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

NO. 00-1012 (AND CONSOLIDATED CASES)

UNITED STATES TELECOM ASSOCIATION, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

OPPOSITION OF RESPONDENTS TO PETITION FOR A WRIT OF MANDAMUS

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In seeking the extraordinary remedy of mandamus, petitioners bear the burden of showing that their right to issuance of the writ is clear and indisputable. The petitioners here – Qwest, Verizon, and USTA – have failed to satisfy this demanding standard. Contrary to petitioners' repeated assertions, the Commission's *Order* does not reinstate the rules that were vacated in *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *petitions for cert. pending*. Instead, the Commission's interim approach is precisely the sort of short-term transitional rule that this Court has upheld in the past.

In *USTA II,* this Court vacated FCC rules that required incumbent local exchange carriers ("ILECs") to lease certain unbundled network elements ("UNEs") to competing local exchange carriers ("CLECs"). *USTA II,* 359 F.3d at 564-77. To comply with the Court's decision, and to fulfill its statutory responsibilities under 47 U.S.C. § 251(d)(2), the Commission on remand must adopt new unbundling rules that reflect a nuanced and comprehensive analysis of competitive impairment under current conditions in particular markets – a complex analysis that will take several more months to complete. The Chairman of the FCC has scheduled these new rules for a vote before the full Commission in December 2004.

For the interim period between the vacatur of the old rules and the promulgation of new rules, the Commission considered the option of providing CLECs with no protection whatsoever for unbundled access to the disputed UNEs until the agency issues new rules governing those specific facilities. In the Commission's expert judgment, however, the complete withdrawal of those UNEs from the wholesale market while the Commission develops its new rules could severely undermine the ultimate implementation of those new rules. The Commission also determined that denying competing carriers interim access to all the facilities that are the subject of the pending FCC proceeding might trigger a sudden spike in consumers' phone bills. The

Commission concluded that it could best serve the public interest by trying to prevent such serious market disturbances during the interim period while the agency prepares its revised rules.

Consistent with the interim arrangements to which ILECs have voluntarily adhered during prior periods of uncertainty, the FCC decided that for an interim period extending no longer than six months, ILECs would be required "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" – whatever those terms may be. *Unbundled Access to Network Elements,* FCC 04-179, ¶ 16 (released Aug. 20, 2004) ("*Order*"). Contrary to petitioners' contention, the Commission's interim rules do not reinstate the rules that have been vacated by this Court. While the interim rules preserve terms in effect under existing agreements, the Commission noted that those agreements generally did not incorporate the requirements of the vacated unbundling rules. *Order* ¶ 23. The Commission also made clear that its interim rules would not permit CLECs to obtain new contracts under the vacated rules, as the CLECs could have done if the agency had reinstated those rules. *Ibid.* In addition, the Commission allowed ILECs to initiate "change of law" proceedings under the terms of their interconnection agreements during this transitional period – authority that would not have been available to the ILECs if the FCC had restored the vacated rules. *Ibid.* The Commission's approach, which minimizes disruption while the Commission formulates permanent rules in compliance with this Court's mandate, was entirely reasonable.

Petitioners have also failed to demonstrate any harm sufficient to justify the extraordinary remedy of mandamus. Particularly given the Commission's intent to act quickly to adopt final rules, there is no need for the Court to issue a writ of mandamus at this time. The Court should therefore deny the mandamus petition. Alternatively, if the Court determines that the petition

should not be denied outright at this time, it should hold the petition in abeyance until at least January 1, 2005, to assess the status of the Commission's remand proceedings at a more appropriate time.

BACKGROUND

1. In 2003, in its Triennial Review proceeding, the Commission issued new rules that were intended to implement the network unbundling requirements of the Telecommunications Act of 1996, as interpreted by this Court in *United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied,* 538 U.S. 940 (2003). *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *corrected by Errata,* 18 FCC Rcd 19020 (2003). The Commission addressed "market-specific variations in competitive impairment" by providing for a "granular" analysis that considered "customer class, geography, and service." *Triennial Review Order* ¶ 118. The Commission also altered its former approach to considering cost disparities between CLECs and ILECs, focusing its impairment analysis on those costs that pose recognized barriers to competitive entry. *Id.* ¶¶ 85-90. Applying this revised impairment framework, the Commission eliminated its earlier unbundling requirements with respect to a significant number of network elements, including the highest-capacity loop and transport facilities, all enterprise switching, and the broadband capabilities of mass market loops. *See generally id.* ¶¶ 4, 7.

With respect to mass market switching and dedicated transport, the administrative record contained evidence that competitors generally were impaired in offering their services without unbundled access to those elements. *See Triennial Review Order* ¶¶ 381-383, 386, 390-391, 437-440, 466-475. On the basis of that evidence, the Commission made nationwide impairment findings for those elements. *Id.* ¶¶ 381, 386, 390, 422. The agency recognized that, in some

particular markets, CLECs might not be impaired without these UNEs. But the record did not contain sufficient evidence to allow the Commission to identify any such markets because the parties to the agency proceeding had submitted only highly aggregated data. Therefore, the Commission asked state commissions to hold proceedings to identify any markets where impairment was absent (employing FCC-prescribed standards), and instructed the states to grant ILECs relief from unbundling in those markets. *Id.* ¶¶ 384, 387, 392, 423, 473.

