

FEDERAL COMMUNICATIONS COMMISSION**47 CFR Part 51**

[CC Docket Nos. 01–338; CC Docket No. 96–98; CC Docket No. 98–147; FCC 03–36]

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopts rules which establish a new standard for determining the existence of impairment under section 251(d)(2) of the Act, sets forth a new list of unbundled network elements (UNEs), and creates a specifically defined role for the states in the unbundling inquiry. The new interpretation of the “impair” standard in section 251(d)(2) finds a requesting carrier to be impaired when lack of access to a facility in the incumbent LEC’s network poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic. The Commission reaffirms that the “at a minimum” language of section 251(d)(2) permits the Commission to take into account factors other than the “impair” and “necessary” standards, particularly important goals of the 1996 Act, when making unbundling determinations. The Commission applies its unbundling analysis to individual elements in a more granular manner than before. Under this more granular approach, the Commission determines whether impairment varies by geographic location, customer class, and service, including a consideration of the type and capacity of the facilities to be used.

DATES: Effective October 2, 2003.

FOR FURTHER INFORMATION CONTACT:

Jeremy Miller, Attorney-Advisor, Wireline Competition Bureau, at (202) 418–1580 or via the Internet at jmiller@fcc.gov. The complete text of this Report and Order and Order on Remand is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. Further information may also be obtained by calling the Wireline

Competition Bureau’s TTY number: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s Report and Order and Order on Remand in CC Docket No. 01–338, CC Docket No. 96–98, and CC Docket No. 98–147; FCC 03–36, adopted February 20, 2003, and released August 21, 2003. The full text of this document may be purchased from the Commission’s duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via e-mail qualexint@aol.com. It is also available on the Commission’s Web site at http://www.fcc.gov/Bureaus/Wireline_Competition/in-regio_applications.

Synopsis of the Report and Order and Order on Remand

1. *Background.* In the *Notice of Proposed Rulemaking (NPRM)* (67 FR 1947, Jan. 15, 2002), the Commission sought comment on many issues concerning the unbundling obligations of incumbent local exchange carriers (LECs) under section 251(c)(3) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act). After the Commission issued the *NPRM*, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in *United States Telecom Association v. FCC (USTA)*, in which it vacated and remanded the Commission’s prior unbundling rules. The Commission issues this *Report and Order and Order on Remand* (Order) to complete the rulemaking it began with the *NPRM* and respond to the D.C. Circuit’s concerns regarding the prior rules.

2. Section 251(c)(3) of the Act requires that incumbent LECs provide UNEs to other telecommunications carriers. Section 153(29) of the Act defines “network element” as “a facility or equipment used in the provision of a telecommunications service,” specifying that “[s]uch term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provisions of a telecommunications service.” Section 251(d)(2) of the Act establishes a general federal standard for use in determining the UNEs that must be made available by the incumbent LECs pursuant to section 251. Section 251(d)(2) provides that “[i]n

determining what network elements should be made available for purposes of section (c)(3), the Commission shall consider, at a minimum, whether “(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”

3. In addition, the Act preserves a state role in addressing unbundling issues. First, section 252 authorizes states to review and to arbitrate interconnection agreements for compliance with the requirements of sections 251 and 252 and this Commission’s implementing rules. Second, section 251(d)(3) also preserves states’ independent state law authority to address unbundling issues to the extent that the exercise of that authority does not conflict with federal law.

4. *Definition of Network Element.* The Commission interprets the definition of “network element” in section 153(29) to refer to an element of the incumbent’s network that is capable of being used to provide a telecommunications service.

5. *Impair Standard.* The Commission finds a requesting carrier to be “impaired” under section 251(d)(2) 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 granular analysis is informed by consideration of the relevant barriers to entry, as well as a careful examination of the evidence, especially marketplace evidence showing whether entry has already occurred in particular markets without reliance on the incumbent LEC’s networks but instead through self-provisioning or reliance on third-party sources.

6. Several types of barriers to entry inform the “impair” analysis. Scale economies, particularly when combined with sunk costs and first mover advantages, can pose a powerful barrier to entry. The Commission will consider the pervasiveness of scale economies to determine whether, in combination with other factors, they are likely to make entry uneconomic. For similar reasons, the Commission also examines scope economies to determine whether they, too, could contribute to a barrier to entry. Sunk costs, particularly when combined with scale economies, can pose a formidable barrier to entry. First mover advantages can contribute to the factors described above. First mover advantages can include preferential access to buildings, access to rights of way, the higher risk of a new entrants’