

ORAL ARGUMENT HELD JANUARY 28, 2004
CASE DECIDED MARCH 2, 2004

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

Nos. 00-1012 *et al.*

UNITED STATES TELECOM ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

**PETITION FOR A WRIT OF MANDAMUS
TO ENFORCE THE MANDATE OF THIS COURT**

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, petitioners Qwest Communications International Inc., United States Telecom Association, and the Verizon telephone companies respectfully submit the following corporate disclosure statements:

Qwest Communications International Inc. Qwest Communications International Inc., through its operating affiliates, provides a variety of broadband Internet-based data, voice, and image communications for businesses and consumers. Qwest is the parent holding company of various affiliates and is a publicly held corporation that has no parent company. No publicly held company owns 10% or more of the outstanding shares of Qwest.

United States Telecom Association. The United States Telecom Association (“USTA”) is the nation’s oldest and leading not-for-profit trade association for the local telephone industry. Founded more than a century ago, USTA’s carrier members provide a full array of voice, data, and video services over wireline and wireless networks. USTA also has international and associate members that include consultants, communications equipment providers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for which disclosure is required.

Verizon telephone companies. The Verizon telephone companies are wholly owned subsidiaries of Verizon Communications Inc., a publicly held company. Those subsidiaries are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.

Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

Insofar as relevant to this litigation, the general nature and purpose of Verizon Communications Inc. is, through its subsidiaries, to provide a variety of communications and related services to residential and business customers. Verizon Communications Inc. is a Delaware corporation with its principal place of business in New York. Verizon Communications Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

INTRODUCTION

The FCC's eight-year course of defiance in implementing the Telecommunications Act of 1996 ("1996 Act") has reached a new plateau. Having tried and failed to obtain a stay of this Court's mandate that would have kept its maximum unbundling rules in place after June 15, 2004, the FCC has simply granted itself the same stay. On August 20, 2004, the FCC released interim rules that perpetuate nationwide unbundling of narrowband facilities through at least the end of February 2005 — nearly a year after this Court's decision and more than eight months after issuance of the mandate — just as if this Court had granted, not denied, the FCC's stay request.¹ Under the FCC's interim rules, incumbent local exchange carriers ("ILECs") must provide unbundled network elements ("UNEs") to serve not only existing competitive local exchange carrier ("CLEC") customers, but also unlimited numbers of *new* CLEC customers nationwide.

The FCC has done all this, moreover, without even attempting to address any of the substantive deficiencies that this Court identified in the agency's earlier nationwide impairment findings, much less making new, valid impairment determinations that conform to this Court's decisions. On the contrary, in keeping with the unlawful provisional impairment findings in the *Triennial Review Order*,² the FCC has once again decided that, because an agency (now the FCC, previously the states) "ultimately might find" that impairment exists *somewhere*,

¹ Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (adopted July 21, 2004, released Aug. 20, 2004) ("*Order*") (attached hereto as Ex. A).

² Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *petitions for cert. pending, NARUC v. USTA*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004).

incumbents must continue to provide UNEs *everywhere*. *Order* ¶ 26. In short, the FCC has merely granted itself a six-month stay accompanied by a rulemaking notice to consider what, if any, changes to make to its maximum unbundling rules.

Mandamus is plainly warranted to address the FCC's latest, and most blatant, defiance of this Court's orders. As this Court has explained, a federal agency, after being denied a stay of the mandate by the Court, may not "implement[] the stay on [its] own" — even on an interim basis — by "reimplement[ing] precisely the same rule that this court vacated." *International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 923 (D.C. Cir. 1984) (per curiam). Where an agency disregards that fundamental rule by adopting interim rules that mirror the regulations the Court has vacated, the Court must act "forthwith to enforce the mandate and require the [agency] to comply with its terms." *Id.* That reasoning applies directly here, and it justifies prompt enforcement of the Court's mandate to invalidate these interim rules.

Indeed, the FCC's conduct is particularly egregious in the context of this case. The FCC's recalcitrance in adhering to prior decisions of this Court and the Supreme Court has resulted in its rules having now been vacated three separate times. As a direct result of the FCC's continuous disregard of the law — "the Commission's persistent refusal to apply the law faithfully," in Chairman Powell's own words³ — incumbent LECs have already been subject to unlawful maximum unbundling requirements for eight years. Yet the FCC cavalierly justifies its reimposition of these vacated rules on the ground that its "interim requirements *merely* maintain unbundling obligations that have been governing the industry." *Order* ¶ 28 (emphasis added). It is simply inexcusable for the FCC to flout a binding judicial determination yet again, and to extend those never-lawful requirements for nearly another year.

³ Statement of Chairman Michael K. Powell at 1 ("Powell Stmt.").

“Will we ever learn?” asks Chairman Powell.⁴ No — not even after three consecutive vacatur. Enough is enough. This Court should grant this petition and enforce its mandate to invalidate these interim rules. The Court should also retain jurisdiction to monitor and enforce the FCC’s compliance with its orders.

BACKGROUND

1. This Court’s Most Recent Vacatur of the FCC’s Unbundling Rules. On March 2, 2004, this Court vacated portions of the FCC’s third attempt to create lawful unbundling rules. The Court did so not only because the FCC had wrongly purported to delegate ultimate unbundling determinations to the states, but also because the FCC’s national impairment findings for switching and high-capacity facilities (transport, high-capacity loops, and dark fiber) were substantively deficient in multiple respects.