2. In *USTA II,* this Court vacated the Commission's rules concerning mass market switching and dedicated transport. 359 F.3d at 564-77.[1] The Court held that the statute did not authorize the FCC to delegate impairment determinations to state commissions. *Id.* at 565-68, 573-74. Having struck down that delegation, the Court went on to rule that the FCC's national impairment findings for mass market switching and dedicated transport could not stand because they were "inconsistent with [the] conclusion in *USTA I* that the Commission may not 'loftily abstract[ ] away from all specific markets.'" *Id.* at 569 (quoting *USTA I,* 290 F.3d at 423). The Court held that the Commission could not make an undifferentiated nationwide finding of impairment without exhaustively "exploring the possibility" of "more nuanced" or "narrowly-tailored" alternatives "and reasonably rejecting them." *USTA II,* 359 F.3d at 570.

In rendering its decision, the Court temporarily stayed the vacatur of the unbundling rules for mass market switching and dedicated transport "until no later than the later of (1) the denial

[1] The Court's opinion did not expressly address the FCC's rules governing high-capacity loops. Those rules, like the rules that the Court explicitly vacated, were based on a nationwide impairment finding that was subject to modification if state commissions found no impairment in particular markets. *See Triennial Review Order* ¶¶ 311-340. ILECs generally have asserted that the Court vacated the unbundling rules for high-capacity loops. *See, e.g.,* Petition at 4 n.5. In light of the ILECs' assertion, and to "ensure a smooth transition governed by clear requirements," the Commission drafted the interim rules at issue here with the conservative assumption that the Court has vacated the high-capacity loop rules. *Order* at n.4.

of any petition for rehearing or rehearing en banc or (2) 60 days from" March 2, 2004 (the date on which the Court issued the *USTA II* decision). *USTA II,* 359 F.3d at 595. No party petitioned for rehearing.

3. In May 2004, the FCC, the CLECs, and the state commissions all filed motions for a stay of the mandate pending the filing of petitions for a writ of certiorari. The Court denied those motions on June 4, 2004.

The FCC and the United States subsequently decided not to petition for certiorari. Shortly thereafter, in the days before the mandate issued, the four Bell operating companies sent letters to the FCC in which they committed to take steps to preserve existing UNE arrangements for a limited period of time to protect the market while the Commission drafted new rules. *See Order* ¶ 7 & n.26. The mandate issued on June 16, 2004.

The CLECs, NARUC, and California filed certiorari petitions, which are pending. In their brief opposing certiorari (filed on September 1, 2004), the FCC and the United States explained that they chose not to seek further review after concluding that the prompt adoption of new FCC rules would best serve the public interest. The government noted in its Supreme Court brief that "[q]uick agency action to establish new rules consistent with the court of appeals' decision will avoid the uncertainty – for consumers and the communications industry as a whole – that would be associated with the process of merits review by [the Supreme] Court and any ensuing remand proceedings in the court of appeals." Brief for the Federal Respondents in Opposition, *NARUC v. USTA,* Sup. Ct. Nos. 04-12, 04-15 & 04-18, at 25.

4. Immediately after this Court issued its *USTA II* decision on March 2, 2004, FCC Chairman Michael Powell directed the agency staff to begin work on revised rules responding to the Court's decision. *See* Statement of FCC Chairman Michael K. Powell Regarding the D.C.

Circuit Decision on Triennial Review, March 2, 2004 (available at www.fcc.gov). On August 20, 2004, as part of that process, the FCC issued an order and notice of proposed rulemaking ("NPRM") in its remand proceeding. In the NPRM, the Commission sought public comment on how it should revise its unbundling rules to respond to the *USTA II* decision. *Order* ¶¶ 8-15. Specifically, the Commission invited parties to submit "evidence at a granular level" that would enable the agency to determine "which specific network elements" it should require ILECs "to make available as UNEs in which specific markets, consistent with *USTA II*." *Order* ¶ 11. Initial public comments are due on October 4, 2004, with reply comments due 15 days thereafter.

In the ordering portion of its decision, the Commission found that "the pressing need for market certainty" justified the adoption of interim rules to ensure a smooth and orderly transition to the new regulatory regime that is being developed on remand. *Order* ¶ 16. The Commission explained that absent agency action, "existing UNE arrangements might be terminated prematurely without an orderly transition mechanism in place" – a scenario that "would be inimical to competition and its benefits for consumers, and thus would be inconsistent with the public interest." *Order* ¶ 10.

