

Client Alert

Latham & Watkins Corporate Department

FCC Releases Order in UNE Triennial Review—New Procedures Announced for Seeking Relief from Unbundling Requirements

Last Thursday, August 21, the Federal Communications Commission (FCC) released the text of its “UNE Triennial Review” order, a decision the Commission announced by 3-2 vote on February 20.¹ The order, produced by a fiercely contested rulemaking begun 20 months ago, is long, complex and at times internally inconsistent. In some instances it departs from the initial statements that were made by FCC personnel when the order was adopted. There are extensive separate statements from all five of the commissioners, four of whom dissented to some parts of the order.

Put simply, this order grants limited relief to the incumbent local exchange carriers (ILECs) from unbundling requirements, in such areas as switching (but only for large customers) and broadband facilities, and delegates to the states the task of determining when ILECs may be relieved of the remaining obligations. Most significantly, this order does *not* eliminate the unbundled network element (UNE) platform or “UNE-P” requirement; ILECs already have commenced new proceedings at the FCC to obtain relief from that pricing rule for the full network elements platform. While the ILECs’ UNE obligations did not expand in any significant way, they now will have to take their arguments for relief from many of the UNE obligations to each state in which they operate.

What follows is a brief summary of the FCC’s unbundling standards and the most significant rule changes adopted by the FCC. In many cases, the order lacks clarity, and the FCC and the courts no doubt will have to sort out its meaning in further legal proceedings. The order will take effect 30 days following its publication in the Federal Register. Appeals may also be taken within that time.

Scope of the FCC’s Authority to Mandate Unbundling

The authority of regulators to order ILECs to provide their competitors access to UNEs is not unlimited. The FCC may not mandate access to UNEs unless the competitor seeking access would be “impaired” in its ability to provide the services that it seeks to offer.² In the past, the FCC also has permitted state regulators to mandate access to a network element even if the FCC had not mandated unbundling of that element. In this order, the FCC clarified the relative roles of the federal and state regulators and explained under what circumstances UNEs would have to be made available.

The “Impairment” Standard

The FCC made an effort to justify all its new unbundling rules in terms

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consistent with a sharply worded decision last year from the U.S. Court of Appeals for the District of Columbia.³ The court had been critical that the FCC had not adequately considered the “impairment” standard described above, but instead had adopted rules that promoted the broadest possible unbundling. The court was especially critical of the FCC for adopting national UNE rules that failed to take into account local differences in market conditions. Therefore, the new order repeatedly cites a much more “granular” analysis of the geographic and product markets—for example, dividing the local exchange market between enterprise and mass market services, examining the availability of both wholesale and retail alternatives to the ILEC, and delegating to the states a significant role to determine whether “impairment” exists in particular locales.

The FCC also states that it now recognizes “the difficulties and limitations” in UNE-based competition⁴ and attempts to demonstrate that it has adopted an “impairment” analysis that will limit the amount of unbundling ILECs must do in the future. The FCC then states its defining principle in exceedingly broad terms, as follows:

“We find a requesting carrier to be impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.”

This principle appears to impose scant restraint on regulatory discretion. In fact, the Commission goes on to describe a very broad body of the “barriers to entry” and other market-based evidence that it considers relevant to the impairment analysis. In doing so, it relies heavily on many of the same factors that it used to justify its prior rules. For example, among the evidence the FCC says is “most persuasive” in evaluating impairment, it lists the availability of the network element outside of the ILECs’ network—that is, if a new entrant has deployed an element (*e.g.*, a switch, or transmission

facilities) in a market, then the FCC will consider this as evidence that barriers to entry in that market are surmountable as to that element. The FCC says that this test is not dispositive. The Commission also says it will *not* presume that an absence of competitive entry means unbundling should be required (for example, in a nascent market).