As to switching, for example, the Court stated that the FCC had failed to consider “several more narrowly-tailored alternatives” that would fully address the FCC’s lone purported basis for finding impairment on a provisional basis (the hot-cut process). *USTA v. FCC*, 359 F.3d 554, 570 (D.C. Cir. 2004) (“*USTA II*”), *petitions for cert. pending*, *NARUC v. USTA*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004). Moreover, “[a]fter reviewing the record,” the Court expressed its “doubt that the record supports a national impairment finding for mass market switches.” *Id.* at 569, 570. Indeed, the Court pointedly noted that the FCC could not possibly justify nationwide impairment findings as to switching because the record evidence “indicated the presence of many markets where CLECs suffered no impairment in the absence of unbundling.” *Id.* at 587.

⁴ Powell Stmt. at 3.

The Court likewise concluded that the Commission’s impairment findings as to high-capacity facilities could not be sustained. Again, the Court found that the Commission had unlawfully delegated authority to state commissions to make impairment determinations. But the Court held that the Commission had also acted unlawfully both by “ignor[ing] facilities deployment along similar routes when assessing impairment” and by refusing to “consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired.” *Id.* at 575, 577. And the Court again indicated that *nationwide* unbundling obligations could not be justified on this agency record: “[A]s with mass market switching, the Order itself suggests that the Commission doubts a national impairment finding is justified on this record.” *Id.* at 574. Indeed, the Commission had “frankly acknowledged that competitive alternatives are available in some locations” for these network elements. *Id.* (internal quotation marks omitted).⁵

⁵ Some competitors, and one Commissioner, have claimed that this Court did not vacate the Commission’s rules requiring nationwide unbundling of high-capacity loops; the Commission assumed, without deciding, that this Court did so. *See Order* ¶ 1 n.4; Statement of Commissioner Michael J. Copps at 2 (“nowhere does the court state that our rules requiring the unbundling of high capacity loop facilities are vacated”). But this Court clearly stated that it was vacating *all* of the Commission’s delegations of impairment determinations to the states. *See USTA II*, 359 F.3d at 568. And the FCC unquestionably made such a delegation in the context of both high-capacity loops and transport. *See Triennial Review Order* ¶¶ 327-328, 394. Moreover, this Court defined the term “transport,” as used in the opinion, to refer to “transmission facilities dedicated to a single customer,” which the Commission defines as “loops,” as well as to facilities dedicated to a “carrier,” which the Commission defines as “transport.” *USTA II*, 359 F.3d at 573; 47 C.F.R. § 51.319(a), (e). The Court’s treatment of high-capacity loops and transport was consistent with the manner in which the incumbents briefed the issue, by addressing both simultaneously. *See Brief for ILEC Petitioners and Supporting Intervenor* at 31-35, Nos. 00-1012 *et al.* (D.C. Cir. filed Jan. 16, 2004); *Reply Brief for ILEC Petitioners and Supporting Intervenor* at 15-17, Nos. 00-1012 *et al.* (D.C. Cir. filed Jan. 16, 2004). And the two substantive flaws the D.C. Circuit identified with respect to the Commission’s analysis of high-capacity facilities — considering impairment on a route-specific basis and the failure to consider the availability of special access, *see USTA II*, 359 F.3d at 575, 577 — apply equally to the Commission’s determinations as to both loops and transport, *see Triennial Review Order* ¶¶ 102, 332, 341, 401, 407.

Finally, the Court concluded that, because of the FCC's almost decade-long record of recalcitrance, its nationwide unbundling rules should remain in place for only 60 more days, unless a party petitioned for rehearing (which no party did). As the Court explained, "[t]his 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." *Id.* at 595. With the ILECs' consent, the FCC subsequently requested, and this Court granted, an additional 45-day stay of the mandate, through June 15, 2004, to enable ILECs and CLECs to attempt to negotiate commercial agreements concerning the terms of network access.

2. The FCC's Requests that This Court Extend the Life of the Prior Unbundling Regime. On May 24, 2004, the FCC, joined by the CLECs and the state commissions, asked this Court to extend the stay of its mandate, and thus preserve the FCC's blanket narrowband unbundling rules, pending the filing and disposition of petitions for a writ of certiorari. After full briefing, this Court denied those motions on June 4, 2004.

Shortly thereafter, the Solicitor General announced that the United States would neither seek a stay from the Supreme Court nor file a petition for a writ of certiorari in this case.⁶ The FCC then likewise decided not to pursue relief from the Supreme Court.⁷ The CLECs and NARUC, however, did apply for a stay of the mandate from Chief Justice Rehnquist. He denied those applications on June 14, 2004.

Accordingly, on June 16, 2004, this Court's mandate issued, vacating the FCC's unbundling rules for mass-market switching and high-capacity facilities.

⁶ Press Release, FCC, *Office of Solicitor General Will Not Appeal DC Circuit Decision* (June 9, 2004); *Solicitor General Authorizes FCC To Represent Itself in Appeal*, Reuters (June 9, 2004).

⁷ Press Release, FCC, *Statement of FCC Commissioner Kevin J. Martin* (June 9, 2004).

3. The FCC’s Adoption of Interim Rules that Reimpose the Prior Unlawful Unbundling Regime Through At Least February 2005. During the period between this Court’s decision on March 2 and the issuance of the Court’s mandate — a span of 106 days — the FCC took *no* action to obtain public comment on new interim *or* permanent rules that would address the deficiencies that this Court had identified. The FCC declined to solicit public comment during that extended period even though, on March 29, Qwest filed a formal petition specifically requesting that the Commission adopt interim rules responsive to this Court’s mandate⁸ and even though the FCC’s own rules require it to issue a public notice of such petitions “promptly.” 47 C.F.R. § 1.403.