To guard against such harmful market disruption, the Commission adopted interim rules that "require [ILECs] 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" (*i.e.,* the day before this Court's mandate issued). *Order* ¶ 16. The Commission declared that these interim requirements would remain in place only until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of the *Order*, and that the interim rules would not govern 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." *Ibid.* The Commission stated that CLECs "may not opt into the contract provisions 'frozen' in place by this interim approach." *Order* ¶ 22. At the same time, the Commission made clear that its interim rules preserve ILECs' contractual prerogatives under their interconnection agreements to initiate change of law proceedings in light of the *USTA II* mandate. *Ibid.*

In a separate statement accompanying the *Order*, Chairman Powell announced that he has scheduled a Commission vote on the final unbundling rules for December 2004. *Order,* Statement of Chairman Michael K. Powell at 2. The *Order* was published in the Federal Register on September 13, 2004. *See* 69 Fed. Reg. 55111-01 (Sept. 13, 2004). Accordingly, the six-month interim rules established by the *Order* will expire by their own terms no later than March 13, 2005, and as early as December 2004 under the schedule described by Chairman Powell.

For the six-month period immediately following the interim period for which the FCC preserved the terms in effect under existing interconnection agreements, the Commission proposed and sought comment on additional transitional requirements. Under the Commission's proposal, in the absence of a Commission ruling requiring unbundling of a particular element under section 251(c)(3), ILECs would be required for six months after the interim period to

continue to lease the element in question, but at a Commission-prescribed rate that is higher than the current rate. *Order* ¶ 29.[2]

ARGUMENT

To obtain a writ of mandamus, petitioners must carry the heavy "burden of showing that [their] right to issuance of the writ is clear and indisputable." *In re Cheney,* 334 F.3d 1096, 1102 (D.C. Cir. 2003) (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 289 (1988)); *see also Cobell v. Norton,* 334 F.3d 1128, 1137 (D.C. Cir. 2003). "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Cheney,* 334 F.3d at 1101 (quoting *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976)). This is not one of those situations. Contrary to petitioners' insistent contention, the FCC's *Order* does not reinstate the same rules that the Court vacated in *USTA II*. Rather, the *Order* adopts short-term interim rules that are reasonably tailored to prevent undue market disruption during the transition to a new regulatory regime – temporary transitional rules of the sort that this Court has repeatedly upheld in the past. The three petitioners[3] also have not shown that they would suffer substantial or lasting harm in the absence of mandamus relief. The Court should deny the mandamus petition.

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[2] As petitioners acknowledge, the FCC's proposal for the six months following the interim period has "no legal force whatsoever." Petition at 13. It is a proposal that the agency may or may not adopt when it issues final rules. Because this proposal does not constitute final agency action, it is not subject to judicial review. *See* 28 U.S.C. § 2342(1).

[3] SBC and BellSouth, who were petitioners in the *USTA II* litigation, have not joined this mandamus petition.

I. THE INTERIM RULES DO NOT VIOLATE THE *USTA II* MANDATE.

Petitioners Qwest, Verizon, and USTA repeatedly contend that the Commission effectively granted itself a stay of this Court's mandate by reinstating "the exact same" rules that the Court vacated in *USTA II*. Petition at 8-11. That is incorrect. As the Commission plainly explained in the *Order,* its approach here differs "in several meaningful respects … from a mere reinstatement of [the] vacated rules" and, in fact, "forecloses the implementation and propagation of the vacated rules." *Order* ¶ 23. The *Order*'s interim rules also do not contravene the Court's mandate in any other respect.

A. The Interim Rules Do Not Reinstate The Vacated Rules.

The interim rules require ILECs for a limited time to "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." *Order* ¶ 21. The interim rules thus maintain contractual arrangements that have been established by ILEC-CLEC negotiations or state arbitrations, while the FCC completes the task of prescribing new rules to govern this important statutory program. As the Commission explained in the *Order,* "[t]he interim requirements merely maintain unbundling obligations that have been governing the industry." *Order* ¶ 28.

Many of the interconnection agreements preserved under the interim rules were not based on the vacated rules. In many instances, those agreements were negotiated or arbitrated before the vacated rules took effect. Thus, the vacated rules themselves do not govern CLECs' interim access to ILECs' network elements. *Order* ¶ 23.

The Commission's refusal to reinstate the vacated rules has two particularly important practical effects. First, as the Commission pointed out, "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." *Order* ¶ 23. Second, if the Commission had reinstated the rules that this Court vacated, no "change of law" with respect to unbundled access would have occurred, and ILECs would not be able to avail themselves of "change of law" proceedings in the states – the contractual mechanism by which individual ILECs and CLECs will reconcile their agreements with this Court's *USTA II* decision. Under the FCC's interim rules, however, ILECs are free to initiate "change of law proceedings that presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport." *Ibid.* By allowing this process to go forward even before the FCC promulgates its final rules on remand, the interim rules will permit any state-approved modifications to "take effect quickly if [the FCC's] 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 the *Order*. *Ibid.* Thus, unlike *International Ladies' Garment Workers' Union v. Donovan,* 733 F.2d 920 (D.C. Cir. 1984) – the case on which petitioners principally rely – this is not a case in which the agency "simply reimplemented precisely the same rule that this court vacated as 'arbitrary and capricious' in its first decision." *Id.* at 923.