Role of the States

Under the prior rules the FCC had permitted the states to add to the list of required UNEs, without a finding by the FCC that an element met the “impairment” standard. In this order, the FCC curtails at least to some degree the ability of the states to adopt unbundling obligations outside the framework created by the FCC; the scope of their discretion remains unclear. Where the FCC has adopted a national unbundling requirement, it seems the states are forbidden from modifying or eliminating it, except as expressly provided by the FCC, and where the FCC has not required access to a particular UNE, the states’ ability to require access also appears to be limited to the specific circumstances enunciated by the FCC (as discussed below).⁵ However, the FCC does not clearly prohibit the states from adding to the list of required UNEs. Rather, state unbundling decisions may not “‘substantially prevent’ the implementation of the federal regulatory regime.”⁶ States are to bring existing rules into conformity with the FCC’s rules.⁷

As to any of the network elements that the FCC has specified the states should evaluate, if a state “fails to perform the granular inquiry” prescribed by the FCC, any party may petition the FCC to step in and perform the analysis in the state’s place. The Commission will place such a request on public notice and decide within 90 days whether or not to exercise jurisdiction over the matter. If the FCC does take the case, it will make a decision within 90 days from the date it assumes jurisdiction in the case of petitions concerning

switching used in the enterprise market at DS1 or greater capacity, and within nine months in all other cases.⁸

Eligibility to Purchase UNEs

The FCC clarified that requesting carriers may only purchase UNEs in order to offer a *qualifying telecommunications service*. Qualifying telecommunications services include those offered by competitors that “have been traditionally within the exclusive or primary domain of incumbent LECs,” specifically including local exchange services such as POTS and local data services, access services such as xDSL and high-capacity circuits. The FCC clarified that CMRS providers are entitled to purchase UNEs to provide CMRS, because that service is used to compete against telecommunications services that have been traditionally within the exclusive or primary domain of the ILEC.⁹

Once a requesting carrier obtains the UNE to provide a qualifying telecommunications service, it may use that UNE to provide any other additional services it chooses.¹⁰

Specific Unbundling Rules for Network Elements: Unbundled Loops

For purposes of the loop unbundling requirements, the FCC distinguishes between the use of UNEs to serve the *mass market* (residential and small business users of analog loops, DS-0 loops, or DSL-capable loops) and to serve *enterprise users* (medium and large businesses using sophisticated telecommunications services, such as loops of DS-1 or greater capacity).

For service to enterprise customers, ILECs no longer must provide UNE access to any lit, optical capacity-level (OC-n) loops.¹¹ In general, however, ILECs must continue to provide access to unbundled DS-1 loops, DS-3 loops (up to two loops per customer) and dark fiber loops unless the state finds that a competitor will not suffer impairment from the lack of such access. A state’s finding of “no impairment” must be

based on FCC-defined triggers measuring the availability of alternatives to the ILEC’s loops at the customer location in question.

DS-1 Loops.¹²

To determine that an ILEC no longer must provide DS-1 UNE loops to a particular location, the state must find that the location meets both prongs of a new *competitive wholesale facilities trigger*.¹³ This test is met when each of two or more competing providers not affiliated with each other or the ILEC: (a) has deployed its own facilities and offers a DS-1 loop over those facilities on a “widely-available wholesale basis to other carriers desiring to serve customers at that location”;¹⁴ and (b) has access to the entire customer location, including each individual unit within that location. In applying this test, the state may count intermodal providers of services comparable in quality to the ILEC’s.

DS-3 Loops.¹⁵

To determine that an ILEC no longer must provide DS-3 UNE loops to a particular location, the state must find that the location satisfies the *competitive wholesale facilities trigger* (identical to the above, except the relevant facilities are DS-3s), the *self-provisioning trigger* or the *potential deployment analysis*.

The *self-provisioning trigger* requires the state to find that each of at least two competing providers not affiliated with each other or the ILEC is serving customers at a location using: (a) its own DS-3 facilities it has deployed at that location; or (b) dark fiber it has acquired under a long-term IRU and to which it has attached its own optonics.¹⁶

The *potential deployment analysis* requires the state to consider whether other evidence shows that a CLEC would not suffer impairment from the lack of access to DS-3 UNE loops at a particular location, considering “evidence of alternative loop deployment at that location; local engineering costs of building and utilizing transmission facilities; the cost

of underground or aerial laying of fiber or copper; the cost of equipment needed for transmission; installation and other necessary costs involved in setting up service; local topography such as hills and rivers; availability of reasonable access to rights-of-way; building access restrictions/costs; and availability/feasibility of similar quality/reliability alternative transmission technologies at that particular location.”¹⁷

Dark fiber loops.¹⁸

To determine that an ILEC no longer must provide DS-3 UNE loops to a particular location, the state must find that the location meets the *self-provisioning trigger* or the *potential deployment analysis*. These two tests are identical to the analogous tests described for DS-3 facilities, above, except that the relevant facility is dark fiber. In applying these tests, states must count competitors that use dark fiber acquired under a long-term IRU, but may not count competitors that acquired dark fiber on a UNE basis from the ILEC.

