

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

UNITED STATES TELECOM ASS'N, *et al.*, )  
Petitioners, )  
 )  
v. ) Nos. 00-1012, 00-1015,  
 ) *et al.*  
FEDERAL COMMUNICATIONS COMMISSION )  
and UNITED STATES OF AMERICA, )  
Respondents. )

**PRELIMINARY RESPONSE OF FEDERAL COMMUNICATIONS  
COMMISSION TO PETITIONS FOR WRIT OF MANDAMUS,  
MOTION TO TRANSFER OR DENY THE PETITIONS,  
AND CONTINGENT REQUEST FOR EXTENSION OF TIME**

The Federal Communications Commission respectfully files this preliminary response to two petitions for a writ of mandamus to enforce the mandate of this Court in *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA*”), *cert. denied*, 123 S. Ct. 1571 (2003).<sup>1</sup> For the reasons discussed below, the Court should transfer the mandamus petitions to the United States Court of Appeals for the Eighth Circuit, in which all “proceedings” with respect to the FCC’s *Triennial Review Order*<sup>2</sup> have been consolidated, pursuant to 28 U.S.C. § 2112(a)(3), by order of the Judicial Panel on Multidistrict Litigation. *See* Consolidation Order, Judicial Panel Docket No. RTC-68 (filed Sept. 16, 2003). Alternatively, the Court should deny the petitions. If the Court declines to transfer or deny the mandamus petitions on the basis of the arguments presented herein, the FCC respectfully requests that it be given a reasonable extension

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<sup>1</sup> The two petitions were filed on August 28, 2003, by the United States Telecom Association (along with Qwest, BellSouth, and SBC) and by Verizon. By order dated September 15, 2003, this Court directed the FCC to file and serve a consolidated response to the petitions by noon on September 25, 2003.

<sup>2</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.* (CC Docket Nos. 01-338, 96-98, and 98-147), FCC 03-36 (released August 21, 2003), 68 Fed. Reg. 52276 (Sept. 2, 2003) (“*Triennial Review Order*” or “*Order*”).

of time – at least two weeks from the date of an order declining to transfer or deny the petitions – to respond fully to the merits of those petitions.

1. In *USTA*, this Court found three defects with the network element unbundling rules that were before it. First, the Court took issue with what it saw as the Commission's decision “to adopt a uniform national rule, mandating [network element] unbundling in every geographic market and customer class, without regard to the state of competitive impairment in any particular market.” 290 F.3d at 422. The Court stated that the Commission should have adopted “a more nuanced concept of impairment than is reflected in findings ... detached from any specific markets or market categories.” *Id.* at 426. Second, while recognizing that “any cognizable competitive ‘impairment’ would necessarily be traceable to some kind of disparity in cost,” the Court faulted the Commission for relying on “cost disparities that, far from being any indication that competitive supply would be wasteful, are simply disparities faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector.” *Ibid.* Third, the Court set aside the Commission's decision to require “line sharing” – unbundling of the high frequency portion of the loop used by new entrants to provide digital subscriber line (“DSL”) services – because the agency “failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite).” *Id.* at 428.

The Commission responded to *USTA* by revising its definition of impairment. Under the agency’s revised definition, a CLEC is impaired for purposes of 47 U.S.C. § 251(d)(2) if the “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.” *Order* ¶ 84. The application of that new impairment standard responds directly and comprehensively to each of the three shortcomings that the Court identified in *USTA*.

First, the Commission’s revised approach implements the Court’s direction to address “market-specific variations in competitive impairment” (*USTA*, 290 F.3d at 422) by calling for a more “granular” analysis that considers “customer class, geography, and service.” *Order* ¶ 118. As to customer class, the Commission’s revised impairment analysis separately addresses the mass market (primarily residential customers) and various enterprise market segments (serving business customers). *Id.* ¶¶ 123-124. With respect to geographic markets, the Commission’s revised approach makes national findings where separate analyses of each geographic area would yield the same result. Where that is not the case, however, the new rules provide for area-specific variations in impairment findings, authorizing fact-finding by state commissions “to ensure that the unbundling rules are implemented on the most accurate level possible while still preserving administrative practicality.” *Id.* ¶ 130. With respect to service distinctions, the Commission’s new impairment standard expressly takes into account “*all* the revenue opportunities that a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could reasonably expect to sell.” *Id.* ¶ 100 (emphasis in original). Under this analysis, a finding of impairment with respect to a particular element necessarily means that CLECs are, in fact, impaired in the provision of *all* of the services that they reasonably can offer with that element. Beyond that restriction, the Commission’s new rules also require that at least one of the services that a CLEC offers with a network element is a “qualifying service” – *i.e.*, one of those core telecommunications services “that compete directly against traditional incumbent LEC services.” *Id.* ¶¶ 140-141.

