

failure (often exacerbated by high sunk costs), the fact that the incumbent LEC has substantial sunk capacity, operational difficulties faced by an entrant that have already been worked out by the incumbent LEC when it built out its network as a monopolist, consumers' reluctance to switch carriers, and advertising and brand name preference. The Commission also examines those barriers to entry that are solely or primarily within the control of the incumbent LEC. The Commission looks to these barriers because it is within the control of the incumbent LEC to eliminate them or mitigate their effects, which could eliminate the need to unbundle network elements to overcome them.

7. *Evidence of Impairment.* Actual marketplace evidence is the most persuasive and useful kind of evidence submitted to show that impairment does not exist, in particular granular evidence that new entrants are providing retail services in the relevant market using non-incumbent LEC facilities. The Commission gives substantial weight to evidence of alternative deployment, but will not find it conclusive or presumptive of no impairment without additional information. On the other hand, if the marketplace evidence shows that new entrants have not widely deployed a particular kind of facility, the Commission will consider the facts as some evidence that barriers to entry in that market for that element are preventing the deployment, but will not presume from lack of entry or lack of deployment, however, that there are barriers to entry in the relevant market, or that any barriers cannot be overcome through means other than unbundling without further analysis. The Commission also gives weight to evidence that intermodal alternatives can be used to provide telecommunications service.

8. The application of the "impair" standard does not change depending on whether a new entrant is providing retail or wholesale services. The Commission also reaffirms its prior conclusion in the *UNE Remand Order*, 65 FR 2367 (Jan. 14, 2000) to afford little weight to evidence that requesting carriers are using incumbent LEC tariffed services.

9. *Granularity of the Impairment Analysis.* In the *NPRM*, the Commission asked many questions about whether and how to make the unbundling analysis more granular by considering such factors as specific services, specific geographic locations, the different types and capacities of facilities, and customer and business considerations.

Subsequently, the *USTA* decision directed the Commission to approach the section 251(d)(2) impairment analysis by considering market-specific variations in impairment. The Commission applies several types of granularity in the unbundling analysis, including considerations of customer class, geography, and service. In addition, within discussions of specific network elements, the Commission injects granularity into the analysis by considering types and capacities of facilities.

10. In particular, with regard to customer class, the Commission finds that the economic characteristics of the mass market and enterprise market can be sufficiently different that they constitute major market segments. With regard to geographic granularity, the Commission considers whether impairment varies geographically throughout the country. In those instances where the record permits the Commission to create unbundling rules that apply nationally, it does so. In other instances, the Commission may delegate authority to state commissions to ensure that the unbundling rules are implemented on the most accurate level possible while still preserving administrative practicality.

11. Finally, with regard to the different services that competitors may wish to offer using UNEs, the Commission adopts an approach that obligates incumbent LECs to provide access to UNEs only when requesting carriers seek to use those elements to compete against those services that traditionally have been the exclusive domain of incumbent LECs, or "qualifying services." "Qualifying services" include, for example, local exchange service, such as POTS, and access services, such as special access using high-capacity circuits. Once a requesting carrier has obtained access to a UNE to provide a "qualifying service," the carrier may use that UNE to provide any additional services, including non-qualifying telecommunications and information services. In order to gain access to a UNE under section 251(c)(3), a requesting carrier must provide a "telecommunications service," and specifically a qualifying telecommunications service, over that UNE. The Commission has interpreted "telecommunications services" to mean services offered on a common carrier basis.

12. *Implicit Support Flows.* In the *USTA* decision, the D.C. Circuit addressed the question of implicit support flows and their relationship to the Commission's decision making under section 251. The court concluded,

among other things, that the Commission had not adequately explained its decision to adopt nationwide unbundling requirements in light of the implicit support flows found in telecommunications rates. In reaching this conclusion, the court expressed concerns about the Commission's approach to unbundling both in areas where the incumbent LEC's retail rates may exceed its costs (presumably referring to historic costs) and in areas where incumbent LEC retail rates may be below cost. By focusing on the economic and operational viability of entry in different market segments, the revised impairment standard addresses the issue of implicit support flows in a manner that is responsive to the concerns raised by the D.C. Circuit. At the same time, the Commission concludes that the statute is best interpreted as giving it considerable discretion to address the relationship between implicit support flows and its impairment analysis. In general terms, the new impairment standard provides that a requesting carrier is deemed 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. The impairment standard is unlikely to result in unwarranted unbundling in the case of areas and services for which local exchange rates generally exceed the incumbent LEC's costs. In addition, were the impairment standard to require unbundling for services and areas with "below cost" rates where actual competitive entry does not take place, little harm would result. The statute contains an exemption from the unbundling requirements for rural carriers and provides for state modification or suspension of the unbundling requirements for incumbent carriers serving, in the aggregate, less than two percent of the nation's access lines. This allows the states to prevent any problems that they believe might result from unbundling requirements in these circumstances.

13. *The "Necessary" Standard.* Section 251(d)(2) requires the Commission, in making its unbundling determination, to consider whether "access to such network elements as are proprietary in nature is necessary." The Commission determines to readopt the interpretation of "necessary" that it gave in the *UNE Remand Order*: a proprietary network element is "necessary" if, taking into consideration the availability of alternative elements outside the