Deadline for State Action:¹⁹

The FCC mandated that state commissions complete their initial reviews applying the triggers outlined above within nine months of the effective date of the Order. Unbundled DS-1s, DS-3s, and dark fiber loops must remain available during this initial review period, and the state may mandate an appropriate transition period where it finds that one or more of the triggers are met. If the state fails to complete its review within the nine-month period prescribed, any aggrieved ILEC may petition the FCC demonstrating this failure. After the state completes this initial review, it must conduct further reviews, acting within six months of the filing of a petition or similar pleading under state-prescribed procedures.

For service to mass market customers (DS-0 and smaller capacity loops):

The FCC requires continued unbundling for copper loops and sub-loops and, to

a limited degree (for a voice-grade circuit), in fiber or hybrid facilities. No unbundling is required of packet-switched broadband facilities.

Copper Pairs and Associated Electronics.²⁰

The ILEC must provide UNE access to all types of two-wire and four-wire copper loops, including any associated time-division multiplexing technology.

The FCC eliminated *line sharing* as a UNE, but indefinitely preserves *all* line sharing arrangements existing before the effective date of the Order, at the existing rates, subject to review in the 2004 Biennial Review under Section 11 of the Communications Act. CLECs may continue to purchase additional line sharing arrangements to serve new customers for one year after the Order's effective date. ILECs are only required to keep these new line sharing arrangements in effect for three years after the effective date of the Order and the rate (for line sharing used to serve these new customers only) ramps up in equal steps over the next three years, so that in Year 1, the rate is 25 percent of the UNE loop rate; in Year 2, it is 50 percent of UNE loop rate; and in Year 3, it is 75 percent of UNE loop rate. After three years, market pricing will prevail as ILECs will no longer be required to offer line sharing UNEs that CLECs requested after the effective date of the Order.²¹

The ILEC must provide CLECs with the ability to engage in *line splitting* with another CLEC, an arrangement under which one CLEC provides the voice service and the other CLEC provides xDSL using the upper frequency portion of the same loop. The ILEC's obligation to provide line splitting applies without regard for whether the voice CLEC purchases UNE switching, and the ILEC must ensure that its OSS can handle pre-ordering, ordering, provisioning, maintenance, repair and billing of line splitting arrangements.²²

With respect to *line conditioning*, the ILEC must, at the CLEC's request, condition the loop for DSL. ILEC may charge for this service based on

forward-looking pricing principles. ILEC must test and report troubles for all features, functionalities, and capabilities of the conditioned loop, not just voice frequencies.²³

For *maintenance and testing*, the ILEC must provide physical loop test access points at the splitter, through a cross-connect to the CLEC's collocation space, or through a standardized interface.²⁴

Hybrid Loops.²⁵

For hybrid copper-fiber loops, the ILEC does not need to provide unbundled access to any packet-switched features or functionalities of the loop, including access to features and functionalities of a DSLAM, xDSL-capable line cards installed in a digital loop carrier system or passive optical networking equipment.

The ILEC, however, must provide, on an UNE basis: (a) access to the copper subloop between the customer's premises and a remote terminal; (b) access to the TDM features and functionalities of the loop necessary to establish a complete transmission path to the ILEC CO, including DS-1 or DS-3 capacity, unless the state has found that one of the no-impairment tests described below has been met; and (c) For narrowband services, either a DS-0-equivalent transmission path using TDM technology between the customer's premises and the ILEC CO, a spare copper loop serving the customer's premises or, if neither of these options is available, some other technically-feasible method of obtaining unbundled access.