Second, the Commission carefully delineated the types of costs that it would consider in determining impairment – focusing on those costs that pose recognized barriers to competitive entry. *Order* ¶¶ 85-86. The Commission explained that its analysis would focus substantially on

sunk costs, “first-mover advantages” flowing from incumbents’ history as monopoly providers, large absolute cost advantages, and scale economies (though not at levels that typically exist for any entrant into any industry). *Id.* ¶¶ 87-90. In focusing on these barriers, the agency largely tracked the approach prescribed by Judge Robert Bork in an *ex parte* letter filed by AT&T. *Id.* at nn.287, 291, 301. The Commission’s analysis also recognized and took into account countervailing cost advantages that new entrants may possess. *Id.* ¶ 89. In addition, responding to the Supreme Court’s direction that the impairment inquiry must consider “the availability of elements outside the incumbent’s network,”<sup>3</sup> the Commission’s revised rules give the greatest weight to evidence of actual deployment by facilities-based competitors in assessing whether any existing cost disparities actually constitute impairment-causing barriers to entry. *Id.* ¶¶ 93-95.<sup>4</sup>

Third, the Commission revisited its treatment of line sharing. *Order* ¶¶ 255-269. This time, the Commission’s analysis incorporated several factors, including: all the revenues that a new entrant could expect to receive from use of the whole loop (*id.* ¶ 258); the development of “line splitting” as a viable way for CLECs to share the low (or, in some cases, the high) frequency portion of a whole loop with other CLECs, if their business plans do not include the provision of both voice and broadband services (*id.* ¶ 259); and the relevance of other broadband platforms (such as cable) to the costs and benefits of mandatory line sharing (*id.* ¶¶ 262-263).

The revised impairment framework adopted in the *Order* has yielded a significantly reduced list of network elements that incumbent LECs must unbundle. The Commission removed unbundling obligations with respect to the highest capacity enterprise loops, as well as

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<sup>3</sup> *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 389 (1999).

<sup>4</sup> Indeed, the principal triggers that the FCC prescribed for geographic market-specific findings of impairment by state commissions are based on evidence of actual deployment of competitive facilities. *See, e.g., Order* ¶¶ 329-331 (high capacity loops), 359, 394-404 (transport), 498-500 (switching).

lower capacity enterprise loops at locations where state commissions – employing a granular approach – find that competition-based triggers are met. The agency also curtailed unbundling obligations with respect to mass market loops that have fiber components. In addition, it eliminated unbundling obligations with respect to the highest capacity transport facilities, as well as lower capacity transport facilities along routes where state commissions determine that competition-based triggers are met. Similarly, the Commission removed unbundling obligations with respect to switching for the enterprise market, and directed state commissions – again, using a granular approach – to remove such obligations regarding mass market switching in particular geographic markets if competition-based triggers are satisfied. The Commission went on to remove existing unbundling obligations for packet switching, and, subject to grandfather provisions and a transition, eliminated incumbent LEC line sharing duties. *See generally Order ¶ 7* (executive summary).

2. The ILECs' mandamus petitions essentially ask this Court to reverse certain portions of the FCC's *Triennial Review Order*. Shortly after they filed these petitions, the ILECs filed petitions for review of the *Order* in this Court and moved for a stay pending review. At about the same time, numerous other parties filed petitions for review of the *Order* in various circuit courts within 10 days after the *Order*'s publication in the Federal Register. Pursuant to the procedure prescribed by 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation conducted a lottery and selected the Eighth Circuit as the court that will rule on all petitions for review of the *Order* in a single, consolidated proceeding. *See Consolidation Order, Judicial Panel Docket No. RTC-68* (filed Sept. 16, 2003).