Instead, without ever seeking public comment, on July 21, 2004 — more than four months after this Court’s decision — the FCC adopted interim rules identical to those that this Court vacated — and then waited nearly a full month to release those rules. The Commission did not purport to make new impairment findings at all, let alone findings that comport with this Court’s guidance, or to address any of the deficiencies identified by this Court’s opinion. Indeed, the words “impair” and “impairment” are nowhere to be found in the portion of the *Order* establishing interim rules. *See Order* ¶¶ 1, 16-30. Instead, the FCC simply reimposed, and extended through at least the end of February 2005 — the so-called “Interim Period” — the exact same nationwide unbundling requirements that this Court invalidated in *USTA II*.⁹ The Commission made no effort, moreover, to limit the applicability of these reimposed rules to

⁸ *See* Petition of Qwest Communications International Inc. (FCC filed Mar. 29, 2004).

⁹ Although the FCC stated that this Interim Period will end either six months after publication of the *Order* in the Federal Register or on the effective date of final rules, whichever is earlier, *see Order* ¶ 29, there is little reason to believe that, absent a mandate from this Court, the FCC will complete the task it has set for itself (*see id.* ¶¶ 8-15) in less than six months. Indeed, it took the FCC six months just to release the *Triennial Review Order* after voting to approve that order. In any event, the FCC expressly reserved to itself the authority to extend (or expand) this Interim Period at any time during the next six months. *See id.* ¶ 16.

existing CLEC customers. On the contrary, it required ILECs to provide mass-market switching and high-capacity facilities for both existing *and new* CLEC customers for the entire period, *see id.* ¶¶ 21 n.59, 25, thereby significantly compounding the damage already inflicted on the public by its unlawful rules.

Only at the end of this Interim Period does the FCC “propose” to relieve ILECs of the obligation to provide UNEs for new CLEC customers, assuming that the FCC has not purported yet again to find impairment as to these facilities. *See id.* ¶ 29. Even in those areas where there is no impairment, however, the FCC “proposes” to require ILECs to continue providing unbundled mass-market switching and high-capacity facilities for then-existing CLEC customers for yet *another* six months — that is, through August 2005, or nearly two years after the establishment of those unlawful rules in the *Triennial Review Order* (not to mention *nine years* after those unlawful rules were first established). *See id.* And even though TELRIC rates, under the FCC’s own interpretation of the 1996 Act as affirmed by this Court,¹⁰ do not (and did not) apply to those facilities, the FCC denies ILECs the right to a “true up” for UNEs obtained during the Interim Period and “proposes” to permit only modest price increases over those TELRIC rates during this so-called “Transition Period”: \$1 more per month for switching and 15% more for high-capacity facilities. *See id.* ¶¶ 25, 29. Nor are incumbents guaranteed the right to cease provision of these UNEs immediately after the Transition Period ends. Instead, the incumbents must rely on “applicable state commission[] processes” and thus are at the mercy of state commissions — “a more favorable venue for preserving . . . aggressive unbundling rights”¹¹ — to interpret the terms of “each incumbent LEC’s interconnection agreements.” *Id.* ¶ 29. And all

¹⁰ *See Triennial Review Order* ¶ 656; *USTA II*, 359 F.3d at 588-90.

¹¹ *Triennial Review Order*, Separate Statement of Chairman Michael K. Powell Approving in Part and Dissenting in Part at 3, 18 FCC Rcd at 17506.

of this is subject to change: the FCC merely “*intend[s]* to incorporate” these steps “into [its] final rules.” *Id.* (emphasis added).

ARGUMENT

“The power of an original panel to grant relief enforcing the terms of its earlier mandate is clearly established in this Circuit.” *International Ladies’ Garment Workers’ Union*, 733 F.2d at 922. The Court may grant such relief to prevent an agency from “do[ing] anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case.” *City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977) (internal quotation marks and brackets omitted).

This case clearly warrants the exercise of this authority. The FCC has disobeyed this Court’s instructions in the most blatant manner possible — reinstating the same rules that this Court vacated and, in effect, granting itself the same stay that this Court (and the Supreme Court) denied. It is intolerable to require petitioners to follow the ordinary review procedures for yet a fourth time to enforce this Court’s judgment and to vindicate their clearly established rights.

I. THE FCC HAS DEFIED THIS COURT’S MANDATE BY REIMPOSING THE SAME RULES THAT THE COURT VACATED

This Court has already determined that mandamus is warranted where an agency re-adopts on an interim basis the very same rules that the Court vacated. In *International Ladies’ Garment Workers’ Union v. Donovan*, the Court had both vacated the Department of Labor’s rescission of a certain rule and, as here, denied the agency’s motion for a stay of the mandate. *See* 733 F.2d at 921. Nevertheless, when the Department of Labor issued its NPRM seeking comment on a new rule, it simultaneously purported to adopt an “emergency” rule reinstating the rescission of the relevant rule for 120 days. *See id.* The Department of Labor did so, moreover,

without advancing any new justifications for its conclusion that were not foreclosed by the Court's prior decision. *See id.* at 923.

