I am making an eleventh hour request to encourage you to allow the states needed jurisdiction over UNE-Ps. Never in the past have states and the FCC had a greater need for a complementary working relationship than they have now. The Telecom Act of 1996 brought about our strong working partnership. This is not the time to take a step away and harness states with "one size fits all" policies.¹

On August 21, 2003, the Federal Communications Commission ("Commission") released its long awaited Triennial Review Order which fundamentally changed the way the Commission and state governments regulate local telephone competition.² This decision, which sets out a new targeted fact-finding role for the states, signals a new era of regulation which alters the way both the Commission and the states gauge the ability of competitors to enter the market without the use of incumbent local exchange carrier ("LEC") facilities. In particular, where states previously were able to expand the obligations of incumbent LECs to make their networks available to competitors for leasing at wholesale rates, states will now apply Commission-defined triggers to determine whether certain pieces of the incumbent LECs' networks should no longer be made available to competitors.³ Thus, state commissions now have a more focused role in determining when an incumbent LEC no longer has to unbundle a particular network element.

In 1996, Congress charged the Commission with determining which parts of incumbent LEC local telephone networks must be made available at wholesale prices, or "unbundled," to new entrants, known as competitive LECs.⁴ Section 251(c) of the Telecommunications Act of 1996 ("1996 Act") was designed to introduce competition into former local exchange monopolies by facilitating the entrance of competitive LECs that could not otherwise afford to construct local net-

¹ J.D. The Catholic University of America, Columbus School of Law, 1999. Mr. Engel is an Attorney-Advisor in the Federal Communications Commission's Wireline Competition Bureau, Competition Policy Division. The opinions expressed in this article are those of the author and do not represent the views of the Federal Communications Commission or the United States Government.

² The Triennial Review proceeding was marked by deep philosophical differences among the five commissioners, resulting in a rare dissent from the Chairman, over which parts of the incumbents' local network should be available to competitive LECs. Christopher Stern & Jonathan Krim, Divided FCC Set to Force 'Bells' to Keep Sharing; Powell Opposing States' Phone Role, Wash. Post, Feb. 20, 2003, at E1 (describing the controversy leading up to the Commission's Triennial Review decision); see also Mark Wigfield, Leading the News: FCC Chief Faces Deregulation Setback, WALL ST. J., Feb. 20, 2003, at A5 (discussing the UNE-P controversy and the upcoming vote to "give states more power to maintain current rules").

³ See Review of 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, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Dkt. Nos. 01-338; 96-98; 98-147 (Aug. 21, 2003) [hereinafter Triennial Review Order] ("Few, if any, other requirements of the 1996 Act have attracted so much regulatory attention, industry effort, or litigation, however, as the requirements under Section 251(c)(3) that [incumbent LECs] make elements of their networks available on an unbundled basis to new entrants as cost-based rates.") Id. at para. 2; 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, CC Dkt. Nos. 01-338, 96-98, 98-147, Notice of Proposed Rulemaking, 16 FCC Rcd. 22781, 22794, para. 27 (2001) [hereinafter Triennial Review NPRM] (asking how satellite, fixed wireless or mobile wireless should weigh in the impairment analysis); see also Gayle Kansagor, et al., States to Play Major Role Under FCC Order, TRDAILY, Aug. 23, 2003, at 7 (describing the Triennial Review Order's discussion of states roles).

works from scratch into the market.\(^5\) Without a doubt, and as evidenced by seven non-stop years of litigation at nearly every level of regulatory and judicial fora, unbundling incumbent LEC networks has proven to be one of the most daunting challenges the Commission has faced. Not only must the Commission determine which parts of the incumbents’ networks, known as unbundled network elements or “UNEs,” can technically be duplicated and to what extent such replication is economically feasible, but the Commission is forced to solve this equation in a fluid environment of rapidly changing technological developments and consumer demands.\(^6\) Moreover, the evolution of technologies such as cable telephony, improved wireless service, and satellite may affect the analysis of whether consumers already have sufficient competitive choices.\(^7\)

Armed with over seven years of unbundling experience, the Commission, in response to the D.C. Circuit’s USTA v. FCC decision, conducted a more detailed “granular” review of local market conditions in order to assess competitive LECs ability to deploy or purchase from alternative sources, each piece of the local network. In the Triennial Review Order, the Commission found that, in certain instances, state commissions are able to gather more detailed evidence regarding the ability of competitive LECs to obtain certain UNEs in various customer and geographic markets.\(^8\) Specifically, state public utility commissions are now empowered to conduct detailed fact-finding inquiries into the market conditions surrounding three key parts of the network: local loops serving large business customers, local circuit switching, and transport.\(^9\) These three UNEs generally represent the bulk of competitive LEC infrastructure deployment, and therefore present the greatest likelihood that competitors may not be impaired without unbundled access to these elements.\(^10\) For the first time since 1996, the Commission’s record demonstrates that, in certain cases, competitors are able to economically deploy these facilities.