Verizon, Qwest, and USTA claim that the distinctions between the interim rules and the vacated rules do not amount to "meaningful differences." Petition at 11 n.14. But when the ILECs opposed a further stay of the mandate pending the filing of petitions for certiorari, they emphasized the importance of "change of law" provisions, saying that they establish "orderly procedures" that should be relied upon to allow a smooth "transition away" from the vacated rules. Joint Opposition of ILECs to Motions to Stay the Mandate Pending the Filing of Petitions

for a Writ of Certiorari, June 1, 2004, at 15. It is too late in the day for petitioners to deny that the Commission's allowance of change of law proceedings during the interim rulemaking period provides ILECs "meaningful" relief as compared to the regime that would have prevailed if the Commission had reinstated its vacated rules. By authorizing the use of contractual change of law procedures, the Commission's interim rules have taken action that is "reasonably calculated" to further the implementation of the Court's mandate – much like interim rules that this Court previously has upheld. *See Mid-Tex Electric Cooperative, Inc. v. FERC,* 822 F.2d 1123, 1130 (D.C. Cir. 1987).

This case is very different from *Radio-Television News Directors Ass'n v. FCC,* 229 F.3d 269 (D.C. Cir. 2000) ("*RTNDA II*"). In that case, the FCC had failed to address a 20-year-old petition to vacate certain broadcast rules that "chill[ed] at least some speech," even after the Court had earlier remanded the matter to the agency with a directive to "act expeditiously." *See Radio-Television News Directors Ass'n v. FCC,* 184 F.3d 872, 887, 889 (D.C. Cir. 1999) ("*RTNDA I*"). In those "extraordinary circumstances" – where the Court found that the Commission had persisted in delaying resolution of a rulemaking petition that had been pending for two decades – the Court issued a writ of mandamus. *RTNDA II,* 229 F.3d at 272. In this case, by contrast, the Commission has commenced its proceeding on remand and intends to act quickly to adopt final rules that respond to this Court's mandate in *USTA II.* Chairman Powell has scheduled the matter for a vote at the Commission's December 2004 open meeting. *Order,* Statement of Chairman Michael K. Powell at 2. That reasonable timetable – which is consistent with the issuance of final rules by the January 2005 deadline that petitioners themselves suggest would be reasonable, *see* Petition at 21 & n.23 – does not remotely resemble the sort of delay

that "is so egregious as to warrant mandamus." *Telecommunications Research & Action Center v. FCC,* 750 F.2d 70, 79 (D.C. Cir. 1984) ("*TRAC*").

B. The FCC Reasonably Rejected Alternative Proposals.

The Commission's interim regulatory framework is reasonably designed "to minimize disruptive effects and marketplace uncertainty" that would result from the abrupt termination of existing UNE arrangements. *Order* ¶ 20. Without interim rules, the Commission found, "the disruption that would accompany a chaotic transition period would undermine the very competition that was the objective of *USTA II*." *Ibid.* A sudden termination of existing UNE arrangements "would be inimical to competition and its benefits for consumers, and thus would be inconsistent with the public interest." *Order* ¶ 10.

This Court has repeatedly held that "[a]voidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule." *Competitive Telecommunications Ass'n v. FCC,* 309 F.3d 8, 14 (D.C. Cir. 2002) ("*CompTel*") (citing *MCI Telecommunications Corp. v. FCC,* 750 F.2d 135, 141 (D.C. Cir. 1984), and *ACS of Anchorage, Inc. v. FCC,* 290 F.3d 403, 410 (D.C. Cir. 2002)). The Commission, moreover, "is entitled to substantial deference" where, as here, "'it acts to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated,' including the objective of implementing large-scale revisions 'in a manner that would cause the least upheaval in the industry.'" *ACS of Anchorage,* 290 F.3d at 410 (quoting *MCI,* 750 F.2d at 141).

Petitioners suggest that those precedents are inapposite because the Court in those cases "upheld interim rules that were *not* issued in response to a vacatur of prior rules." Petition at 12 (emphasis in original). But courts have shown the same deference to interim rules that were issued in response to a judicial vacatur. For instance, after the Seventh Circuit vacated the

FCC's financial interest and syndication ("finsyn") rules in 1992, *see Schurz Communications, Inc. v. FCC,* 982 F.2d 1043 (7th Cir. 1992), the Commission decided to keep some of the finsyn restrictions in place for an interim period of two years. On review, the Seventh Circuit rejected a challenge to these interim restrictions. *Capital Cities/ABC, Inc. v. FCC,* 29 F.3d 309, 314-16 (7th Cir. 1994). In upholding the interim restrictions, Judge Posner explained: "[C]aution in overturning a regulatory system that has been in place for many years strikes us as an adequate reason for an agency's deciding to continue the system in limited form for a brief period before decreeing total deregulation." *Id.* at 316.

In any event, petitioners cannot (and do not) seriously dispute that the FCC may take market stability into account as it implements the *USTA II* mandate. When the Bell companies voluntarily agreed in June 2004 to accept many of the legal obligations that the *Order* subsequently mandated on an interim basis, they "acknowledge[d] the importance of ensur[ing] stability and continuity … and … an orderly transition for consumers" in the wake of *USTA II. Order* ¶ 19 (internal quotations omitted).[4] And petitioner USTA has expressly recognized that "interim rules can be justified … as a way to bridge the gap until the agency can promulgate permanent rules pursuant to notice and comment." Letter from Michael K. Kellogg, Counsel for USTA, to John A. Rogovin, General Counsel, FCC, June 24, 2004, at 4.

