

## D.C. Circuit Affirms Triennial Review Remand Order

**For more information  
please contact:**

**Genny Morelli**  
(202) 342-8531  
gmorelli@kelleydrye.com

**Steven Augustino**  
(202) 342-8612  
saugustino@kelleydrye.com

**Brett Freedson**  
(202) 342-8625  
bfreedson@kelleydrye.com

On June 16, 2006, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") issued its decision in *Covad Communications Company et al. v. FCC*,<sup>1</sup> affirming unbundling determinations made by the Federal Communications Commission ("FCC") in the *Triennial Review Remand Order*<sup>2</sup>. The D.C. Circuit upheld the *Triennial Review Remand Order* in its entirety, denying all challenges raised by the incumbent LECs, as well as by the competitive LECs, the National Association of State Commission Utility Advocates ("NASUCA") and the New Jersey Division of the Ratepayer Advocate ("NJDRRA").

The court's decision is not surprising after the oral argument, on May 15, 2006. The court granted the FCC much more deference than any of the previous courts had done, in *USTA I* and *USTA II*, and handed the FCC a victory on all issues. In light of the fact that the current FCC appears disinclined to address unbundling issues pending in petitions for reconsideration and/or clarification of the *Triennial Review Remand Order*, or to conduct a further comprehensive proceeding to evaluate "impairment" under Section 251(c)(3) of the 1996 Act<sup>3</sup>, the FCC's rules for Section 251(c)(3) unbundled network elements ("UNEs") upheld by the D.C. Circuit likely will remain in effect for the foreseeable future. For competitive LECs, the court's rejection of the incumbent LECs' special access claims preserves UNEs as a viable entry and fill-in strategy<sup>4</sup>. In its discussion of the consumer groups' challenges to the *Triennial Review Remand Order*, howev-

er, the court adopted a burden of proof for the FCC's Section 251(c)(3) impairment analysis that will require competitive LECs to demonstrate the continued need for UNEs in any future review of the federal unbundling rules.<sup>5</sup>

### ANALYSIS

The D.C. Circuit upheld as reasonable "line drawing" the FCC's wire center tests for unbundling of high-capacity DS1 and DS3 loops and dedicated transport, under Section 251(c)(3) of the 1996 Act.<sup>6</sup> Further, the D.C. Circuit rejected claims by the competitive LECs that the FCC's national finding of non-impairment for mass market local switching is both arbitrary and capricious, and inconsistent with law.<sup>7</sup> The court also rejected incumbent LEC arguments that the FCC unjustifiably concluded that it would be inappropriate to eliminate UNEs where competitive LECs are able to use tariffed special access services, and that the FCC erred in permitting conversions of special access circuits to UNEs.<sup>8</sup>

A brief discussion of the specific challenges addressed by the court is provided below.

### Challenges by the Incumbent LECs

The D.C. Circuit expressly rejected claims by the incumbent LECs that the FCC improperly declined to eliminate Section 251(c)(3) unbundling obligations where competitive LECs are able to compete in local exchange markets using the tariffed special access services that the incumbent LECs provide.<sup>9</sup> Contrary to such claims, the D.C. Circuit found that the FCC rea-

sonably declined to find non-impairment, even where tariffed special access services were available,<sup>10</sup> and further, that the FCC's explanation of its decision was fully consistent with the court's directives in *USTA II*.<sup>11</sup> The court agreed with the FCC's reasoning that, unlike the long distance and wireless markets, the local market was not "robustly" competitive, and therefore, that the availability of tariffed special access services did not signal that competitors were not impaired.<sup>12</sup> The court also agreed that the FCC's explanation of the administrative difficulties involved in considering tariffed special access services in the impairment analysis, and held that the FCC adequately "considered" special access services as required by *USTA II*.<sup>13</sup> Responding to other challenges by the incumbent LECs addressing the thresholds for Section 251(c)(3) unbundling requirements for DS1 and DS3 loops and dedicated transport, the D.C. Circuit concluded that the FCC properly considered all record evidence of both actual and potential competition in local exchange markets.<sup>14</sup>

### Challenges by the Competitive LECs

The D.C. Circuit similarly rejected challenges by the competitive LECs to the thresholds for Section 251(c)(3) unbundling requirements for high-capacity loops and dedicated transport, on the grounds that such thresholds do not reflect the record evidence presented to the FCC in the *Triennial Review Remand Order* proceeding.<sup>15</sup> Moreover, the D.C. Circuit was not persuaded by the competitive LECs' claims that the transition rates established for de-listed Section 251(c)(3) UNEs are arbitrary and capricious,<sup>16</sup> and do not comport with the "just and reasonable" pricing standard for network elements that the incumbent LECs must continue to provide under Section 271 of the 1996 Act.<sup>17</sup> With specific regard to mass market local

switching, the D.C. Circuit affirmed the FCC's national finding of non-impairment, under the *Triennial Review Remand Order*, and concluded that such finding was appropriate where the CLEC parties presented no evidence of impairment that would justify a more granular analysis.<sup>18</sup>

