, pending the expeditious completion of a proceeding crafting new permanent rules.[62] As we describe below, parties have proposed a variety of alternative approaches. We have considered these and other alternatives, but determine that none of them better promotes stability and minimizes harmful disruption in the telecommunications markets during the transition to new permanent rules that are consistent with the *USTA II* decision. Both AT&T and ALTS, for example, suggest that the Commission consider enabling incumbent LECs to petition for waivers of any interim requirements requiring access to unbundled elements in certain circumstances. Recognizing that this subject matter is complicated and fact-intensive – particularly in a waiver process that seeks to address the range of concerns raised by the court in *USTA II* – we find that administrative resources will be best spent immediately addressing permanent rules, rather than perfecting a longer interim regime.

25. We also decline to make our interim rules subject to a "true-up," under which, for example, competing carriers would be required to pay back the difference between UNE and market-based rates if the Commission determines that a particular network element need not be unbundled under its permanent rules. This approach is tantamount to doing nothing at all, given the severity of the immediate financial impact it could have on competitive LECs. For accounting purposes, these carriers would likely have to begin to reserve – immediately and for every single element subject to dispute – the difference between the UNE prices temporarily in effect and the higher rates, such as special access pricing, to which those elements might ultimately (and, in the presence of a true-up, retroactively) be subjected. We also considered, but decline to adopt, an interim approach that precludes the addition of new customers; given the high rate of customer turn-over for services affected by these rules, we find that competitive LECs' ability to compete or even stay in business, using network elements that may be retained to some degree in permanent rules, would be severely compromised. Further, while we find it critical to provide carriers with the certainty of a near-term transitional pricing mechanism, we find it unnecessary to establish at this time a multi-year transitional mechanism, as requested by AT&T.

26. Moreover, we find that our interim approach, which preserves legal obligations as of June 15, 2004, is superior to the imposition of entirely new interim requirements. Temporary implementation of unfamiliar interim requirements would likely require changes to existing practices, possibly including costly and cumbersome alterations to incumbent LECs' operations and support systems, which might need to be reversed or further revised only months later when the final rules become effective. Moreover, any attempt to create and implement new unbundling rules that would be effective for only the brief interim period until the Commission adopts permanent rules would be administratively burdensome for both the Commission and industry participants. Finally, the temporary withdrawal of access to UNEs that the Commission ultimately might find to be subject to section 251(c)(3) would threaten irreparable – and perhaps debilitating – harm to competitive LECs, which rely on such elements to serve their customers, and which might well be unable to recapture customers lost during a UNE-free interim period. Thus, just like the absence of any rules at all, the implementation of a new interim approach could lead to further disruption and confusion that would disserve the goals of section 251.

---

[62] *See ALTS June 23 Letter* at 2-3; Letter from Richard S. Whitt, Senior Director, Federal Law and Policy, MCI, to Michael K. Powell, Chairman, FCC, *et al*. at 4 (filed June 25, 2004); Letter from Michael Kellogg, Counsel for United States Telecom Association, to John A. Rogovin, General Counsel, Federal Communications Commission at 2-3 (filed June 24, 2004).

27. Given the need for immediate interim action, the requirements set forth here shall take effect immediately upon Federal Register publication, and without prior public notice and comment. Commission rules permit us to render an order effective upon publication in the Federal Register where good cause warrants.[63] Similarly, section 553(b) of the Administrative Procedures Act (APA)[64] permits any agency to implement a rule without public notice and opportunity for comment "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[65] As a general matter, we firmly believe that public notice requirements are an essential component of our rulemaking process. Above, we seek comment regarding permanent rules on an expedited basis to ensure prompt implementation of the *USTA II* mandate. We find, however, that while receipt of public comment clearly is necessary to the formulation of final rules responsive to *USTA II*, there exists good cause to make this Order effective upon Federal Register publication and adopt the interim requirement described herein immediately.

28. We find such good cause for several reasons. First, concurrently with the action in this Order, the Commission is commencing a new proceeding, and is thus limiting the applicability of these interim requirements to only six months.[66] Second, immediate adoption of the interim approach, without prior notice and comment, serves the public interest. The interim requirements merely maintain unbundling obligations that have been governing the industry. Indeed, the obligation to unbundle switching, enterprise market loops, and transport has been in place for several years.[67] As described above, precipitate elimination of those requirements could destabilize the market and initiate negotiations that might, in some or all cases, be rendered null and void upon the Commission's issuance of final rules. Courts have upheld agencies' exercise of section 553(b) authority based on considerations such as the need to avoid "regulatory confusion" and industry disruption where parties have placed "considerable reliance" on the vacated rules.[68] These considerations are applicable here, and counsel prompt implementation of an interim requirement without prior notice and comment, effective upon publication of this Order in the Federal Register.

B. Twelve-Month Plan

29. Our commitment to providing certainty and steadiness in the market extends beyond the six-month interim period addressed above. We recognize that while certainty in the short term is critical, industry participants also require a clear understanding of how the regulatory landscape might change

[63] *See* 47 C.F.R. §§ 1.103(a), 1.427(b).

[64] 5 U.S.C. § 500 *et seq.*

[65] 5 U.S.C. § 553(b)(3)(B).

[66] *Mid-Tex Elec. Co-op., Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987).

[67] *See, e.g.*, *UNE Remand Order*, 15 FCC Rcd at 3704, para. 15. In many cases, BOCs have already voluntarily agreed to adhere to much of the legal obligation we preserve here.