[4] *See, e.g.,* Letter from Edward Whitacre, Chairman and CEO, SBC, to Michael K. Powell, Chairman, FCC, June 9, 2004 (SBC agreed to preserve existing UNE arrangements at least through the end of 2004 "[t]o help ensure stability and continuity … and to help assure regulators, policymakers and consumers that there will be no marketplace disruption during the transition" to a new regulatory regime); Letter from F. Duane Ackerman, Chairman and CEO, BellSouth, to Michael K. Powell, Chairman, FCC, June 10, 2004 (affirming BellSouth's "commitment to ensure an orderly transition for consumers and carriers away from the Commission's rules" that the Court vacated in *USTA II*).

Petitioners complain that the interim rules did not "address *all* of the failings" of the rules that the Court vacated. Petition at 11 (emphasis in original). But it would be unreasonable to expect interim rules to address every aspect of the Court's decision. Interim rules are permissible as a temporary stopgap until the adoption of permanent rules that fully respond to the Court's mandate and implement the statutory requirements. *See* 5 U.S.C. § 553(b)(3)(B); *see also, e.g., CompTel,* 309 F.3d at 14 ("Avoidance of market disruption pending broader reforms is … a standard and accepted justification for a temporary rule."); *American Gas Ass'n v. FERC,* 888 F.2d 136, 152-53 (D.C. Cir. 1989) ("When the Commission determined that it required further information in order to respond to the mandate of [*Associated Gas Distributors v. FERC,* 824 F.2d 981 (D.C. Cir. 1987), *cert. denied,* 485 U.S. 1006 (1988)], it was not unreasonable to delay issuing a final rule until April 1, 1988, and to put out an interim rule to govern the industry through the 1988 winter heating season."). Petitioners nonetheless claim that the Commission's interim rules must reflect a comprehensive impairment analysis for each network element in question. Petition at 12. Requiring that sort of interim approach not only would place unrealistic demands on the Commission, but would obliterate any real distinction between interim and permanent rules.

To perform an impairment analysis that will satisfy the requirements of *USTA II*, the Commission will need to develop an augmented, up-to-date record. In the *Order,* the Commission commenced a new rulemaking for just that purpose. *Order* ¶¶ 8-15. As petitioners point out, several ILECs deemed it appropriate even before the Commission issued its NPRM to provide the Commission with extensive new evidence on the subject of impairment. Petition at 13 n.15. The Commission will need time to review this new evidence, as well as evidence it receives from other parties, before it can make well-informed decisions in the next few months

as to whether competing carriers are impaired at the present time without unbundled access to mass market switching, dedicated transport, and high-capacity loops in particular markets. It is unreasonable to expect the Commission at this interim stage to hastily prejudge the extent of impairment on the basis of a record that is still in the process of being compiled.

Petitioners also attack two other aspects of the interim rules: (1) preserving ILECs' contractual obligations to provide CLECs with UNEs to serve new customers; and (2) the failure of the interim rules to provide for a pricing "true-up" upon the issuance of final rules. Petition at 14-15. In the *Order,* the Commission reasonably explained why it rejected these approaches. It "considered, but decline[d] to adopt, an interim approach that precludes the addition of new customers" because, in the agency's judgment, "given the high rate of customer turn-over for services affected by these rules," a ban on new customers would have "severely compromised" CLECs' "ability to compete or even stay in business." *Order* ¶ 25.[5] Petitioners do not even attempt to dispute the correctness of that determination by the FCC. Furthermore, even if existing interconnection agreements allow CLECs to sign up new customers under the vacated rules despite the issuance of this Court's mandate and the ILECs' ability to invoke change of law procedures, CLECs will be cautious in enrolling new customers under any business plan that assumes the future availability of the disputed facilities as UNEs. Indeed, AT&T announced that it would *not* accept new residential customers precisely because of the uncertainty arising from *USTA II. See* Young, A Phone Deal You Don't Want, Wall St. J., June 29, 2004, at D1.

[5] In comments submitted during the Triennial Review proceeding, for example, WorldCom estimated that about half of its customers terminate their service within just three months of commencing it. *See Triennial Review Order* at n.1604.

For similar reasons, the Commission declined to make the interim rules subject to a "true-up" that would require CLECs "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." *Order* ¶ 25. The Commission determined that adopting a true-up would be tantamount to denying CLECs any interim right of UNE access under their existing contracts. *Ibid.* A true-up requirement, the Commission concluded, would have a severe and "immediate financial impact" on the continued viability of competing carriers because, due to accounting requirements, those carriers "would likely have to begin to reserve – immediately and for every single element subject to dispute" – any amounts for which they might possibly be liable when the true-up becomes due (after the FCC decides what facilities do and do not have to be provided at UNE rates under the new, permanent rules). *Ibid.*

Petitioners apparently recognize that, in at least some markets, CLECs will be impaired without access to the UNEs at issue in this case. Yet, if petitioners have their way, CLECs in those markets will be unable to obtain those UNEs until the Commission adopts final rules. That outcome is inconsistent with Congress's intent to promote local competition by making UNEs available to CLECs who would be impaired without them. If those CLECs are deprived of access to all of the disputed UNEs during the interim period, they may go out of business before the Commission implements final unbundling rules that could possibly restore their right of access to some of those UNEs. *Order* ¶ 26. To avert this serious threat to the development of local competition, the Commission reasonably decided to make the UNEs in question available for the interim period – to the extent provided under existing interconnection agreements – until the Commission is able to make more definitive unbundling determinations on the basis of an updated record.