This Court left no doubt that such “an attempt to circumvent a lawful order of this court” warrants mandamus. *Id.* In response to a motion to enforce the mandate, the Court explained that the agency had, “in effect, implemented the stay on [its] own” by “reimplement[ing] precisely the same rule that this court vacated as ‘arbitrary and capricious.’” *Id.* Although the Court decided that, given the procedural posture of the case, the district court should resolve the mandamus issue in the first instance, it made plain that, on the current record, it was “clearly correct” that the agency had violated this Court's mandate and thus that, unless new information became available, the district court “must act forthwith to enforce the mandate and require the Secretary to comply with its terms.” *Id.*

Similarly, in *Radio-Television News Directors Association v. FCC*, 229 F.3d 269 (D.C. Cir. 2000), the Court again granted mandamus, this time against the FCC, because the agency reinstated the same rules that the Court had vacated. There, as here, the Commission had failed over a prolonged period to demonstrate that the relevant rules were lawful, and, again as in this case, the Court had required the agency to act expeditiously on remand. *Id.* at 270. Instead of doing so, however, the Commission adopted an interim measure that would put back in place the same rules that the petitioners had long attacked and did so without “cur[ing] the deficiencies” that the Court had identified. *Id.* at 272; *see id.* at 271 (“notwithstanding the Commission's continuing failure to provide adequate justification, . . . petitioners would again be subject to the [same] rules”). Given the Commission's history of recalcitrance and its inability over many years to justify the same rules, the Court's “decision is preordained and the mandamus will issue.” *Id.* at 272.

The FCC's actions here are at least as egregious as they were in these other cases. There can be no dispute that, as in *International Ladies' Garment Workers' Union*, the FCC has reimposed on an interim basis the exact same requirements that this Court vacated, and has done so for even longer than the 120-day period at issue in that case. As in that case, the agency has effectively "implemented . . . on [its] own" the very stay of mandate that this Court denied, relying, moreover, on the same theory — the supposed need to "avoid disruption" and to preserve "market certainty" (*Order* ¶¶ 1, 16) — that it advanced in its motion to stay the mandate. *See* Motion of the FCC to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari at 10, Nos. 00-1012 *et al.* (D.C. Cir. filed May 24, 2004) (arguing that a stay was warranted "to preserve stability in telecommunications markets" and to avoid "regulatory uncertainty and market disruption"). And, as in *Radio-Television News Directors Association*, the FCC has failed over a prolonged period to justify these requirements — indeed, the FCC has imposed blanket nationwide unbundling on three separate occasions, and each time its rules have been vacated by the Supreme Court or this Court. By putting the ILECs in the same position they would have been in had the Court granted the FCC's stay request through at least the end of February 2005, the agency has, to say the least, "deliberately frustrate[d] . . . the intended effect of [the Court's] decree," which justifies mandamus under settled law. *MCI Telecomms. Corp. v. FCC*, 580 F.2d 590, 595, 597 (D.C. Cir. 1978).

The FCC suggests that it is not "mere[ly] reinstat[ing]" its vacated rules because, "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." *Order* ¶ 23 (emphasis in original). But to the extent that agreements on that date embodied the prior unbundling rules that were vacated

by this Court in *USTA I*¹² (or even the rules vacated by the Supreme Court in *Iowa Utilities Board*¹³), they are no different from the rules vacated in *USTA II*. The FCC has thrice imposed — and thrice had vacated — the very same rules requiring nationwide unbundling of mass-market switching and high-capacity facilities at issue in this *Order*.¹⁴

Even beyond the fact that the FCC has readopted the same rules that this Court vacated, the FCC has not come close to conforming its interim rules to this Court’s established requirements. As the Court has explained, proper interim rules must be “reasonably calculated” to address *all* of the failings of the initial rule that the Court “considered substantial enough to call the entire [agency] policy into question,” *Mid-Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1130 (D.C. Cir. 1987), and “must avoid the problems [the Court] identified in [its] opinion,” *Brae Corp. v. United States*, 740 F.2d 1023, 1070-71 (D.C. Cir. 1984) (per curiam). Thus, in *Mid-Tex*, the Court upheld interim rules issued in response to an order of this Court vacating earlier rules only after finding that FERC, in its interim rules, had “put into place safeguards adequate” to address each of the flaws in the initial rule that “FERC did not — and has not — convinced [the Court] can safely be ignored.” 822 F.2d at 1131.

¹² *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA I*”), *cert. denied*, 538 U.S. 940 (2003).

¹³ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

¹⁴ The FCC suggests two other ways in which its *Order* purportedly “differ[s] from a mere reinstatement of [the] vacated rules.” *Order* ¶ 23. First, any CLEC that has no current right to obtain mass-market switching or high-capacity facilities as UNEs cannot rely on the *Order* to obtain that right. *See id.* Second, state commission rulings in any change-of-law proceedings conducted during the Interim Period might permit ILECs to implement any future no-impairment findings quickly following the Interim Period. *See id.* But the FCC does not seriously claim that these are meaningful differences. Virtually every CLEC that today wants to obtain mass-market switching and high-capacity facilities as UNEs could obtain those elements under their interconnection agreements (based on twice- or thrice-vacated rules) prior to the mandate. And, based on past actions, the possibility that state commissions will ensure prompt implementation of no-impairment findings is, at most, cold comfort to ILECs.