Consistent with the plain terms of section 2112, this Court should transfer the mandamus petitions to the Eighth Circuit. After a lottery is held under section 2112(a)(3) to determine

which court will adjudicate multiple petitions for review of a single agency order, the statute expressly states: “All courts in which *proceedings* are instituted *with respect to the same order* ... *shall* transfer those proceedings to the court in which the record is ... filed [*i.e.*, the court selected by lottery].” 28 U.S.C. § 2112(a)(5) (emphasis added). Under the statute’s plain terms, the ILECs’ mandamus petitions are clearly “proceedings ... with respect to the same order” that is the subject of the consolidated review proceeding in the Eighth Circuit. Consequently, this Court should transfer these petitions to the Eighth Circuit.

Transfer of the mandamus petitions is necessary to ensure the proper functioning of the jurisdictional lottery system. When Congress adopted that system, it intended that “the circuit court in which the proceedings are consolidated will take jurisdiction over all review proceedings dealing with the same order.” *See* 1987 U.S.C.C.A.N. 3198, 3202 (quoting S. Rep. No. 100-263 (1987)). If any such proceedings were not transferred, an untenable scenario would develop: More than one court would be reviewing the same agency order. The lottery system was created to avert just such an inefficient and potentially chaotic outcome.

Indeed, even before the lottery system took effect, this Court long ago acknowledged the unsavory prospect of “duplicative judicial review and conflict between circuits” if more than one court reviewed the same agency order. *Natural Resources Defense Council v. EPA*, 673 F.2d 392, 400 (D.C. Cir. 1980). To prevent this undesirable result, the Court properly adopted a broad reading of the phrase “proceedings ... with respect to the same order” in an earlier version of section 2112. *See id.* at 398 (“Petitions for review of a single agency action should be consolidated to prevent ‘simultaneous participation in proceedings in more than one circuit.’”) (quoting *ACLU v. FCC*, 486 F.2d 411, 413 (D.C. Cir. 1973)). These same concerns justify a transfer of the ILECs’ mandamus petitions to the Eighth Circuit. Such a transfer will ensure that

the *Triennial Review Order* does not spawn separate review proceedings in two different courts, in violation of both the language and purpose of section 2112(a).

The Court should be aware that the ILECs have filed a motion in the Eighth Circuit to transfer the petitions for review of the *Triennial Review Order* to this Court. In our view, that pending motion should have no effect on this Court's obligation to transfer the mandamus petitions to the Eighth Circuit at this time. In the wake of the lottery conducted under 28 U.S.C. § 2112(a)(3), this Court will be transferring the ILECs' review petitions and stay motion to the Eighth Circuit. It should likewise transfer the mandamus petitions now, in accordance with 28 U.S.C. § 2112(a)(5). Then, if the Eighth Circuit decides to grant the ILECs' transfer motion, all of the proceedings concerning the *Order* – including the mandamus petitions – will come to this Court. Alternatively, if the Eighth Circuit denies the ILECs' transfer motion, it will then be in a position to adjudicate all of the proceedings related to the *Triennial Review Order*, including the mandamus petitions. Under either scenario, the goal of section 2112(a) will be achieved: A single court will have jurisdiction to resolve all pending challenges to the *Order*. To ensure the realization of this statutory objective, this Court should immediately transfer the mandamus petitions to the Eighth Circuit.

3. If the Court does not transfer the mandamus petitions, it should deny those petitions because the review proceeding before the Eighth Circuit will give the ILECs a full opportunity to present all of the claims that they assert in their mandamus petitions, including their contentions that the *Order* fails to comply with the mandate in *USTA*. In similar circumstances, the Court in 1998 denied a motion to enforce the mandate it had issued two years earlier in *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522 (D.C. Cir. 1996) ("*CompTel*"). The Court had remanded the *CompTel* case for further consideration of the FCC's

transport rate structure. 87 F.3d at 532. In 1997, the FCC issued an order that addressed a wide range of issues concerning reform of the access charge regime. *Access Charge Reform*, 12 FCC Rcd 15982 (1997). Among other things, the *Access Charge Reform Order* responded to the *CompTel* remand. Various parties filed petitions for review of that order in multiple courts of appeals; and, as a result of a lottery conducted under 28 U.S.C. § 2112(a)(3), all of the review petitions were assigned to the Eighth Circuit. Subsequently, AT&T filed with this Court a motion to enforce the *CompTel* mandate. The Court denied the motion, reasoning that AT&T could assert its challenges to the FCC's *Access Charge Reform Order* in the proceeding before the Eighth Circuit. *Competitive Telecommunications Ass'n v. FCC*, 1998 WL 135461 (D.C. Cir. Feb. 20, 1998) (unpublished).<sup>5</sup> Subsequent events confirmed the soundness of the Court's rationale for denying AT&T's motion. In the course of reviewing the *Access Charge Reform Order*, the Eighth Circuit fully considered – and ultimately rejected – the argument that the order was inconsistent with this Court's *CompTel* mandate. *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 544 (8<sup>th</sup> Cir. 1998).