[68] *Mid-Tex v. FERC*, 822 F.2d at 1131-32; *see also* Amendment of Parts 80 and 87 of The Commission's Rules to Permit Operation of Certain Domestic Ship and Aircraft Radio Stations Without Individual Licenses, WT Docket No. 96-82, Notice of Proposed Rulemaking, 11 FCC Rcd 6353, 6354, paras. 12-13 (1996) (finding good cause to suspend a regulatory requirement without public notice, in part to avoid confusion and regulatory uncertainty in the affected industries).

after our issuance of final rules. While we cannot and will not prejudge the important questions posed in the attached Notice, we believe the public interest would be served by a transition in the event that our final rules decline to require unbundled access to any element or elements that were available to requesting carriers as of June 15, 2004. Thus, our two-phase plan also contemplates a second six-month phase, to take effect in the absence of a Commission finding that specific elements that were made available to requesting carriers under the rules vacated by *USTA II* are reinstated. The entire twelve-month plan is as follows:

- ***Interim period:*** Until the earlier of (1) six months after Federal Register publication of this Order or (2) the effective date of the final unbundling rules adopted by the Commission in the proceeding opened by the appended *Notice*, the interim approach described above will govern. Incumbent LECs shall continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place during the interim period, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements.

- ***Transition period:*** For the six months following the interim period (that is, the six months following the expiration of the interim requirements on the earlier of six months after Federal Register publication of this Order or the effective date of the Commission's final unbundling rules), in the absence of a Commission ruling that switching, dedicated transport, and/or enterprise market loops must be made available pursuant to section 251(c)(3) in any particular case, we propose the following requirements, designed to protect incumbent LECs' interests while also guarding against the precipitous rate increases that might otherwise result. First, in the absence of a Commission ruling that switching is subject to unbundling, an incumbent LEC shall only be required to lease the switching element to a requesting carrier in combination with shared transport and loops (*i.e.*, as a component of the "UNE platform") at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of this Order, for this combination of elements plus one dollar. Second, in the absence of a Commission ruling that enterprise market loops and/or dedicated transport are subject to section 251(c)(3) unbundling in any particular case, an incumbent LEC shall only be required to lease the element at issue to a requesting carrier at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for that element on June 15, 2004, or (2) 115% of the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of this Order, for that element.[69] With respect to all elements at issue here, this transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates. As during the interim period, carriers shall remain free to negotiate alternative arrangements (including rates) superseding our rules (and state public utility

[69] As noted above, we do not in any case preclude state commissions from imposing price increases greater than those specified in this Order. Moreover, we do not in any case prohibit carriers from entering into agreements contemplating other pricing arrangements.

commission rates) during the transition period.[70] Subject to the comments requested in response to the above NPRM, we intend to incorporate this second phase of the plan into our final rules.

- ***Post-transition period***: After the transition period expires, incumbent LECs shall be required to offer on an unbundled basis only those UNEs set forth in our final unbundling rules, and subject to the terms and conditions set forth therein. The specific process by which those rules shall take effect will be governed by each incumbent LEC's interconnection agreements and the applicable state commission's processes.

30. We recognize that transition plans are always imperfect, as they by definition retain – temporarily – aspects of the regime being discarded. We believe, however, that the moderate price increases described above are both reasonable and necessary because they will mitigate the rate shock that could be suffered by competitive LECs in the first several months after the planned conclusion of our proceeding regarding final rules. At the same time, the time limitations applicable to these transitional limits on price increases will protect the interests of incumbent LECs in those situations where unbundling is not ultimately required.

V. PROCEDURAL MATTERS

A. Ex Parte Presentations

31. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[71] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[72] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

B. Comment Filing Procedures

32. Pursuant to sections 1.415 and 1.419 of the Commission's rules,[73] interested parties may file comments within 21 days after publication of this Notice in the Federal Register and may file reply comments within 36 days after publication of this Notice in the Federal Register. All filings should refer to CC Docket No. 01-338 and WC Docket No. 04-313. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[74] Parties wishing to file significant

---

[70] In no case, however, shall an incumbent carrier during this transition period charge a rate higher than the rate described here (*i.e.*, the June 15 rate plus one dollar for the UNE platform, or 115% of the June 15 rate for enterprise loops and/or dedicated transport) absent the negotiated consent of the competitor leasing the element or a state commission ruling expressly permitting the higher rate.

[71] 47 C.F.R. §§ 1.200 *et seq*.

[72] *See* 47 C.F.R. § 1.1206(b)(2).

[73] 47 C.F.R. §§ 1.415, 1.419.

[74] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998); Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

amounts of data are encouraged to file copies of that data on CD-ROM in a searchable, read-only format, formatted in Microsoft Word, Microsoft Excel, PDF, or such other format as may be approved by the Wireline Competition Bureau. We note that the Wireline Competition Bureau has today adopted a protective order under which commenters may file confidential materials in this proceeding if they so chose.[75]

33. Comments filed through ECFS can be sent in electronic form via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include a full name, postal service mailing address, and the applicable docket numbers, which in this instance are CC Docket No. 01-338 and WC Docket No. 04-313. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to ecfshelp@fcc.gov, and should include the following words in the regarding line of the message: "get form<your e-mail address>." A sample form and directions will be sent in reply.

34. Parties who choose to file by paper must file an original and four copies of each filing. Parties filing by paper must also send five (5) courtesy copies to the attention of Janice M. Myles, Wireline Competition Bureau, Competition Policy Division, 445 12th Street, S.W., Suite 5-C327, Washington, D.C. 20554, or via e-mail janice.myles@fcc.gov. Paper filings and courtesy copies must be delivered in the following manner. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

35. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location last from 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. This facility is the only location where hand-delivered or messenger-delivered paper filings or courtesy copies for the Commission's Secretary and Commission staff will be accepted.

36. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

37. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

38. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

39. One copy of each filing must be sent to Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160, or online at www.bcpiweb.com.

[75] This protective order matches that which the Bureau adopted for use in the *Triennial Review* proceeding. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147, Order, 17 FCC Rcd 5852 (WCB 2002).

40. Each comment and reply comment must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.48 and all other applicable sections of the Commission's rules.[76] We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission.