The FCC's interim rules do none of those things. The FCC has once again imposed nationwide unbundling for narrowband facilities without confronting *any* of the issues the Court has identified. The FCC has not explained why more tailored mechanisms would not address any alleged impairment caused by the hot-cut process; it has not considered whether deployment on analogous routes demonstrates that CLECs can compete without transport and high-capacity loops; and it has not considered whether the availability (and extensive use) of tariffed special access services demonstrates that CLECs are not impaired without UNEs. Most egregiously of all, the FCC has perpetuated its nationwide unbundling requirements without even acknowledging, much less wrestling with, the overwhelming evidence demonstrating the existence of numerous competitive alternatives in markets throughout the country. *See USTA II*, 359 F.3d at 587 (with respect to “mass market switching[,]. . . the evidence indicated the presence of many markets where CLECs suffered no impairment in the absence of unbundling”); *id.* at 574 (the Commission had “frankly acknowledged that competitive alternatives are available in some locations” for transport) (internal quotation marks omitted).

The FCC cites no case that authorizes an agency to promulgate interim rules that address *none* of “the problems [the Court] identified in” vacating the prior rules. *Brae Corp.*, 740 F.2d at 1070-71. Instead, the FCC relies on cases in which this Court upheld interim rules that were *not* issued in response to a vacatur of prior rules. *See Order* ¶ 20 & nn.55-56. In those cases, moreover, the interim rules were part of a genuine transition to a comprehensive new regime. *See, e.g., ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002); *see Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002). Here, in contrast, the FCC has simply granted itself a six-month stay accompanied by a *Notice of Proposed Rulemaking*. There

is no “transitional aspect” to these interim rules whatsoever. And the proposed “transition” plan for the second six months appears to be just that — a proposal — with no legal force whatsoever.

The FCC’s only proffered justification for ignoring the Court’s decision is to claim that “preserv[ing] legal obligations as of June 15, 2004, is superior to the imposition of entirely new interim requirements.” *Order* ¶ 26. Yet this supposed superiority is tied entirely to the possibility that the FCC might “temporar[ily] withdraw[] . . . access to UNEs that the Commission ultimately might find to be subject to [47 U.S.C. §] 251(c)(3).” *Id.* In other words, because the Commission’s final rules might require unbundling *somewhere*, the interim rules must require unbundling *everywhere*. But given the FCC’s and this Court’s own assessment of the record evidence of competition at the time of the *Triennial Review Order* — not to mention evidence of even more extensive competition today¹⁵ — there can be no serious doubt that

¹⁵ For example, Verizon has recently provided the Commission with detailed evidence, establishing on an MSA-by-MSA basis, that competitors are capable of — and are — competing for high-capacity services using either their own facilities or a combination of competitive facilities and special access purchased from Verizon. *See* Ex Parte Letter from Susanne A. Guyer, Verizon, to Chairman Michael K. Powell, *et al.*, FCC, at 1, CC Docket Nos. 01-338 *et al.* (June 24, 2004). Verizon has also shown that when carriers provide high-capacity services using Verizon’s network they do so *more than 90% of the time* by purchasing special access, not UNEs, and that 80% of Verizon’s sales of high-capacity facilities are to other carriers, while only 20% are directly to business customers. *See* Ex Parte Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, Attach. at 2, CC Docket Nos. 01-338 *et al.* (July 29, 2004). Other carriers have made similar showings. *See* Ex Parte Letter from Cronan O’Connell, Qwest, to Marlene H. Dortch, FCC, Attach., CC Docket Nos. 01-338 *et al.* (Aug. 20, 2004); Ex Parte Letter from Christopher M. Heimann, SBC, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338 *et al.* (Aug. 18, 2004).

Verizon has submitted similar evidence, also on an MSA-by-MSA basis, demonstrating that competitors are not impaired without unbundled switching. *See, e.g.*, Ex Parte Letter from Michael E. Glover, Verizon, to Marlene H. Dortch, FCC, Mass Market Switching Attach. at 15-16, CC Docket Nos. 01-338 *et al.* (July 2, 2004). Moreover, cable companies now offer local telephone service, whether circuit switched or VoIP, to tens of millions of homes. *Id.* at 5-11. Roughly 85-90% of U.S. homes now have access to cable modem service, and therefore access to VoIP, whether provided by their cable operator, by national providers such as Vonage, by major long-distance carriers such as AT&T, or by others. *Id.*

lawful final rules, at a minimum, could not require unbundling *nationwide*. Tellingly, the FCC never claims that it could not identify at least some of the areas where there is no plausible claim of impairment; indeed, there is no evidence that it even tried to do so despite “evidence indicat[ing] the presence of *many markets*” where there is no impairment. *USTA II*, 359 F.3d at 587 (emphasis added); *accord id.* at 574.

Moreover, despite the lack of any new impairment finding — or any attempt to address the deficiencies the Court has identified — the FCC’s interim rules require that ILECs continue to provide UNEs not only to existing CLEC customers, but also to *new* CLEC customers through at least the end of February 2005. That is indefensible. As this Court has explained, Congress made impairment the “touchstone” of the unbundling inquiry, *USTA I*, 290 F.3d at 425, and the Commission accordingly may not order unbundling without impairment, *see Iowa Utils. Bd.*, 525 U.S. at 388-89, 391-92, 397 (finding that the Commission “was wrong” in concluding that impairment inquiry was discretionary); *Supplemental Order Clarification*¹⁶ ¶ 16 (Commission determines “impairment” “before imposing additional unbundling obligations on incumbent LECs”). Thus, even assuming the Commission has limited authority in the absence of an impairment finding to require continued service to *existing* customers as part of a prompt transition to a lawful regime, any attempt to *expand* unbundling in the absence of an impairment finding is completely beyond the Commission’s statutory authority, regardless of whether such an obligation is imposed as part of an interim or transitional regime. *See Environmental Defense Fund v. EPA*, 167 F.3d 641, 649 (D.C. Cir. 1999) (rejecting “grandfather” rule that would have exempted projects from conformity with statutory requirements); *Natural Resources Defense*

¹⁶ Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) (“Supplemental Order Clarification”), *aff’d*, *Competitive Telecomms. Ass’n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).

