

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

United States Telecom Association, <i>et al.</i> ,)	
Petitioners,)	
)	
v.)	No. 00-1012 (and
)	consolidated cases)
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

**MOTION OF RESPONDENTS TO DISMISS
PETITION FOR A WRIT OF MANDAMUS**

The Federal Communications Commission recently voted to adopt new rules in response to this Court’s decision in *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir.) (“*USTA II*”), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004). Those new rules will supersede the interim requirements that have been challenged in the pending mandamus petition. In light of the FCC’s adoption of final rules implementing the Court’s mandate in *USTA II*, and the fact that the challenged interim requirements will soon expire by their own terms in any event, respondents respectfully move to dismiss the mandamus petition.

In *USTA II*, this Court vacated FCC rules governing access to certain unbundled network elements under 47 U.S.C. § 251. In August 2004, the FCC launched a proceeding to establish new unbundling rules to implement the Court’s *USTA II* decision. At that time, the Commission adopted interim requirements that were scheduled to expire within six months. *Unbundled Access to Network Elements*, 19 FCC Rcd 16783 (2004) (“*Order*”). Upon the Commission’s release of the *Order* establishing the interim requirements, Verizon, Qwest, and the United States Telecom Association jointly petitioned for a writ of mandamus to enforce the *USTA II* mandate. Those petitioners maintained that mandamus relief was warranted because, in their view, the

interim requirements did not comply with the *USTA II* mandate. Among other things, petitioners contended that the interim requirements would effectively “extend the life of existing unlawful [un]bundling rules indefinitely.” Petition at 20. On September 23, 2004, the same three petitioners filed a petition for review of the *Order*, in which they likewise challenged the lawfulness of the interim requirements. *United States Telecom Ass’n v. FCC*, D.C. Cir. No. 04-1320 (filed Sept. 23, 2004).

In their opposition to the mandamus petition, respondents observed that the interim requirements will expire by their own terms no later than March 13, 2005, and will be superseded sooner if permanent unbundling rules take effect before that date. Opposition at 6-7 (citing *Order* ¶ 16). Respondents further noted that FCC Chairman Powell had scheduled for December 2004 a Commission vote on adoption of permanent unbundling rules. Opposition at 7 (citing *Order*, Separate Statement of Chairman Michael K. Powell at 2). Respondents accordingly asked the Court to deny the mandamus petition or, in the alternative, to 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. Opposition at 26.

By order dated October 6, 2004, the Court on its own motion ordered that consideration of the mandamus petition be held in abeyance. It directed the parties to file motions to govern future proceedings on January 4, 2005.

In accordance with the timetable announced by Chairman Powell last August, the Commission voted at its public meeting on December 15, 2004, on new unbundling rules. By a 3-to-2 vote, the Commission adopted new rules that will replace the interim requirements. Chairman Powell and Commissioners Abernathy and Martin voted to adopt the new rules. Commissioners Copps and Adelstein dissented, asserting that the Commission should have

imposed more extensive network-unbundling requirements on incumbent local exchange carriers.

In adopting the new rules, the Commission found that competitors are not impaired without unbundled access to mass-market local circuit switching. Applying a revised unbundling framework, the Commission also made findings that will reduce incumbents' mandatory unbundling of dedicated interoffice transport and high-capacity loops. In addition, the Commission voted to prohibit the use of unbundled network elements for the exclusive provision of long-distance and mobile wireless telecommunications services. For the Court's convenience, we have attached the agency's press release summarizing the new rules, as well as separate statements issued by the FCC Chairman and three Commissioners.

The Commission's adoption of final rules in response to the *USTA II* decision has obviated any need for further proceedings on the mandamus petition. That petition concerns interim requirements that the new rules will supersede. The Commission expects to release its order promulgating the new rules within approximately one month. When the new rules take effect, the interim requirements will have no continuing force. Any legal challenges to the interim requirements (including both the instant mandamus petition and the overlapping petition for review) will become moot if they are still pending at that time. As noted, moreover, the interim requirements would in any event expire by their own terms no later than March 13, 2005. Any party aggrieved by the new rules will have an opportunity to challenge those rules after the

Commission issues its order promulgating the new rules. In light of these considerations, the Court should dismiss the petition for a writ of mandamus.

Respectfully submitted,

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