41. Filings and comments may be downloaded from the Commission's ECFS web site, and filings and comments are available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, D.C. 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160, or online at www.bcpiweb.com.

C. Commission Resources For Commenting Parties

42. In order to keep interested parties apprised of new developments in this proceeding and to facilitate meaningful comment from all interested parties, the Wireline Competition Bureau will maintain a website devoted to this proceeding, including links to relevant resources, available at: http://www.fcc.gov/wcb/cpd/triennial_review/. This website is not intended to serve – and should not be relied upon – as a complete list of relevant resources, but rather to promote meaningful analysis during the accelerated comment period contemplated in this Notice.

43. Additionally, for parties not familiar with the Commission's Internet resources, we highlight two databases that may aid interested parties in their participation in this proceeding. First, the Commission's Electronic Comment Filing System (ECFS) serves as the repository for official records in the Commission's docketed proceedings and rulemakings, such as this, from the year 1992 onward.[77] Any interested party can research, retrieve, view, and print any document in the system, including comments and other pleadings filed by parties to prior and ongoing proceedings.[78] Second, all Commission decisions and other publications issued since March 1996 can be found via the Commission's EDOCS database.[79]

---

[76] *See* 47 C.F.R. § 1.48.

[77] The Commission's ECFS system can be accessed at: http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi (main site); or at: http://svartifoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi (alternative site).

[78] Please refer to the Commission's ECFS webpage at: http://www.fcc.gov/cgb/ecfs/ for more details. For instructions on filing comments or other pleadings, please refer to the discussion above.

[79] The Commission's EDOCS database is available at: http://hraunfoss.fcc.gov/edocs_public/SilverStream/Pages/edocs.html. EDOCS has two search modules: quick[79] and advanced. The quick search allows users to search by a document's DA or FCC number, its release date, and/or its title or description. The advanced search allows users to search by a much larger number of criteria including citations, titles, descriptions, docket numbers, and dates. The EDOCS advanced query works with any data element or combination of data elements.

D. Accessible Formats

44. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (tty).

E. Initial Regulatory Flexibility Analysis

45. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this Notice of Proposed Rule Making as set forth above, and have a separate and distinct heading designating them as responses to the IRFA.

F. Paperwork Reduction Act Analysis

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

VI. ORDERING CLAUSES

47. Accordingly, IT IS ORDERED that pursuant to Sections 1, 3, 4, 201-205, 251, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r), and 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, the *Order and Notice of Proposed Rulemaking* in CC Docket No. 01-338 and WC Docket No. 04-313 IS ADOPTED, and the interim requirements set forth herein SHALL BECOME EFFECTIVE immediately upon publication in the Federal Register pursuant to 5 U.S.C. § 553(b)(3)(B).

48. IT IS FURTHER ORDERED that pursuant to Sections 1, 3, 4, 201-205, 251, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r), and 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, the emergency motion for stabilization order filed in CC Docket Nos. 01-338, 96-98, 98-147 by CompTel/ASCENT on June 24, 2004 IS GRANTED to the extent indicated herein and otherwise IS DENIED.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the RFA,[1] the Commission has prepared this IRFA of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this NPRM. Written public comments are sought on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM, provided above in Part V. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for SBA Advocacy.[2] In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rule

2. We initiate this proceeding to begin a comprehensive examination of the circumstances under which incumbent LECs must make UNEs available to requesting carriers pursuant to sections 251(c)(3) and 251(d)(2) of the Act. The Commission last reviewed its unbundling rules comprehensively in 2003 in the *Triennial Review Order*. Portions of the *Triennial Review Order* were vacated and/or remanded by the D.C. Circuit in its *USTA II* decision.[4] The NPRM seeks comment on how the Commission should respond to the D.C. Circuit's opinion, both in terms of creating a legally sustainable impairment standard and applying that standard to individual network elements.[5]

B. Legal Basis

3. The legal basis for any action that may be taken pursuant to the NPRM is contained in Sections 1, 3, 4, 201-205, 251, 256, 271, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r).

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Would Apply

4. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the

---

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the SBREFA, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *Id.*

[4] *USTA II*, 359 F.3d 554.

[5] *See* Order and Notice of Proposed Rulemaking, *supra* paras. 8-13.

number of small entities that may be affected by the rules adopted herein.[6] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[7] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[8] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[9]

5. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by our action. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.[10] The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,[11] Paging,[12] and Cellular and Other Wireless Telecommunications.[13] Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

6. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[14] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such

---

[6] 5 U.S.C. § 604(a)(3).

[7] 5 U.S.C. § 601(6).

[8] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[9] 15 U.S.C. § 632.

[10] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service* at Table 5.3, Page 5-5 (May 2004) (*Trends in Telephone Service*). This source uses data that are current as of October 22, 2003.

[11] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in Oct. 2002).

[12] 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in Oct. 2002).

[13] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

[14] 15 U.S.C. § 632.

dominance is not "national" in scope.[15] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

7. *Wired Telecommunications Carriers*. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[16] According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.[17] Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more.[18] Thus, under this size standard, the great majority of firms can be considered small.

8. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[19] According to Commission data,[20] 1,310 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,310 carriers, an estimated 1,025 have 1,500 or fewer employees and 285 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

9. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[21] According to Commission data,[22] 563 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 563

---

[15] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

[16] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

[17] 1997 Economic Census, Establishment and Firm Size, Table 5, NAICS code 513310 (issued Oct. 2000).

[18] Id. The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[19] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110 (changed from 513310 in October 2002).

[20] *Trends in Telephone Service* at Table 5.3.

[21] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

[22] *Trends in Telephone Service* at Table 5.3.

carriers, an estimated 472 have 1,500 or fewer employees and 91 have more than 1,500 employees. In addition, 14 carriers have reported that they are "Shared-Tenant Service Providers," and all 14 are estimated to have 1.500 or fewer employees. In addition, 37 carriers have reported that they are "Other Local Service Providers." Of the 37, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our proposed action.

10. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[23] According to Commission data,[24] 281 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 254 have 1,500 or fewer employees and 27 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

11. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[25] According to Commission data,[26] 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed action.

12. *Prepaid Calling Card Providers.* The SBA has developed a size standard for a small business within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.[27] According to Commission data, 32 companies reported that they were engaged in the provision of prepaid calling cards.[28] Of these 32 companies, an estimated 31 have 1,500 or fewer employees and one has more than 1,500 employees.[29] Consequently, the Commission estimates that the great majority of prepaid calling card providers are small entities that may be affected by the rules and policies adopted herein.

13. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to "Other Toll Carriers." This category includes toll carriers that

---

[23] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

[24] *Trends in Telephone Service* at Table 5.3.

[25] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

[26] *Trends in Telephone Service* at Table 5.3.

[27] 13 C.F.R. § 121.201, NAICS code 513330 (changed to 517310 in Oct. 2002).

[28] *Trends in Telephone Service* at Table 5.3.

[29] *Id.*

do not fall within the categories of interexchange carriers, OSPs, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[30] According to Commission's data, 65 companies reported that their primary telecommunications service activity was the provision of other toll services.[31] Of these 65 companies, an estimated 62 have 1,500 or fewer employees and three have more than 1,500 employees.[32] Consequently, the Commission estimates that most "Other Toll Carriers" are small entities that may be affected by the rules and policies adopted herein.

14. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"[33] and "Cellular and Other Wireless Telecommunications."[34] Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.[35] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.[36] Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.[37] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[38] Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

15. *Broadband PCS.* The broadband PCS spectrum is divided into six frequency blocks

---

[30] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

[31] *Trends in Telephone Service* at Table 5.3.

[32] *Id.*

[33] 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

[34] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[35] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

[36] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

[37] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

[38] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[39] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years."[40] These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[41] No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[42] On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 305, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

16. *Narrowband Personal Communications Services.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less.[43] Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.[44] To ensure meaningful participation

---

[39] *See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824 (1996); see also 47 C.F.R. § 24.720(b).

[40] *See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824 (1996).

[41] *See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332 (1994).

[42] Broadband PCS, D, E and F Block Auction Closes, (rel. Jan. 14, 1997); *see also Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436 (1997).

[43] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

[44] *See* "Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total $617,006,674," Public Notice, PNWL 94-004 (released Aug. 2, 1994); "Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total $490,901,787," Public Notice, PNWL 94-27 (released Nov. 9, 1994).

by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.[45] A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million.[46] A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million.[47] The SBA has approved these small business size standards.[48] A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.[49] Three of these claimed status as a small or very small entity and won 311 licenses.

17. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to "Cellular and Other Wireless Telecommunications" companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.[50] According to the Census Bureau data for 1997, only twelve firms out of a total of 1,238 such firms that operated for the entire year in 1997, had 1,000 or more employees.[51] If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

18. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for defining "small" and

---

[45] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000).

[46] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000).

[47] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000).

[48] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

[49] *See* "Narrowband PCS Auction Closes," Public Notice, 16 FCC Rcd 18663 (WTB 2001).

[50] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[51] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513322 (October 2000).

"very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[52] This small business standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[53] A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.[54] The SBA has approved these small size standards.[55] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[56] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.[57] Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[58] A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.[59]

19. *Specialized Mobile Radio*. The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years.[60] The Commission awards "very small entity" bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years.[61] The SBA has approved these small business size standards for the 900 MHz Service.[62] The Commission has held auctions for geographic

---

[52] *Amendment of Part 90 of the Commission's Rules to Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, Third Report and Order, 12 FCC Rcd 10943, 11068-70, paras. 291-295 (1997).

[53] *Id.* at 11068, para. 291.

[54] *Id.*

[55] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[56] *See generally* "220 MHz Service Auction Closes," Public Notice, 14 FCC Rcd 605 (WTB 1998).

[57] *See* "FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made," Public Notice, 14 FCC Rcd 1085 (WTB 1999).

[58] *See* "Phase II 220 MHz Service Spectrum Auction Closes," Public Notice, 14 FCC Rcd 11218 (WTB 1999).

[59] *See* "Multi-Radio Service Auction Closes," Public Notice, 17 FCC Rcd 1446 (WTB 2002).

[60] 47 C.F.R. § 90.814(b)(1).

[61] 47 C.F.R. § 90.814(b)(1).

[62] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999. We note that, although a request was also sent to the SBA requesting approval for the small business size standard for 800 MHz, approval is still pending.

area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.[63] A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[64]

20. *Common Carrier Paging*. The SBA has developed a small business size standard for wireless firms within the broad economic census categories of "Cellular and Other Wireless Telecommunications."[65] Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.[66] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.[67] Thus, under this category and associated small business size standard, the great majority of firms can be considered small.

21. In the *Paging Second Report and Order*, the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[68] A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[69] The SBA has approved this definition.[70] An auction of Metropolitan Economic Area (MEA) licenses

[63] *See* "Correction to Public Notice DA 96-586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,'" Public Notice, 18 FCC Rcd 18367 (WTB 1996).

[64] *See* "Multi-Radio Service Auction Closes*," Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

[65] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[66] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

[67] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

[68] *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, Second Report and Order, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (*Paging Second Report and Order*); *see also Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085-10088, paras. 98-107 (1999).

[69] *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

[70] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.[71] Fifty-seven companies claiming small business status won 440 licenses.[72] An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.[73] One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.[74] Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 379 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services.[75] Of these, we estimate that 373 are small, under the SBA-approved small business size standard.[76] We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

22. *700 MHz Guard Band Licenses.* In the *700 MHz Guard Band Order*, we adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[77] A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[78] Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[79] SBA approval of these definitions is not required.[80] An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on

---

[71] *See* "929 and 931 MHz Paging Auction Closes," Public Notice, 15 FCC Rcd 4858 (WTB 2000).