Fiber-to-the-Home Loops.²⁶

ILECs are not required to provide UNE access to newly-constructed 100 percent fiber loops serving residential end user premises. If the ILEC deploys the FTTH loop to replace an existing loop, the ILEC must provide UNE access to a 64 kbps channel on the fiber loop if it retires the copper loop. Upon request, if it leaves the copper in the ground, it must provide UNE access to the copper loop and return it to serviceable condition. Before the ILEC retires the

copper loop, it must provide notification to competitors of the network change, allowing competitors an opportunity to object. In addition, the ILEC must comply with any approval or notification procedures states impose for loop plant retirements.

Access to Inside Wiring in Multi-Unit Premises

The FCC's Order requires ILECs to unbundle subloops, including inside wire subloops, and NIDs. Specifically, ILECs must provide their competitors unbundled access to subloops so that the competitors are able to access all customers residing in multiunit premises, regardless of the type or capacity of the loop the competitor will provide.²⁷ Recognizing that the FCC's prior orders could be interpreted as requiring a competitor to choose collocation as its method of interconnection in order to obtain a subloop, the FCC's Order now makes clear that ILECs are required to provide subloops to access multiunit premises without collocation.²⁸

Network Interface Devices (NIDs)

The FCC's Order imposes three specific unbundling obligations regarding access to NID functionality:

First, ILECs must provide competitors with access to the NID on the ILEC's side of the network on a stand-alone basis, thereby allowing competitors to connect their own loop facilities to the premises wiring at any customer location.²⁹

Second, ILECs are prohibited from imposing a separate charge for NID functionality in those cases where the NID is a component of an unbundled end-to-end loop or a subloop. Rather, such charge should be included in the overall unbundled loop or subloop charge.³⁰

Third, the FCC's rules prohibit an ILEC from imposing a charge on a competitor in those instances where the competitor has constructed its own NID at the premises and only needs to make

contact with the ILEC to disconnect the customer's wiring on the customer's side of the NID and to reconnect the inside wiring to the competitor's NID.³¹ The FCC concluded that, under these specific circumstances, the competitor is not accessing the ILEC's NID as a UNE; thus, it would violate the FCC's rules to require that the ILEC's technician be present during the disconnect and to impose a charge on the competitor to make contact on the "non-network side of the NID."³²

UNE Combinations (Including EELs)

The FCC will continue to require the ILEC: (1) to provide UNEs in a manner that allows the CLEC to combine them to provide a telecommunications service; (2) not to separate network elements that it currently combines; (3) to combine elements at the request of a CLEC, provided that the combination is technically feasible and will not impair the ability of other CLECs to obtain access to UNEs or interconnect with the ILEC's network; and (4) to combine UNEs with the elements the CLEC already possesses, unless the combination is not technically feasible.

The Order modifies the obligation to offer access to a particular UNE combination known as the enhanced extended link (EEL), which is a combination of an unbundled loop and unbundled transport, with or without multiplexing capability. The FCC previously prohibited the commingling of EELs with other facilities that the requesting carrier obtained at wholesale from an ILEC other than through unbundling; the Order now lifts that prohibition and requires ILECs to allow CLECs to engage in such commingling.³³

Before purchasing DS-1 or DS-3 EELs, the requesting carrier must now certify that a series of conditions, designed to prevent "gaming" and ensure the EEL is used at least in part for local voice service, are met.³⁴ Among other things, these conditions require the CLEC to

obtain a state certification to provide local voice service, assign local numbers to the EEL circuits, pass ANI information, and terminate EELs to local collocation arrangements.

The FCC previously had limited the ILECs' obligation in order to prevent the use of EELs for unintended bypass of access charges by inter-exchange carriers; thus, ILECs only had to make EELs available to those carriers that provide "a significant amount of local exchange service" to the customer. The new rules appear to retain the policy underlying the former restriction while clarifying the eligibility standard.

Unbundled Local Circuit Switching

In the Order, the FCC adopted separate standards for access to unbundled ILEC local circuit switching for (i) enterprise customers (customers using DS-1 capacity and higher) and (ii) mass market customers (customers using DS0, voice-grade circuits or DSL).