C. The Duration Of The Interim Rules Is Consistent With The Mandate And This Court's Precedent.

In the past, when this Court's vacatur of agency rules has created the potential for market disruption, the Court has recognized that an agency can be justified "in promulgating temporary emergency rules …until [the agency] can … promulgate new permanent rules which reflect [the Court's] holding." *Brae Corp. v. United States,* 740 F.2d 1023, 1070 (D.C. Cir. 1984); *see also American Gas Ass'n,* 888 F.2d at 152-53. In light of that precedent, petitioner USTA has acknowledged before the FCC that "interim rules can be justified … as a way to bridge the gap until the agency can promulgate permanent rules pursuant to notice and comment." Letter from Michael K. Kellogg, Counsel for USTA, to John A. Rogovin, General Counsel, FCC, June 24, 2004, at 4. The interim rules set forth in the *Order* will last no longer than is necessary to perform that reasonable and permissible function.

Petitioners assert that the interim rules will remain in place "through at least the end of February 2005." Petition at 1, 6, 14, 16. That assertion ignores various scenarios under which the interim rules would expire or be superseded before that time. The interim rules will expire in less than six months if the FCC's final unbundling rules take effect before then. *Order* ¶ 16. In addition, the interim rules can be superseded at any time by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (such as an order addressing a pending petition for reconsideration of the *Triennial Review Order*), or (3) (with respect to rates) a state public utility commission order raising the rates for network elements. *Order* ¶ 16.

Petitioners suggest that the FCC's interim rules are part of a strategy "to preserve maximum unbundling through delay." Petition at 19. There is no basis for that claim of agency bad faith. And it makes no sense. Chairman Powell and Commissioner Abernathy, who voted to

adopt the interim rules, strenuously *opposed* the switch-unbundling requirements that this Court vacated in *USTA II*. *See Triennial Review Order,* Separate Statement of Chairman Michael K. Powell, 18 FCC Rcd at 17504-20; *id.,* Separate Statement of Commissioner Kathleen Q. Abernathy, 18 FCC Rcd at 17521-30. And in their separate statements accompanying the *Order*, they reiterated their staunch opposition to a policy that the ILECs have dubbed "maximum unbundling."[6]

Contrary to petitioners' assertion, the Commission has not adopted a "strategy" of delay. Indeed, the FCC and the United States decided not to seek certiorari in this case because they sought to avoid delay. In their brief opposing certiorari petitions filed by other parties, the FCC and the United States explained that the public interest can best be served not by protracted litigation, but by the prompt adoption of new rules by the FCC: "Quick agency action to establish new rules consistent with the court of appeals' decision will avoid the uncertainty – for consumers and the communications industry as a whole – that would be associated with the process of merits review by [the Supreme] Court and any ensuing remand proceedings in the court of appeals." Brief for the Federal Respondents in Opposition, *NARUC v. USTA,* Sup. Ct. Nos. 04-12, 04-15 & 04-18, at 25.

In their own opposition to the certiorari petitions in the Supreme Court, unlike the instant mandamus petition in this Court, the ILECs emphasized that "the FCC has stated that it intends

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[6] *See Order,* Statement of Chairman Michael K. Powell at 1 ("I am not a fan of UNE-P …. 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."); *id.,* Statement of Commissioner Kathleen Q. Abernathy at 1 ("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.").

to adopt new narrowband unbundling rules by December 15 of this year," and argued that there was "no reason for the [Supreme] Court to address issues that are slated to become moot before a decision can be reached." Brief for Respondents BellSouth, Qwest, SBC, USTA, and Verizon in Opposition, *NARUC v. USTA,* Sup. Ct. Nos. 04-12, 04-15 & 04-18, at 1. Under the same reasoning that the ILECs have advanced in the Supreme Court, the Commission's resolve to adopt new rules by the end of the year makes it inappropriate for this Court to grant mandamus relief on the basis of petitioners' irresponsible claims of intentional "delay."

II. PETITIONERS HAVE NOT DEMONSTRATED IRREPARABLE HARM THAT WOULD JUSTIFY THE EXTRAORDINARY REMEDY OF MANDAMUS.

The remedy of mandamus "is reserved for extraordinary circumstances in which … no other adequate means to obtain relief exist." *Byrd v. Reno,* 180 F.3d 298, 302 (D.C. Cir. 1999); *see also In re Sealed Case,* 151 F.3d 1059, 1063 (D.C. Cir. 1998). Mandamus "may not be invoked as a mere substitute for appeal" when a party can obtain adequate relief by seeking direct appellate review of an FCC order and requesting a stay pending review. *In re GTE Service Corp.,* 762 F.2d 1024, 1026-27 (D.C. Cir. 1985). Judged by these stringent standards, petitioners have failed to show the sort of severe and irreparable harm that would justify the extraordinary relief they seek.