### DS1 and DS3 Loops and Dedicated Transport

The court rejected claims by the competitive LECs that the FCC's findings justified a nationwide finding of impairment for DS1 loops.<sup>19</sup> Without addressing the competitive LECs' arguments that the wire center thresholds established by the FCC do not capture impairment for high capacity loops, the court found that the FCC had reasonably balanced market data to predict when and where loops could be deployed.<sup>20</sup> Relying on the substantial deference exhibited throughout its decision, the court also found that the FCC reasonably explained its decision not to use a building-specific approach for its impairment determinations,<sup>21</sup> and its reasons for using collocation as a proxy for the level of loop competition in the wire center.<sup>22</sup> At bottom, the court declined to challenge the FCC's conclusion that wire centers and fiber based collocation were sufficient to predict actual and potential deployment of loops.

With regard to high-capacity dedicated transport, the D.C. Circuit took a similar approach. The competitive LECs challenged the FCC's impairment analysis for DS1 dedicated transport because it relied on the presence of wholesale dedicated transport alternatives, even though the FCC acknowledged that such DS1 level facilities were scarce.<sup>23</sup> For the court, however, the FCC reasonably explained that its approach was designed to capture not only wholesale alternatives, but also

the potential for self-deployment of transport on a route.<sup>24</sup> Thus, the wire center thresholds established by the FCC for unbundling of DS1 dedicated transport also satisfied the court.

### Mass Market Local Switching

The D.C. Circuit affirmed the FCC's national finding of non-impairment for mass market local switching, under the *Triennial Review Remand Order*. The court noted that "the mere fact that the FCC eliminated unbundling across the board does not make it unlawful," and further, that "the 'granularity' criterion does not require the FCC to manufacture regulatory variation where the record does not support it."<sup>25</sup> The court held that the FCC reasonably concluded that competitive LECs are not impaired without unbundled access to local switching "in light of the fact that CLECs have deployed their own switches in 86% of the ILECs' wire centers . . . and, in light of the fact that CLECs are deploying high-tech switches that have 'higher capacity and wider geographic reach' than the old switches employed by the ILECs..."<sup>26</sup> Moreover, the court found that the competitive LECs failed to offer any explanations or contrary evidence when confronted with this record of competitive switch deployment.<sup>27</sup> The court further noted that the 1996

Act does not obligate the incumbent LECs to prove non-impairment; rather, the burden of persuasion rests on the shoulders of the party that urges the FCC to find impairment.<sup>28</sup> In this case, the court found "no evidence of impairment in [mass market local switching] markets . . . [g]iven the lopsided record, the Commission reasonably declined to find impairment."<sup>29</sup>

The D.C. Circuit likewise was not persuaded by claims that the transition rates established for de-listed Section 251(c)(3) UNEs are arbitrary and capricious because the FCC did not disclose the empirical justification for its calculation and ignored proffered alternatives. The court found that the FCC had "explained its decision to adopt a rate increase . . . 'This is all the [Administrative Procedure Act] requires.'" Finally, the claim that the FCC's transition rates for mass market local switching do not comport with the just and reasonable pricing standard for network elements that the incumbent LECs must continue to provide under Section 271 of the 1996 Act was not reached on the merits because the court found competitive LECs had not raised this issue in comments before the FCC.

### ENDNOTES

<sup>1</sup> *Covad Communications Company et al. v. FCC*, No. 05-1095 (consolidated with Nos. 05-1100, 05-1101, 05-1110, 05-1122, 05-1130, 05-1133, 05-1137, 05-1224) (D.C. Cir. 2006).

<sup>2</sup> *In the Matter of Unbundled Access to Network Elements (WC Docket No 04-313); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand, FCC 04-290, 20 FCC Rcd 2533 (rel. Feb. 4, 2005) ("Triennial Review Remand Order").

<sup>3</sup> 47 U.S.C. § 251(c)(3).

<sup>4</sup> See *Covad Communications Company*, 05-1095 at 17-18.

<sup>5</sup> *Id.* at 36.

<sup>6</sup> See *id.* at 23.

<sup>7</sup> See *id.* at 34-35.

<sup>8</sup> See *id.* at 19.

<sup>9</sup> *Covad Communications Company*, No. 05-1095 at 16.

<sup>10</sup> *Id.* at 19.

<sup>11</sup> *Id.* at 17.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 18.

<sup>14</sup> *Id.* at 20.

<sup>15</sup> *Id.* at 26-27.

<sup>16</sup> *Id.* at 39.

<sup>17</sup> *Id.* at 39-40.

<sup>18</sup> *Id.* at 34-35.

<sup>19</sup> *Id.* at 27.

<sup>20</sup> *Id.* at 29.

<sup>21</sup> *Id.* at 28-29.

<sup>22</sup> *Id.* at 29-30.

<sup>23</sup> *Id.* at 32.

<sup>24</sup> *Id.* at 33.

<sup>25</sup> *Id.* at 34.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 35.

<sup>28</sup> *Id.* at 36.

<sup>29</sup> *Id.*