Council, Inc. v. Reilly, 976 F.2d 36, 40-41 (D.C. Cir. 1992) (rejecting argument that stay of regulations was “a reasonable transitional regime” when statute “mandated” a different result) (internal quotation marks omitted).

Again, the FCC’s only response is to claim that it must require unbundling nationwide simply because its final rules might require unbundling as to some UNEs in some markets. *See Order* ¶ 25 (“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” without nationwide unbundling) (emphasis added). As shown above, this claim cannot be squared with *USTA II* or the evidence of significant competition without UNEs.¹⁷

The injury of requiring incumbents to provide new UNEs in the absence of any impairment finding is magnified by the FCC’s refusal to permit a “true up” upon the issuance of final rules, even with regard to “new adds” in markets where the FCC affirmatively finds no impairment. *See Order* ¶ 25. The supposed harm to competitors that the FCC identifies as grounds for declining to require such a true up — the difficulty that competitors would have in reserving funds today to account for the possibility of a later true up (*id.*) — is directly traceable to the FCC’s refusal to eliminate required unbundling in any market at all, including those where this Court recognized that even the year-old record compiled in the *Triennial Review* proceeding leaves no doubt that CLECs can compete without UNEs.

¹⁷ To the extent the FCC claims that CLECs have relied on the unbundling permitted by its unlawful rules, *see Order* ¶ 28, this Court has recognized that “reliance is typically not reasonable” where the agency orders on which the reliance was based “not only had never been judicially confirmed, but were under unceasing challenge before progressively higher legal authorities.” *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1110 (D.C. Cir. 2001).

II. PETITIONERS HAVE NO ADEQUATE ALTERNATIVE REMEDY

The relief sought by petitioners here is warranted not only because the FCC has flouted this Court's decision yet again, but also because "the statutorily prescribed remedy" — a petition for review of the FCC's interim rules, coupled with a motion for a stay pending such review — is "clearly inadequate." *In re GTE Corp.*, 762 F.2d 1024, 1027 (D.C. Cir. 1985). Incumbents have followed that traditional course three times and prevailed, but — eight years later — they remain stuck with the same unlawful unbundling regime. As courts have recognized, "[r]equiring petitioner to participate in the relitigation of issues already decided" — here, for a fourth time — "can hardly be called an *adequate* means of correcting non-compliance with a mandate of this court," but instead "would reward bureaucratic misconduct." *Department of Navy v. Federal Labor Relations Auth.*, 835 F.2d 921, 923 (1st Cir. 1987). Given the Commission's "unwillingness to adhere to prior judicial rulings," *USTA II*, 359 F.3d at 595, incumbents "are entitled to immediate relief to prevent further litigation of matters already put to rest by this court." *Department of Navy*, 835 F.2d at 924.

By permitting competitors to add *new* UNE lines in every market across the country through at least the end of February 2005 — without a lawful finding of impairment and despite record evidence that, as of 2002, there were "many markets where CLECs suffered no impairment," *USTA II*, 359 F.3d at 587 — the FCC has condemned incumbents to a continued loss of hundreds of thousands of customers every month. Petitioners and other incumbent carriers have already lost approximately 17 million customers to the synthetic competition spawned by the UNE-P. More than 9 million of those losses occurred after this Court struck down the FCC's unbundling rules in *USTA I*; and nearly 1 million of those losses occurred *after*

this Court again struck down the FCC's rules in *USTA II*.¹⁸ These lost lines represent the incumbents' best, highest-volume customers, who have been vigorously targeted by CLECs. ILECs are also losing revenues to CLECs that use TELRIC-priced high-capacity facilities despite the fact that CLECs demonstrably can and do successfully serve business customers using tariffed special access services purchased at volume and term discounts. *See* note 15, *supra*.

It is well established that losses such as these constitute irreparable injury. *See Gateway E. Ry. Co. v. Terminal R.R. Ass'n*, 35 F.3d 1134, 1140 (7th Cir. 1994); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994); *Reuters Ltd. v. UPI, Inc.*, 903 F.2d 904, 909 (2d Cir. 1990). In addition, the continued imposition of the vacated unbundling rules makes it virtually impossible for ILECs to negotiate commercial alternatives to regulated UNEs, something the Commission itself said was in the public interest. *See* Letter from Michael K. Powell, Chairman, FCC, *et al.*, to Walter B. McCormick, Jr., President/CEO, USTA (Mar. 31, 2004).