Petitioners' claims of harm are greatly overstated. Even before the FCC adopted the interim rules, the four Bell operating companies ("BOCs") had voluntarily agreed on an interim basis to accept many of the same obligations that the rules subsequently imposed. *See Order* ¶ 7 & n.26. When the BOCs made those voluntary commitments, they obviously did not believe that those obligations would irreparably harm them. Indeed, BellSouth and SBC, two BOCs who were petitioners in the *USTA II* litigation, have not sought mandamus here.

Even more tellingly, after the Supreme Court vacated the FCC's original unbundling rules in *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366 (1999), the corporate predecessors of the two ILEC petitioners here (Verizon and Qwest) agreed to continue to abide by their existing interconnection agreements until the Commission issued new rules in response to the Supreme Court's remand.[7] The rules that were vacated in that case required much more network unbundling than the rules that this Court vacated in *USTA II*.[8] Thus, the burden of the ILECs' voluntary commitments to live under their existing agreements after the Supreme Court's remand was much greater than any burden of complying with the interim requirements of the *Order.* Against that backdrop, petitioners cannot now credibly claim that they will suffer irreparable harm as a consequence of the new interim rules.

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[7] *See* Letter from William P. Barr, GTE, to Lawrence Strickling, FCC, Feb. 12, 1999 ("during the FCC proceeding on remand from the Supreme Court, GTE will continue to make available each of the individual network elements defined in the now-vacated FCC rules and our existing interconnection agreements."); Letter from Edward D. Young III, Bell Atlantic, to Lawrence Strickling, FCC, Feb. 8, 1999 ("during the FCC proceeding on remand from the Supreme Court, Bell Atlantic will continue to make available each of the individual network elements defined in the now-vacated FCC rules and our existing interconnection agreements"); Letter from Bruce K. Posey and Katherine L. Fleming, U S West, to Lawrence Strickling, FCC, Feb. 11, 1999 ("U S WEST will honor existing contracts with respect to the availability and pricing of unbundled network elements until the FCC adopts its order setting forth new interconnection rules, network element definitions and ILEC obligations").

[8] In the *Triennial Review Order,* the Commission eliminated the unbundling requirements that it had previously imposed with respect to line sharing, the broadband capabilities of loops that serve residential customers, and enterprise switching (used to serve large and mid-size businesses). This Court affirmed the agency's decision to roll back these requirements. *USTA II,* 359 F.3d at 578-87. The interim rules at issue here apply only to three discrete categories of network elements: mass market switching, dedicated transport, and high-capacity loops. In that respect, they impose much less pervasive unbundling requirements than the rules that the Supreme Court vacated in 1999 – rules that remained in effect (by agreement of the major ILECs) until the FCC issued new rules to respond to the Supreme Court's remand.

Assuming that new rules take effect before the end of the year, the interim requirements imposed by the *Order* would be largely the same as the voluntary commitments made by Verizon and Qwest. The only differences would be that, under the interim rules, Verizon would have to extend its voluntary offering of UNEs for a period of six weeks or less, Qwest would have to offer high-capacity loops and transport as UNEs for a few months, and both carriers would have to fill UNE orders for new CLEC customers until new rules were promulgated in December 2004. Verizon and Qwest have not shown that the incremental differences between their voluntary commitments and the interim rules would cause irreparable harm. Likewise, although petitioners imply that the interim rules will harm "the hundreds of smaller ILECs represented by USTA," Petition at 17, the petition fails to substantiate any concrete injury to those carriers.

Petitioners primarily complain that they are losing customers to CLECs that use UNEs. Petition at 16-17 & n.18. But if the FCC adopts final rules that allow ILECs to obtain the elimination of contractual unbundling obligations that have been preserved on an interim basis under the *Order*, petitioners may very well regain the customers they have lost. Indeed, Bell company officials have told institutional investors that the Bells expect to win back most of the customers they have lost to CLECs. *See* Hyde, Baby Bells See Rivals Taking Fewer Phones (Sept. 9, 2004) (http://biz.yahoo.com/rb/040909/telecoms_competition_1.html). As this Court has recognized, "revenues and customers lost to competition which can be regained through competition are not irreparable." *Central & Southern Motor Freight Tariff Ass'n v. United States,* 757 F.2d 301, 309 (D.C. Cir. 1985) (internal quotations omitted). And in the absence of irreparable harm, a grant of mandamus would be inappropriate. *In re Thornburgh,* 869 F.2d 1503, 1517 (D.C. Cir. 1989).