Enterprise Customers:

The FCC makes a national finding that the ability of competitors to serve enterprise customers is *not* impaired without circuit switching.³⁵ However, the FCC recognizes that competitors could be impaired without switching with respect to enterprise customers in certain markets.³⁶ Therefore, state commissions have 90 days from the effective date of the Order to petition the FCC to rebut the national finding in individual markets based on specific operation and economic evidence.³⁷

Mass-Market Customers:

The FCC finds that competitive carriers are impaired without access to circuit switching due to operational and economic barriers caused by the "hot cut" processes currently implemented by ILECs.³⁸ Recognizing hot cut processes as a substantial cause of impairment, the FCC implements procedures to mitigate the causes of switching impairment.

Within 9 months of the effective date of the Order, states must approve and implement a “batch cut” migration process to transfer large volumes of mass-market customers in a cost-effective and seamless manner.³⁹ Alternatively, states may issue detailed findings that a batch cut process is unnecessary in a particular market because the ILEC’s hot cut processes do not give rise to impairment. For instance, this may be the case in small, rural markets where the number of requests is low.⁴⁰

In addition, the Order directs state commissions to apply specific triggers to evaluate whether impairment exists with respect to switching in specific markets.

Under the new rules, state commissions must find “no impairment” where there are 3 or more competing carriers each serving mass market customers in a particular market with the use of their own switches.⁴¹ Even if this trigger is satisfied, the state commission still may find competitors to be impaired where it finds exceptional circumstances that cause a significant barrier to entry even to carriers that self-provision switches.⁴²

The state commission must also find “no impairment” where there are 2 or more competitive wholesale providers that are unaffiliated with the ILEC and each other in the market, each offering wholesale local circuit switching using their own switches to mass market customers.⁴³

If neither of the above triggers is satisfied, the state commission must conduct further analysis to determine whether the market is suitable for competitive deployment even though no three carriers have in fact provisioned their own switches.⁴⁴ As part of this analysis, the FCC requires states to evaluate evidence of actual competitive deployment of switches and operational and economic barriers to entry.⁴⁵ The Order sets forth criteria for states to define specific markets and to evaluate operational and economic factors. If the state commission finds impairment, the Order requires consideration of whether

such impairment can be remedied by a narrower rule that makes unbundled switching temporarily available for a minimum of 90 days for customer acquisition purposes, rather than for an indefinite period.⁴⁶

The Order requires states to make periodic reviews of impairment for unbundled local switching.⁴⁷ The Order indicates that the FCC will provide guidance to and exercise oversight of states as they make impairment determinations with respect to switching. If a state commission fails to complete this granular inquiry, an aggrieved party may file a petition with the FCC demonstrating the failure.⁴⁸

Packet Switching

The FCC entirely removed packet switching as a stand-alone UNE on a national level. The limited availability of packet switching under the existing rules will no longer be required.⁴⁹

Dedicated Transport

The Commission limited its definition of the dedicated transport network element to those transmission facilities *connecting ILEC switches or wire centers*.⁵⁰ This limitation represents a narrowing of the previous definition to reflect the distinction between the economics of dedicated facilities used for backhaul between networks and transport within an ILEC’s network.

Impairment:

The Commission conducted its impairment analysis of dedicated transport on a capacity basis. Thus the Commission made different findings of impairment or non-impairment based upon the following capacity levels: OC-n, DS-3, DS-1 and dark fiber transport.⁵¹

OC-n Transport.

The Commission found on a national level that requesting carriers are *not* impaired without access to unbundled OC-n transport facilities. Thus, no unbundling of OC-n is required.⁵²

DS-3 Transport.

The Commission finds that requesting carriers nationally are impaired without access to unbundled DS-3 transport.⁵³ This determination is subject to state review to determine where competitive carriers are not impaired without access to ILEC unbundled DS-3 transport on a route-specific basis.⁵⁴ States may find no impairment, as described below, under either of two triggers. A requesting carrier may not obtain more than 12 unbundled DS-3 circuits along a single route.⁵⁵

DS-1 Transport.

The Commission found on a national level that requesting carriers are impaired without access to unbundled DS-1 transport facilities.⁵⁶ This determination is subject to a state review as described below.

Dark Fiber Transport.