Contrary to the FCC's claims, the incumbents did not agree to suffer these harms. *See Order ¶¶ 19, 23 n.61, 28 n.67*. The FCC points to the commitments it extracted from some of the larger incumbents, though not the hundreds of smaller ILECs represented by USTA, between

¹⁸ Indus. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *Local Telephone Competition: Status as of December 31, 2003*, at Table 4 (June 2004); Blake Bath, Lehman Brothers, *Verizon Communications* at 3, Fig. 2 (July 28, 2004); Frank Governali, *et al.*, Goldman Sachs, *SBC Communications, Inc.* at 3 (July 23, 2004); Blake Bath, Lehman Brothers, *Telecom Services — Wireline* at 7, Fig. 8 (June 23, 2004); BellSouth Corp., *2Q04 Financials* at 9, available at <http://www.bellsouth.com/investor/pdf/2q04p.pdf>; Qwest Communications International Inc., *2Q04 Financials* at Attach. D, available at http://media.corporate-ir.net/media_files/NYS/q/reports/2Q04_Attachments_ABCD.xls; Qwest Communications International Inc., *1Q04 Financials* at Attach D, available at <http://www.qwest.com/about/media/pressroom/attachments/1Q04AttachmentD.pdf>.

the issuance of this Court’s opinion in *USTA II* and the mandate. But the incumbents made those commitments to provide the FCC with time to issue rules that comply with this Court’s mandate — a task that the FCC could (and should) have started months earlier. The interim rules the FCC adopted make no pretense of complying with the mandate and, moreover, go well beyond even the broadest of the incumbents’ commitments, which as the FCC acknowledges “differ both in their scope and in their duration.” *Id.* ¶ 7. Some ILECs committed that they would “not unilaterally increase the prices it charges for the mass market UNE-Platform or high-capacity loop or transport UNEs before January 1, 2005.”¹⁹ Qwest, in contrast, “pledge[d] not to raise UNE-P rates for the remainder of the year”; it made no commitment with respect to high-capacity loops and transport.²⁰ And Verizon’s commitment with respect to the mass-market UNE-Platform was limited to November 11, 2004; with respect to high-capacity loops and transport, Verizon committed only “to give [its] wholesale customers at least 90 days notice.”²¹

¹⁹ Letter from F. Duane Ackerman, Chairman/CEO, BellSouth, to Michael K. Powell, Chairman, FCC (June 10, 2004); *see also* Letter from Edward E. Whitacre, Jr., Chairman/CEO, SBC, to Michael K. Powell, Chairman, FCC (June 9, 2004) (“SBC will continue providing to our wholesale customers the mass market UNE-P, loops and high-capacity transport . . . and will not unilaterally increase the applicable state-approved prices for these facilities at least through the end of this year.”).

²⁰ Letter from Richard C. Notebaert, Chairman/CEO, Qwest, to Michael K. Powell, Chairman, FCC (June 14, 2004).

²¹ Letter from Ivan Seidenberg, Chairman/CEO, Verizon, to Michael K. Powell, Chairman, FCC, at 2 (June 11, 2004). Contrary to the FCC’s claims, Verizon has not “announced its intention to withdraw” mass-market switching or high-capacity facilities as UNEs “immediately.” *Order* ¶ 17 & n.49. Instead, Verizon informed state commissions that, under the plain language of many of its voluntarily negotiated, state commission-approved interconnection agreements, CLECs had agreed that Verizon could discontinue providing a UNE when federal law no longer required Verizon to provide it; in each case, however, Verizon’s statements were qualified by reference to the commitment Verizon made to the FCC. *See Ex Parte* Letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, FCC, Attach. at 1 (July 1, 2004). In any event, as the FCC expressly notes, discontinuing provision of these UNEs pursuant to agreed-upon terms in interconnection agreements is “permitted under the court’s holding in *USTA II*.” *Order* ¶ 17 (emphasis added). Finally, contrary to the FCC’s claims, the fact that many agreements permit an incumbent to stop providing a UNE, on notice and without

These commitments thus provide no justification for relegating incumbents to the standard appellate process to vindicate rights they should have secured at least two vacatur ago.

Time and again, the FCC has used every conceivable tactic to preserve maximum unbundling through delay: whether by representing that it would act “expeditiously” on petitions for reconsideration of its *UNE Remand Order* (on which it never ruled) to postpone this Court’s review of that order; by voting on the *Triennial Review Order* on February 20, 2003, only to release it six months later with an effective date of October 2, 2003; or by waiting more than four months after this Court issued its opinion in *USTA II* (and five weeks after the mandate issued) to adopt interim rules, only to delay another month before releasing them. The FCC has done so secure in the knowledge that state commissions — which are even more committed to the discredited regime of maximum unbundling than the FCC — would let nothing upset the “completely synthetic competition” dependent on the FCC’s unlawful unbundling rules. *USTA I*, 290 F.3d at 424; *see also USTA II*, 359 F.3d at 573, 576 (recognizing that the 1996 Act’s “purpose is to stimulate competition — preferably genuine, facilities-based competition” — not to “generat[e] ‘competition,’ no matter how synthetic”).

The FCC’s current *Order* is of a piece with this strategy of recalcitrance and delay. The FCC purports to freeze everything in place for another six months, notwithstanding the Court’s clear vacatur of the agency’s rules, and then leaves a calculated ambiguity as to what happens at the end of that six-month period. Even if the FCC does adopt new rules at the end of that six-month period — and its assurances that it will do so are hardly convincing given past practice —

proceedings before a state commission, is in no way inconsistent with incumbents’ representations that, through existing agreements or voluntary commitments, there were already in place “‘orderly procedures . . . to transition away from the current regime of maximum unbundling.’” *Id.* ¶ 17 n.49. Such voluntarily negotiated provisions provide for “orderly procedures”; indeed, they give CLECs exactly the benefit of their bargain.

the *Order* suggests that the States will be left free to decide when and how to implement those changes. That is a clear recipe for further delay and litigation.²² If the FCC fails by the end of that six-month period to adopt its “propose[d]” “transition plan,” the result will be a regulatory vacuum that the state commissions will be only too happy to attempt to fill with unbundling orders of their own, forcing the ILECs, in order to vindicate their statutory rights, to pursue relief in 51 separate district court actions. Either way, the FCC will have given the States carte blanche to extend the life of existing unlawful bundling rules indefinitely. This Court has already held that the FCC cannot affirmatively delegate the impairment determination to the States. Neither can the FCC do so indirectly, through its own inaction. For these reasons, what is needed right now — and what is clearly warranted in light of the FCC’s continued intransigence — is a writ of mandamus that accomplishes three things.