[72] *See* "929 and 931 MHz Paging Auction Closes," Public Notice, 15 FCC Rcd 4858 (WTB 2000).

[73] *See* "Lower and Upper Paging Band Auction Closes," Public Notice, 16 FCC Rcd 21821 (WTB 2002).

[74] *See* "Lower and Upper Paging Bands Auction Closes," Public Notice, 18 FCC Rcd 11154 (WTB 2003).

[75] *Trends in Telephone Service* at Table 5.3.

[76] 13 C.F.R. § 121.201, NAICS code 517211.

[77] *See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299 (2000).

[78] *See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299, 5343, para. 108 (2000).

[79] *See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299, 5343, para. 108 (2000).

[80] *See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299, 5343, para. 108 n.246 (for the 746-764 MHz and 776-794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

September 21, 2000.[81] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[82] *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[83] A significant subset of the Rural Radiotelephone Service is the BETRS.[84] The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[85] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

23. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.[86] We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[87] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

24. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[88] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public

---

[81] *See* "700 MHz Guard Bands Auction Closes: Winning Bidders Announced," Public Notice, 15 FCC Rcd 18026 (2000).

[82] *See* "700 MHz Guard Bands Auction Closes: Winning Bidders Announced," Public Notice, 16 FCC Rcd 4590 (WTB 2001).

[83] The service is defined in section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[84] BETRS is defined in sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

[85] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

[86] The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[87] 13 CFR § 121.201, NAICS codes 513322 (changed to 517212 in October 2002).

[88] 13 CFR § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars.[89] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

25. *Fixed Microwave Services.* Fixed microwave services include common carrier,[90] private operational-fixed,[91] and broadcast auxiliary radio services.[92] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[93] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

26. *Offshore Radiotelephone Service.* This service operates on several ultra high frequencies (UHF) television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.[94] There are presently approximately 55 licensees in this service.

---

[89] *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

[90] *See* 47 C.F.R. §§ 101 et seq. (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

[91] Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[92] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

[93] 13 CFR § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[94] This service is governed by Subpart I of Part 22 of the Commission's Rules. *See* 47 C.F.R. §§ 22.1001-22.1037.

We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services.[95] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[96]

27. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years.[97] The SBA has approved these definitions.[98] The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

28. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of $40 million or less in the three previous calendar years.[99] An additional size standard for "very small business" is: an entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[100] The SBA has approved these small business size standards.[101] The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and polices proposed herein.

29. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave

---

[95] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[96] *Id.*

[97] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS)*, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

[98] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

[99] *See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, Report and Order, 12 FCC Rcd 18600 (1997), 63 Fed.Reg. 6079 (Feb. 6, 1998).

[100] *Id.*

[101] *See* Letter to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998) (VoIP); Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Hector Barreto, Administrator, Small Business Administration, dated January 18, 2002 (WTB).

frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).[102] In connection with the 1996 MDS auction, the Commission defined "small business" as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[103] The SBA has approved of this standard.[104] The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).[105] Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[106]

30. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,[107] which includes all such companies generating $12.5 million or less in annual receipts.[108] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[109] Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million.[110] Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

31. Finally, while SBA approval for a Commission-defined small business size standard

---

[102] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995) (*MDS Auction R&O*).

[103] 47 C.F.R. § 21.961(b)(1).

[104] *See* Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Bureau, from Gary Jackson, Assistant Administrator for Size Standards, Small Business Administration, dated March 20, 2003 (noting approval of $40 million size standard for MDS auction).

[105] Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. *See MDS Auction R&O*, 10 FCC Rcd at 9608, para. 34.

[106] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of $12.5 million or less). *See* 13 C.F.R. § 121.201, NAICS code 517910.

[107] 13 C.F.R. § 121.201, NAICS code 517510.

[108] *Id.*

[109] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4 (issued October 2000).

[110] *Id.*

applicable to ITFS is pending, educational institutions are included in this analysis as small entities.[111] There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

32. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[112] The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[113] An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[114] The SBA has approved these small business size standards in the context of LMDS auctions.[115] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning that won 119 licenses.

33. *218-219 MHz Service.* The first auction of 218-219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs).[116] Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry

---

[111] In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

[112] *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

[113] *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order*, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

[114] *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

[115] *See* Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

[116] *See* "Interactive Video and Data Service (IVDS) Applications Accepted for Filing," Public Notice, 9 FCC Rcd 6227 (1994).

over losses), has no more than $2 million in annual profits each year for the previous two years.[117] In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years.[118] A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years.[119] The SBA has approved of these definitions.[120] At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this analysis that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

34. *Incumbent 24 GHz Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of "Cellular and Other Wireless Telecommunications" companies. This category provides that such a company is small if it employs no more than 1,500 persons.[121] According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[122] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[123] Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[124] and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

35. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have

---

117 *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fourth Report and Order, 9 FCC Rcd 2330 (1994).

118 *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

119 *Id.*

120 *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

121 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

122 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Employment Size of Firms Subject to Federal Income Tax: 1997," Table 5, NAICS code 513322 (issued October 2000).

123 *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

124 Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million.[125] "Very small business" in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[126] The SBA has approved these definitions.[127] The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

36. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers. This category comprises establishments "primarily engaged in providing direct access through telecommunications networks to computer-held information compiled or published by others."[128] Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less.[129] According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.[130] Of these, 2,659 firms had annual receipts of under $10 million, and an additional 67 firms had receipts of between $10 million and $24,999,999.[131] Thus, under this size standard, the great majority of firms can be considered small entities.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

37. In this NPRM, we seek comment on proposed rules that would establish unbundling requirements for incumbent LECs, pursuant to sections 251(c) and 251(d)(2) of the Act. The Commission last reviewed its unbundling rules comprehensively in 2003 in the *Triennial Review Order*.[132] Portions of the *Triennial Review Order* were vacated and/or remanded by the D.C. Circuit in its *USTA II* decision.[133] The NPRM seeks comment on how the Commission should respond to the D.C. Circuit's opinion, in terms of both how to create a legally sustainable impairment standard, as well as

[125] *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd 16934, 16967, para. 77 (2000) (24 GHz Report and Order); see also 47 C.F.R. § 101.538(a)(2).