The Commission found on a national level that requesting carriers are impaired without access to unbundled dark fiber transport facilities.⁵⁷ This finding also is subject to the two-trigger state review described below.⁵⁸

Two-Trigger Review:

This order creates two triggers by which an ILEC can show in a route-specific state review proceeding that a requesting carrier is not impaired without unbundled DS-3, DS-1 or dark fiber transport. A state must find non-impairment as to any particular point-to-point route if the state finds either that a newly-defined *transport self-provisioning trigger* or the *transport third party alternative trigger* have been met.

The *transport self-provisioning trigger* requires the state to find that it is economical for the requesting carrier to self-provision transport facilities, as evidenced by *three carriers, in addition to the ILEC*, each having made sunk investments in transport facilities on the route.⁵⁹ Because the FCC concluded that competitors generally cannot self-provision capacity at the DS-1 level, it held that the transport self-provisioning

trigger should not apply at the DS-1 level.⁶⁰

The *transport third party alternative trigger* requires the state to find that carriers have the ability to use *two or more carriers, in addition to the ILEC*, as wholesale alternatives to the ILEC's network on the route.⁶¹

Deadline for state action:

States are expected to complete their initial reviews applying the triggers within nine months of the Order's effective date.⁶² States may set an "appropriate" period for competitive LECs to transition off UNE transport after a finding of no impairment.⁶³ To the extent that a state does not complete its review as required, a party may file a petition with the FCC demonstrating the state's failure to comply with these procedures.⁶⁴ After the completion of the initial reviews, states must conduct further reviews to identify additional transport routes where no impairment exists, and these must be completed within six months.⁶⁵

Shared Transport

The FCC found that requesting carriers are impaired without access to unbundled shared transport only to the extent that the Commission finds that the carriers are impaired without access to unbundled switching. Thus, carriers must unbundle shared transport only to the extent that they continue to be required to unbundle local circuit switching.⁶⁶

Signaling and Back-Office Operations

Signaling Networks:

In circumstances where an ILEC is required to provide access to switching as a UNE, carriers purchasing the switching UNE must also have access to ILEC signaling. In all other instances, the FCC found that competitive LECs, on a national level, are *no longer impaired* without access to signaling networks.⁶⁷ The FCC found that there

are multiple alternative providers of signaling services; the Order reiterates, however, that ILECs are obligated under the statute and the rules to provide interconnection between signaling networks and the signaling networks of alternative providers.⁶⁸

Call-Related Databases:

The FCC concluded that, on a national basis, competitive carriers that deploy their own switches are *not* impaired in any market without access to the ILEC's call-related databases used in signaling networks for billing and collection or for the provision of telecommunications services. The FCC found that carriers deploying their own switches have a substantial number of reliable, competitive alternatives to the ILECs' call-related databases, except with respect to 911 and E911 databases.⁶⁹ Competitive carriers continue to be impaired on a national basis without access to the 911 and E911 databases; thus, access to these databases must continue to be unbundled.⁷⁰ As with signaling networks, carriers that purchase switching as a UNE will also obtain unbundled access the ILEC's call-related databases.

OSS Functions:

The Order maintains the availability of operations support systems (OSS) functions to competitive carriers as UNEs.⁷¹ The FCC reasons that OSS functions represent an extensive infrastructure that would be nearly impossible for competitors to duplicate, and there is no evidence of any available alternatives.⁷²

Rules Related to Negotiation of UNE Agreements

Duty to Negotiate in Good Faith: The FCC rules are amended to provide that a new entrant may withhold information about its own costs when negotiations concern unbundling or leasing of the ILEC's network rather than the new entrant's network.⁷³

Transition periods:

Other than the transition period adopted for line sharing, discussed above, the FCC declined to establish a formal transition period to implement the provisions of the Order. Rather, it stated that individual carriers should be allowed the opportunity to negotiate specific terms and conditions to implement the Order's rules.⁷⁴ However, the FCC applied section 252(b) as a default timetable for modification of interconnection agreements and called upon carriers to complete these negotiations in good faith. Thus, the effective date of the rules adopted in the Order is deemed the "notification" or "request" date for contract amendment notifications.⁷⁵ Where a negotiated agreement cannot be reached, parties may submit requests for state arbitration between 135 and 160 days after the Order becomes effective.⁷⁶ The states are required to complete their consideration of such disputes within nine months of the effective date of the Order.⁷⁷