First, the Court should vacate the FCC’s interim rules requiring the unbundling of mass-market switching and high-capacity facilities. These interim rules constitute an unlawful stay of this Court’s mandate granted by the FCC to itself after trying and failing to obtain such relief in the courts.

Second, the Court should require the FCC, finally and promptly, to decide the issue that Congress required it to decide and that it has now refused to decide in accordance with the

²² Even before the FCC’s *Order*, a number of States had already issued standstill orders or otherwise required continued unbundling notwithstanding this Court’s decision. *See, e.g.*, Draft Decision at 2, Docket Nos. 96-09-22 et al. (Conn. Dep’t of Pub. Util. Control May 20, 2004); Draft Decision at 20, Docket No. 99-03-21RE01 (Conn. Dep’t of Pub. Util. Control July 28, 2004); Order at 13-14, Case No. 1029, Order No. 13222 (D.C. Pub. Serv. Comm’n June 15, 2004); Order, Cause Nos. 42500, 42500-S1 & 42500-S2 (Ind. Util. Reg. Comm’n June 14, 2004); Opinion and Order at 6, Case No. U-14139 (Mich. Pub. Serv. Comm’n June 3, 2004); Order at 3, Docket No. TO03090705 (N.J. Bd. Pub. Utils. June 18, 2004); Stand-Still Order at 1-2, Docket Nos. 29829 & 29824 (Tex. Pub. Util. Comm’n July 28, 2004); Order No. 05 at 18-19, Docket No. UT-043013 (Wash. Utils. & Transp. Comm’n June 15, 2004); Order at 12, Case No. 04-0359-T-PC (W. Va. Pub. Serv. Comm’n June 8, 2004).

statute and various court orders for a fourth time. If the FCC fails to make an affirmative impairment finding with respect to any given element by the end of the year, it should be deemed to have found no impairment with respect to that element, and such determination should be binding on the states.²³ Only such affirmative relief will establish a federal standard, check the unbundling efforts of state commissions, and rescue incumbents from the irreparable harm they are suffering under the existing, unlawful regime.

Third, and most importantly, the Court should confirm that, absent a lawful impairment finding *by the FCC*, the 1996 Act imposes no obligation on incumbents to provide UNEs under section 251(c)(3) and, at a minimum, that incumbents cannot be required, either by the FCC or the States, to let competitors place *new* orders for UNE switching and high-capacity facilities. Consistent with the statutory requirement that a lawful finding of impairment by the FCC must *precede* unbundling, the FCC should also be directed — where it is unable to justify continued unbundling under the proper legal standards — to adopt a plan to end *existing* UNE-P arrangements and UNE high-capacity facilities without any additional proceedings at the state level.

To the extent that existing interconnection agreements require ILECs to provide switching and high-capacity transport, they do so only because those agreements of necessity incorporated the FCC's unlawful unbundling rules. Having had those rules thrice-vacated, it is the FCC's obligation — and one that it should be ordered to fulfill — to undo the consequences of its unlawful orders by affirming that interconnection agreement provisions that implement the vacated rules do not require continued unbundling absent a current finding of impairment by the

²³ It should not be enough for the FCC simply to vote on new rules by that date, with the actual order to issue and become effective months later, as the Commission did with its *Triennial Review Order* and with the *Order* at issue here. The FCC should be required to issue and make effective permanent rules before the end of the year or be deemed to have found no impairment.

FCC.²⁴ To fail to require the FCC to correct the wrongs done by its unlawful orders — to allow the FCC simply to wash its hands of the issue and allow state commissions to extend the process indefinitely — “would be to give legal effect to the Commission’s invalid order.” *Williams v. Washington Metro. Area Transit Comm’n*, 415 F.2d 922, 943 (D.C. Cir. 1968) (en banc).²⁵

The Court should also retain jurisdiction over this matter so that it may promptly address and rectify any further FCC recalcitrance.

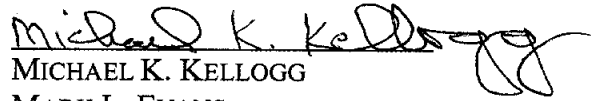
CONCLUSION

The Court should grant this petition, issue a writ of mandamus as described above to enforce its mandate, and retain jurisdiction to ensure future compliance.

²⁴ See *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) (“An agency, like a court, can undo what is wrongfully done by virtue of its order.”); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 336-37 (1956).

²⁵ To the extent that individual ILECs made commitments to the FCC, *see* notes 19-21, *supra*, they will of course abide by those commitments. Furthermore, to the extent that ILECs have been able to reach private commercial agreements with some of the CLEC customers — outside the scope of sections 251-252 — those agreements will be unaffected by the Court’s action.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 23rd day of August 2004, I caused copies of the foregoing Petition for a Writ of Mandamus To Enforce the Mandate of This Court to be served upon each of the parties on the attached service list by electronic mail (as indicated on the attached list) and by first-class mail, postage prepaid.



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