[126] *24 GHz Report and Order*, 15 FCC Rcd at 16967, para. 77; *see also* 47 C.F.R. § 101.538(a)(1).

[127] *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Gary M. Jackson, Assistant Administrator, Small Business Administration, dated July 28, 2000.

[128] Office of Management and Budget, North American Industry Classification System, page 515 (1997). NAICS code 514191, "On-Line Information Services" (changed to current name and to code 518111 in October 2002).

[129] 13 C.F.R. § 121.201, NAICS code 518111.

[130] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 514191 (issued October 2000).

[131] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 4, Receipts Size of Firms Subject to Federal Income Tax: 1997, NAICS code 514191 (issued October 2000).

[132] *Triennial Review Order*, 18 FCC Rcd 16978.

[133] *USTA II*, 359 F.3d 554.

applying that standard to individual network elements.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

38. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[134]

39. In this Notice, we seek comment on how to develop legally sustainable rules for access to unbundled network elements. We seek comment, for instance, on how best to define markets, including product markets and customer classes. We also wish to solicit comment on the economic effect that various UNE approaches might have on small entity telecommunications providers.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

40. None.

[134] 5 U.S.C. § 603(c)(1) – (c)(4).

STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

Re: Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338.

Today's decision does two critical things: It starts a rulemaking to quickly replace rules within 6 months, swept away by a court incensed by the Commission's persistent refusal to apply the law faithfully. Second, it puts in place an interim freeze for 6 months, ensuring consumers and competitors are protected while we complete our work. Contrary to the inaccurate assertions being thrown around, there are no automatic price increase after 6 months for facilities providers. Today's Order only seeks comment on a transition that will not be necessary if the Commission gets its work done.

Over a year and a half ago, I dissented from the Majority's ill-considered decision to preserve at all costs a repudiated mode of competition—UNE-P. I took that position on policy grounds, but my greatest concern was the prolonged uncertainty it would unleash. I believed, given that this modality had twice before been struck down by the courts, it was a reckless decision that was sure to meet a similar fate, which, in turn, would plunge a fragile market into even further chaos. I wrote: "I fear as much or more for competitors as I do for incumbents, for the prolonged uncertainty . . . may prove stifling."[1] Despite the warning, we forged ahead and now we embark for the fourth time on an effort to write rules that promote local competition. Getting it right this time, without clever shortcuts, is vital.

I want to make one essential point at the outset, given the melodrama of my dissenting colleagues: There are not automatic price increases after 6 months for facilities providers. Such assertions are flat wrong. I elaborate on this more fully below.

I am not a fan of UNE-P as the vehicle for parking our aspirations for vigorous voice competition. It is a synthetic form of competition that would never have proved sustainable, or have provided long-lasting consumer benefits. I believe government policy should encourage intermodal and intramodal facilities-based competition. Bringing some of your own infrastructure to the table allows a competitor to offer a differentiated service to consumers. It allows a competitor to control more of its costs, and thus offer consumers potentially lower

[1] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17519 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020 (2003).

prices. A facilities competitor is less dependent on its major competitor for its service—an unenviable position for any competitor. And, a facilities competitor helps create vital redundant networks that can serve our nation if other facilities are damaged by those hostile to our way of life. Facilities competition is real competition and it is emerging everywhere.

There is no need to fear that consumers will be left with nothing to choose from as UNE-P begins to whither. Consumers are using wireless telephones more than they are using wired telephones today—many now use their mobile as their primary phone. Cable companies are offering competitive telephone service to residential consumers. VoIP is surging into the marketplace as broadband grows, offering an exciting and new competitive alternative that offers cut-rate prices and futuristic features. Indeed, the venerable AT&T is pushing its own VoIP consumer service and re-entering the consumer wireless market. Aggressive AT&T advertisements for VoIP, touting the re-invention of the telephone, are blanketing the airwaves during the Summer Olympic Games. And, recent reports show Ma Bell has teamed up with cable providers to offer this service in direct competition to the Bells.[2] I applaud these developments.

I also have consistently supported intramodal competitors that are facilities-based. Carries like Covad, NuVox, McLeod and XO have been important contributors to competition. In the *Triennial Review Order*, I supported fully requiring incumbents to unbundle DS1 loops and transport, as did every one of my colleagues. I remain steadfastly committed to providing the key network elements to these facilities competitors in this proceeding, without which they would be impaired. Indeed, I am quite confident that we will be able to provide these elements, once we have a full and complete record, consistent with the guidance of the court. We will move to do so as quickly as possible.

It is exceedingly important for the Commission to rewrite the new rules of competition as fast as it can. As I predicted in the *Triennial Review Order*, the course the Commission took a year and a half ago has led to more uncertainty that risks stifling investment. Clarity is needed to repair the damage. The court has vacated the competition rules and we need to work to fill the void. As an interim step, today we freeze any changes in the current competition rules for six months, to protect consumers from any sudden disruption in service. This will give us the time we need to repair the rules. I have committed to push the Commission to complete this proceeding in six months, before the freeze expires. As a sign of that commitment, I have already scheduled the decision for a vote at our December 2004 open meeting. I insist the parties and urge my colleagues to move heaven and earth to ensure we meet this objective. Consumers demand it and competitors and incumbents alike need it.