Modification of Existing Networks

Existing FCC rules require ILECs to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility has already been constructed. "Routine network modifications" are defined as activities that the ILEC regularly undertakes for its own customers, including rearranging or splicing cable, and adding or reconfiguring multiplexers.⁷⁸ The rules also require line and loop conditioning (as necessary) to make unbundled loops xDSL-capable, and this Order finds that competitors continue to be impaired without access to such conditioning.⁷⁹

This order clarifies that an ILEC's UNE obligation to perform routine modifications to network facilities does not include construction of new lines for a requesting carrier.⁸⁰ Rather, the FCC clarified, ILECs are not required to construct new loop or transmission facilities at the behest of a requesting carrier so that the requesting carriers

can access them as UNEs. Requesting carriers may, however, purchase such facilities in accordance with ILEC special construction tariffs, including any tariffed termination liabilities that apply. The Commission explicitly rejects the requests of competitors for relief from termination liabilities for special construction.⁸¹

UNE Pricing Rules

While this order addresses only the obligation to unbundle, and not the price at which UNEs must be made available, the FCC did use this opportunity to clarify two aspects of its “total element long-run incremental cost” (TELRIC) pricing standard for UNEs.

Cost of Capital:

The Order clarifies that the “cost of capital” component of TELRIC pricing should reflect (i) the risks that exist in a market in which there is facilities-based competition, not the actual competitive risk the ILEC currently faces in providing UNEs;⁸² and (ii) any unique risks associated with new facilities that employ new technology and offer new services.⁸³ This second clarification allows states to consider the use of different costs of capital for different elements, but does not foreclose a party from proposing a single cost of capital for all UNEs that appropriately reflects the risks associated with competitive markets for the services provided over ILEC networks.⁸⁴

Depreciation:

The FCC clarified that the rate at which assets can be depreciated over their useful life, a factor in TELRIC pricing, should reflect the competitive nature of the market in which the assets are used. The Commission rejected requests by the large ILECs to mandate the use of the same depreciation lives reflected in their financial reporting. However, the Commission recognized that states are using straight-line depreciation, rather than accelerated depreciation that reflects the anticipated decline in the

value of assets in a competitive market. The FCC held that the depreciation rate under TELRIC should reflect the actual decline in value that would be anticipated in the competitive market TELRIC assumes. The goal is to replicate the results that would be anticipated in a competitive market, according to the FCC. Under this “economic depreciation” requirement, a carrier may accelerate recovery of the initial capital outlay for an asset over its life to reflect any anticipated decline in its value.⁸⁵

“Pick and Choose” To Be Revisited

The FCC requested further comment on whether it should reconsider its rules implementing section 252(i) of the Communications Act, which permits competitive carriers to opt into individual portions of interconnection agreements.⁸⁶ The Commission tentatively concluded that a modified approach would better promote the goals of section 252(i), and proposed changing the rule to permit third parties to opt into negotiated interconnection agreements only in their entirety. Under the FCC’s proposal, once an ILEC has in place a statement of generally available terms (SGAT) which functions as a substitute for an interconnection agreement, the ILEC would be free to negotiate alternative arrangements with competitive carriers without being subject to the old “pick and choose” rule.⁸⁷

Effective Dates

The FCC’s rules will be effective 30 days following publication in the Federal Register of this order, unless the FCC or a court issues a “stay” prohibiting enforcement of the rules while they are being reviewed.

Comments on the FCC’s Further Notice of Proposed Rulemaking on the “pick and choose” rule will be due 30 days following publication in the Federal Register as well.

The FCC declined to adopt a “sunset” date for these rules.⁸⁸ Rather, the

Commission is scheduled to reexamine these rules in 2004, as part of its biennial review of all regulations, to determine if “documented changes” in the market merit modifications to the rules.⁸⁹

Endnotes

¹ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003); “FCC Decision in the UNE Triennial Review,” Client Alert, Latham & Watkins LLP, March 10, 2003 (available at: www.lw.com).

² 47 U.S.C. §251(d)(2)(B).