For the same reasons that the Court denied AT&T's motion to enforce the *CompTel* mandate, it should likewise deny the ILECs' mandamus petitions to enforce the *USTA* mandate. In this case, as in the access charge litigation, any party that wishes to allege an inconsistency between the FCC's order and this Court's prior mandate may assert any such challenge before the Eighth Circuit, which is adjudicating all challenges to the underlying FCC order in one consolidated proceeding. Moreover, to the extent that the ILECs claim a need for more immediate relief, they have already moved for a stay pending review. The ILECs' pending

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<sup>5</sup> We recognize that this unpublished order was entered before January 1, 2002. See D.C. Cir. Rule 28(e)(1)(A). We respectfully seek leave to cite this order.

review petitions, coupled with their stay motion, provide them with an adequate opportunity to obtain relief and obviate the need for the extreme remedy of mandamus.

As this Court has often noted, the writ of mandamus is “an extraordinary remedy, to be reserved for extraordinary situations.” *National Ass’n of Criminal Defense Lawyers v. United States Department of Justice*, 182 F.3d 981, 986 (D.C. Cir. 1999) (quoting *In re Sealed Case*, 151 F.3d 1059, 1063 (D.C. Cir. 1998)); see also *In re Executive Office of the President*, 215 F.3d 20, 23 (D.C. Cir. 2000) (“EOP”) (quoting *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976)). Mandamus is simply not warranted when “the party seeking the writ has ... other adequate means, such as a direct appeal, to attain the desired relief.” *In re Cheney*, 334 F.3d 1096, 1102 (D.C. Cir. 2003) (internal quotations omitted). That is precisely the case here. The ILECs’ allegations of error cannot support the issuance of a writ of mandamus because “any error – even a clear one – could be corrected on appeal without irreparable harm” to the ILECs. See *EOP*, 215 F.3d at 23 (quoting *National Ass’n of Criminal Defense Lawyers*, 182 F.3d at 987). Accordingly, the Court should deny the mandamus petitions.

4. In the event that the Court declines to transfer or deny the mandamus petitions on the basis of the arguments set forth above, the Commission respectfully requests that the Court grant an extension of time for the Commission to respond fully to the merits of the petitions. The current deadline for the FCC’s response to the petitions is September 25, 2003 – a mere ten days after issuance of the Court’s order calling for a response. In the mandamus context, a 10-day response period is an inordinately accelerated timetable, especially in a case as complex as this one. And in the midst of this 10-day period, the federal government shut down for two days in response to Hurricane Isabel. Furthermore, the Commission must also respond to the ILECs’

stay motion and their motion to transfer the case from the Eighth Circuit by September 24, 2003 – one day before the agency’s current deadline for responding to the mandamus petitions.

There is no compelling reason for the Court to adhere to this expedited schedule. After all, the ILECs have also moved for a stay of the *Order*. If they succeed in obtaining a stay, there will be no need for this Court to act on the mandamus petitions in an expedited fashion because the rules that the ILECs challenge will not take effect anytime soon. On the other hand, if the ILECs fail to make the showing necessary to obtain the extraordinary remedy of a stay, they will be unable to satisfy the even more stringent standards for justifying the more extreme remedy of mandamus.

In any event, it would make little sense for the Commission to file a full response to the ILECs’ mandamus petitions until this Court decides whether, in light of the review proceeding in the Eighth Circuit, those petitions should be transferred or denied. If the Court declines to transfer or deny the petitions, the Commission respectfully requests that it be given a reasonable extension of time to file a full response to the merits of the petitions. We ask that the Commission’s response be due no sooner than two weeks from the date of an order declining to transfer or deny the mandamus petitions.

**CONCLUSION**

For the foregoing reasons, the Court should transfer the mandamus petitions to the Eighth Circuit or, in the alternative, deny them. If the Court declines to transfer or deny the petitions on the basis of the foregoing arguments, it should grant the Commission a reasonable extension of time to respond fully to the merits of the petitions. In that event, the Commission's response to the mandamus petitions should be due no sooner than two weeks from the date of an order declining to transfer or deny the petitions.

Respectfully submitted,

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