In addition to an interim freeze, we also seek comment on a transition proposal that will only take effect if the Commission does not act on final rules, or fails to justify an unbundled element. It is important to emphasize that no transition will be required, or go into effect if we

[2] *AT&T dials up VoIP service with cable deals*, USA Today, Aug. 19, 2004; *AT&T, Cable Providers Join Forces*, Wall Street Journal, Aug. 19, 2004.

meet our objective to finish the rules and re-justify necessary inputs. In other words, no price increases if we get the job done, which I am fully confident we will. For example, I have expressed a commitment and some confidence that DS1 loops and transport will remain unbundled elements for facilities-based providers. Should the Commission adopt final rules along these lines, facilities competitors will not be subject to price increases, or special access pricing. Indeed, I expect that will be the case.

Some parties wanted even more to be done to make elements available right this minute. I fully empathize with the desire to re-unbundle key elements immediately. A business loathes even a brief period of uncertainty. However, I believe there is no lawful way to order an incumbent to provide an element indefinitely that the court vacated with gusto. To do so now, without notice or comment from the public is a hazardous and unlawful course to take. To do so is to flaunt the court's decision and would lead, I am sure, to the court vacating our interim rule and perhaps making it even more difficult to sustain good competition rules. This is an unacceptable risk, for short-term gain. This is the game we played before that cost so dearly and I doubt seriously the court would be amused to play it again. It might be worth repeating the court's own words when it wiped these rules from the books: "This deadline is appropriate in light of the Commission's failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings. *So ordered*."[3] Will we ever learn?

Before concluding, I must reject utterly the inaccurate and revisionist statements of my dissenting colleagues. The unbundling rules have been tossed out because of their ill-considered UNE-P decision. We are working now to pick up the pieces. We are not free to simply plop the rules back into place as they seem to think. Second, they bemoan the harm to facilities competitors by our action today, while simultaneously refusing overtures by us to modify today's decision to provide greater confidence to this community going forward. They seem prepared to inflict harm on companies, in order to maintain the political purity to criticize today's well-considered step to reconstruct a regime blown down by the court's rejection of their approach.

Nonetheless, I believe a majority of the Commission is committed to providing a sound decision that will allow competition to flourish. I am confident that we can put in place the fundamentals of sustainable competition and get this right for American consumers.

[3] *United States Telecom Ass'n v. FCC* , 359 F.3d 554, 595 (D.C. Cir. 2004), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Re: *Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338.*

This Order and Notice of Proposed Rulemaking represent an important step along the road to sustainable, facilities-based competition. In the wake of the D.C. Circuit's decision invalidating many of the Commission's unbundling rules, we must expeditiously build a record and develop a revised framework. For too long the Commission has given short shrift to the direction provided by the courts in pursuit of a policy of maximum unbundling. Now, we have an opportunity to craft judicially sustainable rules that promote competition in a manner that more fully embraces free-market principles and is less dependent on regulatory micromanagement. While our rules must change, I remain committed to ensuring that bottleneck transmission facilities continue to be unbundled, consistent with our statutory mandate; the challenge ahead is to develop an appropriate framework that distinguishes true bottlenecks from facilities that can be self-supplied or obtained on a reasonable wholesale basis.

As we address the court's directives on remand, this Order will ensure the stability of the telecommunications marketplace and will minimize disruption to consumers. By freezing existing interconnection and access arrangements for six months, we provide full protection for competitors that purchase access to elements in markets where the Commission is likely to find impairment and reinstitute unbundling obligations that are consistent with the court decision. And to the extent that some competitors will have to diminish their reliance on unbundled network elements, the six-month freeze, along with the subsequent period during which wholesale rate increases will be constrained for existing customers, will provide for an orderly transition to alternative arrangements.

I recognize and appreciate competitors' anxiety that DS-1 transmission facilities — which can be critical inputs in bringing competition to the small business market — could be subject to significant price increases following the end of the six-month freeze. This risk is an inevitable byproduct of the D.C. Circuit's vacatur of significant portions of the Triennial Review Order. But it is fully within the Commission's power to prevent any price increases from occurring. Indeed, it bears emphasis that a clear majority of the Commission has advocated the continued unbundling of DS-1 facilities in most circumstances and has also called for issuing new unbundling rules well before the interim period ends. If we fulfill our responsibilities, as I am confident will be the case, then there will be no price increases for any DS-1 loops or transport facilities that are designated as UNEs; rather, TELRIC rates would continue to apply as they do today. I will do everything in my power, and I trust the same is true of my colleagues, to develop an appropriate analytical framework that yields procompetitive and judicially sustainable unbundling rules — hopefully by the end of the year, but in all events within the next six months.

As the Commission undertakes this task, the upcoming months provide a further opportunity for commercial negotiations. Competitors that make use of network elements that seem most vulnerable under the D.C. Circuit decision — most notably, circuit switching — may

continue to obtain access to the relevant capabilities at just and reasonable rates. I applaud the efforts of those carriers that have already reached commercial deals regarding the price and other terms of such access, and I encourage others to do so. Yet I am disappointed that the Commission did not clarify in this Order the legal status of commercial agreements that pertain to services or facilities for which no section 251 mandate exists. Because both incumbent LECs and competitors have cited lingering uncertainty on this issue as a stumbling block to further agreements, we should have removed that obstacle now. I only hope that the Commission does so in the near future.

Finally, I am committed to working with my colleagues to reach consensus on unbundling rules that provide meaningful competitive opportunities while heeding the admonishments of the courts. While we have differed on some issues in the past, the Commission was unanimous in its support for unbundling high-capacity transmission facilities in many circumstances. I see no reason why we cannot reach agreement on these issues once again. As we move toward the adoption of permanent rules, we must be willing to reach compromises to produce a sustainable order that will finally bring certainty and stability to the competitive landscape.

DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338.