³ *USTA v. FCC*, 290 F. 3d 415 (D.C. Cir. 2002); *reh’g denied*, (D.C. Cir. 2002), 2002 U.S. App. Lexis 18832 (D.C. Cir. Sept. 4, 2002). *cert. denied sub nom. WorldCom, Inc. v. USTA*, 123 S.Ct. 1571 (2003).

⁴ Order ¶ 3 (“We are very aware that excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.”).

⁵ Order ¶¶ 187-89.

⁶ Order ¶ 193.

⁷ Order ¶ 195.

⁸ Order ¶ 190.

⁹ Order ¶ 135-140.

¹⁰ Order ¶ 143.

¹¹ Order ¶¶ 315-319.

¹² Order ¶¶ 325-327.

¹³ Order ¶¶ 337-338.

¹⁴ 47 C.F.R. § 51.319(a)(4)(ii)(A).

¹⁵ Order ¶¶ 320-324.

¹⁶ Order ¶¶ 332-334.

¹⁷ 47 C.F.R. § 51.319(a)(5)(ii); Order ¶ 335.

¹⁸ Order ¶¶ 311-314.

¹⁹ Order ¶¶ 339-340.

²⁰ Order ¶¶ 248-250.

²¹ Order ¶¶ 255, 264-265.

²² Order ¶¶ 251-252.

²³ Order ¶ 268; 47 C.F.R. § 51.319(a)(1)(iii).

²⁴ Order ¶ 268; 47 C.F.R. § 51.319(a)(1)(iv).

²⁵ Order ¶¶ 288, 296-297.

²⁶ Order ¶ 273, 281-284.

²⁷ Order ¶ 347.

²⁸ Order ¶350.

²⁹ Order ¶ 353.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Order ¶¶ 579-582.

³⁴ Order ¶¶ 597-611; 47 C.F.R. § 51.318(b-d).

³⁵ Order ¶ 451.

³⁶ Order ¶ 454.

³⁷ See Order ¶¶ 456, 457.

³⁸ Order ¶ 459.

³⁹ Order ¶ 460.

⁴⁰ Order ¶ 490.

⁴¹ Order ¶ 501.

⁴² Order ¶ 503.

⁴³ Order ¶¶ 504-505.

⁴⁴ Order ¶506.

⁴⁵ Order ¶¶508-520.

⁴⁶ Order ¶ 524.

⁴⁷ Order ¶ 526.

⁴⁸ Order ¶ 527.

⁴⁹ Order ¶ 537.

⁵⁰ Order ¶ 365.

⁵¹ Order ¶ 380.

⁵² Order ¶ 359.

⁵³ Order ¶ 386.

⁵⁴ Order ¶ 389.

⁵⁵ Order ¶ 388.

⁵⁶ Order ¶390.

⁵⁷ Dark fiber is defined as fiber optic cable transport facilities without any activated electronics that would render them capable of carrying communications. Order ¶381.

⁵⁸ Order ¶384.

⁵⁹ Order ¶¶ 399-400.

⁶⁰ Order ¶ 409.

⁶¹ See *id.*

⁶² Order ¶ 417.

⁶³ Order ¶ 417.

⁶⁴ *Id.*

⁶⁵ Order ¶ 418.

⁶⁶ Order ¶ 534.

⁶⁷ Order ¶ 544.

⁶⁸ Order ¶ 548, *citing* 47 U.S.C. §§ 251(a), 251(c)(2).

⁶⁹ Order ¶ 551.

⁷⁰ Order ¶ 557.

⁷¹ Order ¶ 562. The Commission did not modify the definition of OSS.

⁷² Order ¶ 564.

⁷³ See 47 C.F.R. §51.01(c)(8)(ii).

⁷⁴ Order ¶ 700.

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ Order ¶¶ 632, 634.

⁷⁹ Order ¶ 642.

⁸⁰ Order ¶ 632.

⁸¹ Order ¶¶ 645-648.

⁸² Order ¶¶ 680, 681.

⁸³ Order ¶ 683.

⁸⁴ Order ¶ 684.

⁸⁵ Order ¶¶ 685-691.

⁸⁶ Order ¶¶ 713, 720, 725.

⁸⁷ *Id.*

⁸⁸ Order ¶ 711.

⁸⁹ Order ¶ 710.

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