Alternatively, if the Commission retains some unbundling requirements when it adopts final rules in this proceeding, and if petitioners believe that they are aggrieved by those requirements, they will have "a clearly adequate remedy" in the normal course of litigation: They can petition for review of the FCC's new rulemaking order and move for a stay pending review. *See GTE Corp.,* 762 F.2d at 1026. Consequently, there is no reason to grant mandamus here.[9]

III. THE SPECIFIC RELIEF SOUGHT BY PETITIONERS IS UNJUSTIFIED.

Before considering resort to the extreme remedy of mandamus, the Court should afford the Commission an opportunity to act in a timely fashion. If again asked by petitioners, the Court could reassess the Commission's progress toward implementing new rules at the beginning of 2005, and could then determine whether judicial action is warranted. But there is no basis for granting mandamus now, when the agency has announced its intention to act within the time frame proposed by petitioners themselves. *See In re Monroe Communications Corp.,* 840 F.2d 942, 946 (D.C. Cir. 1988) (no need for mandamus in light of assurances by FCC counsel "that the outstanding issues will be resolved expeditiously"); *TRAC,* 750 F.2d at 80 (declining to grant mandamus petition because "the FCC has assured us that it is moving expeditiously").

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[9] Given the extraordinary nature of mandamus, this Court should not grant mandamus relief more readily than it would grant a stay if petitioners were to petition for review of the interim rules. And petitioners could not obtain a stay of the interim rules unless they demonstrated that the balance of hardships tips in their favor. Consequently, the Court should also consider the balance of hardships when assessing petitioners' mandamus request. Because CLECs would suffer extreme competitive harm in the absence of the interim rules – harm that far exceeds any injury petitioners might incur by complying with the interim rules – the Court should deny the mandamus petition.

In their request for mandamus relief, petitioners also ask the Court to rule that, if the Commission "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." Petition at 21. This extraordinary proposal ignores decades of Supreme Court precedent. It is well settled that a reviewing court cannot itself make determinations that Congress has assigned to an administrative agency: "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.... [A]n appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *SEC v. Chenery Corp.,* 318 U.S. 80, 88 (1943); *see also INS v. Orlando Ventura,* 537 U.S. 12, 16 (2002). Therefore, when reviewing agency action, a "court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" *Ibid.* (quoting *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 744 (1985)). "Rather, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Orlando Ventura,* 537 U.S. at 16 (internal quotations omitted).

If (as petitioners propose) this Court were to treat any failure by the Commission to issue new rules before 2005 as a finding of no impairment, the Court would effectively be making a determination that Congress entrusted to the FCC – a determination that the agency is expected to make on the basis of the record evidence before it. An unqualified nationwide finding of no impairment would also run afoul of this Court's holding in *USTA I* that it is arbitrary and

capricious "to adopt a uniform national rule … without regard to the state of competitive impairment in any particular market." *USTA I,* 290 F.3d at 422.

Petitioners maintain that if the FCC fails to act by the end of the year, the Court should announce a federal "no impairment" standard "to check the unbundling efforts of state commissions." Petition at 21. Wholly apart from the impropriety of such a judicial encroachment on the FCC's congressionally delegated authority, the ILECs are here asking this Court to decide a substantive question of law that it expressly has determined is *not* ripe for review – whether a federal determination against requiring unbundling would necessarily preclude the states from ordering equivalent unbundling. In the *Triennial Review Order,* the FCC did not make any determinations that any particular state rules were preempted; and in *USTA II,* the Court found that the preemption issue was not yet ripe. 359 F.3d at 594. Furthermore, if states impose additional unbundling obligations, they are likely to do so through their arbitration and approval of interconnection agreements. Section 252(e)(6) entrusts federal district courts – not this Court – with jurisdiction to review state commissions' decisions concerning interconnection agreements. 47 U.S.C. § 252(e)(6).

Petitioners now maintain that state commissions will likely "extend the life" of the vacated unbundling rules "indefinitely" if the Commission fails to act quickly on remand Petition at 20. But as noted above (see Part I.A, *supra*), petitioners took a very different position when they opposed the FCC's motion for a stay of the mandate in this case. They then contended that a stay was unnecessary because "there are orderly procedures in place to transition away from the current regime" – the "change of law" provisions in state-approved interconnection agreements. ILEC Opposition to Motions to Stay the Mandate, June 1, 2004, at 15; *see also* Opposition of ILECs to Applications for Stay, Sup. Ct. Nos. 03-A1008 & 03-A1010,

June 14, 2004, at 30. Under those "orderly procedures," state commissions resolve any disputes stemming from changes in the law. Petitioners have offered no good explanation supporting their assertion that the procedures they once touted as sufficient to fill the void created by this Court's vacatur of the FCC's old unbundling rules are now likely to cause the ILECs irreparable harm.

In any event, petitioners' prediction that FCC inaction will create "a regulatory vacuum" after January 1, 2005 (Petition at 20) is far too speculative a rationale to justify the extraordinary remedy of mandamus. If the Commission adopts new rules by December 2004, petitioners' predictions of a "regulatory vacuum" will never materialize. At this point, petitioners' request for mandamus relief is at best premature.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of mandamus or, in the alternative, hold the petition in abeyance until no earlier than January 1, 2005, to assess the status of the Commission's remand proceedings at that time.

Respectfully submitted,

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