I respectfully but strongly dissent to these interim rules. There is no need to mince words. The current Commission is on track to butcher the pro-competitive vision of the 1996 Act. And it is sticking consumers with higher telephone rates and fewer choices. The people who pay America's phone bills deserve better.

The majority characterizes this effort as a comprehensive plan to stabilize the market. The truth is just the opposite. In exchange for a standstill today, they commit to price increases tomorrow. After six months of stay, existing enterprise market loop and dedicated transport customers can expect rate increases of 15 percent. The news is even worse for new customers. For enterprise loops and transport, rates will race up to special access. This could mean price increases of more than 300 percent—a potentially lethal blow to any carrier that built its business plan on the core tenets of the 1996 Act. For carriers operating on slim margins in price sensitive markets, absorbing these increases may just not be possible.

Stability in the short term is good. But it is meaningless if it is accompanied by rate increases that make it impossible for facilities-based carriers to continue to operate. In a capital intensive industry, this kind of regulatory whiplash prevents companies from planning. It ruptures good business models. It scares investors. And it denies the market the clarity it needs and deserves from the FCC.

This situation is particularly harmful to carriers serving small business customers. Small businesses power this country's economy. They generate between two-thirds and three-quarters of all new jobs. They produce over half of our private sector output. The Small Business Administration tells us that in metropolitan areas, 29 percent of small business customers are served by competitive carriers, many of them using enterprise loops and transport facilities. Right now, thousands of small business consumers enjoy affordable access to innovative broadband services that were previously available only to the largest business customers. Clearly, America's small businesses are deriving huge benefits from these services, and their productivity has been increasing as a result. Why would we eliminate this opportunity? For whose benefit?

In effect, the majority justifies these price increases as pressure on the Commission to put final rules in place. But in putting pressure on the Commission, the majority points a loaded gun at industry's head. I agree wholeheartedly that we need final, judicially-sustainable rules in place as soon as possible. And I believe my colleagues will work hard to ensure this happens. But there is no reason to hold one segment of an industry hostage to a motivational framework for regulators.

The problems with the majority's framework run deep. The price increases they commit

to are based on shaky legal ground. There is no analysis relating them back to the Commission's statutory duties. There is no discussion of impairment. This may come as a surprise to both Congress and the courts, because impairment is the touchstone of our unbundling policy under Section 251. It triggers a very specific pricing obligation. All elements unbundled pursuant to Section 251 must be made available to competitors at cost plus a reasonable profit. The statute provides no authority for grafting onto the current rules arbitrary price increases of 15 to 300 percent. Today's decision casts aside these legal realities, saving them, perhaps, for another day. The bad news for competitors is that they must deal with the resulting wreckage now. After so many trips to the court and back, ignoring the statute like this only invites more problems.

It didn't have to be this way. Sadly, there is no justification for the majority's insistence on price increases during the interim period. The Commission was unanimous in upholding unbundled access to DS-1 transmission facilities in the original Triennial Review Order, and nowhere does the court state that our rules requiring the unbundling of high capacity loop facilities are vacated. To suggest that special access rates apply in six months and a day is not just devastating—it is, as a legal matter, wholly unnecessary.

Similarly, we must address the future of line-sharing and how it can contribute to renewed competition in the drastically-changed and more anti-competitive environment that we now confront. We especially need to clarify that the standstill in today's decision also applies to carriers using the high frequency portion of the loop.

I hope we can hammer out greater certainty on these issues very soon. Reconsideration is a good idea. But I cannot and will not be party to any policy that permits competition-killing price increases before we achieve permanent rules. I hope permanent rules will come quickly, but given all the volatilities we face in this summer of 2004, it is not unimaginable that it might take more than six months until we achieve them. By then this Commission's version of "Survivor" might be over, and those left standing could number less than a handful. That's not what the 1996 Act, competition, consumer well-being or good regulation is all about.

DISSENTING STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

Re: Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338.

For all involved, this Order continues the "one step forward, two steps back" saga of the local competition provisions of the Telecommunications Act of 1996. After eight years of divisive litigation and a summer of promises, the Commission adopts an approach that prolongs the regulatory uncertainty for incumbents, competitors, and consumers alike. Indeed, the only things that are certain here are that consumer prices will go up and that the telecommunications industry will fight the same old battles come the new year.

Through this Order, the Commission adopts an ambiguous approach that is perhaps designed to give a little to everyone but that ultimately grants stability to none. The Order leaves unclear which elements are available to competitors and at what prices they will be available. It is difficult to imagine how either competitors or incumbents will plan for the future, develop business plans, or seek investor support with this foggy vision into the long-term framework. If savvy industry players will be left wondering about the rules of the game, consumers surely will have little guidance about how to choose among the ever-dwindling list of providers.

In response to this ambiguity, this Order promises Commission action before the end of this year. Promises of swift action are laudable, but, rather than deferring the difficult decisions, we should be working right now to develop permanent rules that provide certainty for all involved. At the very minimum, it is unfair to incumbents, competitors, and consumers to "hide the ball" with the ambiguous approach adopted here.

If regulatory certainty is elusive in this Order, what is clear is that prices for consumers are likely to rise. Rather than respond to the D.C. Circuit's decision on a tailored and responsive basis, this Order calls for higher rates for consumers and competitors without any linkage to the requirements of the statute. For new customers in particular these rates could rise dramatically without any consideration of "impairment," the statutory touchstone when deciding which elements should be available at cost-based prices.

Though I cannot join this Order, I have appreciated recent dialogues with my colleagues. I was disappointed that we could not take limited action to provide meaningful protection for carriers serving small business customers, but remain open to reconsideration of these issues. A more daunting but equally pressing challenge now is to move forward as expeditiously as possible with the final rulemaking process. Our chief goal now should be to develop permanent rules for all UNEs as soon as possible, so that the American public and the telecom industry will understand what the choices and price tag will be. The Act and the American consumer deserve no less.