Section I of this article briefly summarizes the Commission’s significant post-1996 Act unbundling decisions, including a summary of the Commission’s most recent unbundling determinations in the Triennial Review Order. Section II examines the Commission’s authority to delegate to the states the authority to perform the fact-finding inquiries needed to determine impairment under the Commission’s revised unbundling rules. Section II also includes a broad discussion of the ability of a federal agency to preempt the states and an analysis of the Commission’s authority to require state action. Finally, Section III considers the practical implications of the Commission’s delegation to the states and considers some of the issues that will likely be addressed in upcoming appeals of the Triennial Review Order.\(^11\)

I. A BRIEF HISTORY OF UNBUNDLING

Section 251(d)(1) of the Act expressly grants the Commission authority to establish regulations implementing the requirements of the rest of Section 251, including Section 251(c)(3)’s requirement that incumbent LECs provide access, to any requesting telecommunications carrier, to their networks on an unbundled basis.\(^12\) In addition, although Section 251(d)(1) undoubtedly provides the Commission with the authority to implement unbundling regulations, the Act also preserves a role for the states. Specifically, Section 251(d)(3) of the Act permits states to regulate unbundling so long as the exercise of their authority does not conflict with, or substantially prevent implementation of, the Commission’s unbundling actions:

In prescribing and enforcing its regulations to implement the unbundling requirements . . . the Commi-

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\(^6\) See Triennial Review Order, supra note 3, at para. 7 (“We recognize that competition has evolved at a different pace in different geographic markets and for different market segments.”). Indeed, the proliferation of alternatives for consumers, such as cable telephony, wireless, and xDSL technologies, have radically changed the equation for determining whether there is competition in the local market. See, e.g., id. at para. 52 (stating that, as of mid-2002, cable telephony rep-

\(^7\) See id. at para. 228 (recognizing that cable and wireless technologies are increasingly competitive with incumbent LEC local services).

\(^8\) See Triennial Review Order, supra note 3, at para. 118.

\(^9\) See id. at paras. 187-88.

\(^10\) See generally id. at Parts VI.A (Loops), VI.C (Dedicated Transport), VI.D (Local Circuit Switching).

\(^11\) See generally id. at paras. 3-6.

A. The Local Competition Order

Accordingly, pursuant to Section 251(d)(1) of the 1996 Act, the Commission created a national list of network elements in the 1996 Local Competition Order that incumbent LECs must make available to new entrants on an unbundled basis. In general, applying Section 251(d)(2)(B)'s ambiguous standard that competitors should have unbundled access to each piece of the incumbent LEC's network that they would otherwise be "impaired" without, the Commission concluded that competitive LECs would be impaired without access to essentially the entire incumbent LEC network. In addition to the national list, the Commission delegated to the states the authority to apply the Commission's interpretation of Section 251(d)(2)'s "necessary" and "impair" standards to require incumbent LECs to unbundle additional network elements beyond the Commission's minimum national list. States, however, were not expressly denied the ability to take UNEs off the national list.

13. Id. §251(d)(3). Section 252(e)(3) generally preserves the state's authority to review interconnection agreements: Notwithstanding paragraph (2), but subject to Section 253, nothing in this Section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. Id. §252(e)(3). Similarly, Section 261 preserves state regulation promulgated prior to, and after, the date of the Act, provided that such requirements are "not inconsistent" with the Act or the Commission's regulations. Id. §261(b)-(c).

14. See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Dkt. 96-98, First Report and Order, 11 FCC Rcd. 15499 (1996) [hereinafter Local Competition Order] (subsequent history omitted); 47 U.S.C. §251(d)(1) (2000) ("Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all action necessary to establish regulations to implement the requirements of [Section 251]."); Id. §251(d)(2) (directing the Commission to perform the "necessary and impair" analysis to determine what UNEs should be made available to competitive LECs).


16. Local Competition Order, supra note 14, at 15641-42, paras. 281-82; see also 47 C.F.R. §51.317(a) and (b) (1996) (providing that the state could decline to require unbundling of the network element only if that network element did not satisfy the applicable "necessary" or "impair" test).

17. See Local Competition Order, supra note 14, at 15566-68, paras. 133-37.

18. Iowa Utilities Bd., 525 U.S. at 374-75 (discussing the incumbents' arguments that the authority to implement the local competition provisions belonged, not to the Commission, but to the states). Notably, no party challenged the Commission's conclusion that it could authorize the states to apply those standards to require unbundling of additional network elements under federal law. See Triennial Review Order, supra note 3, at para. 182 (discussing the Iowa Utilities Bd. decision).


20. Id. at 378 n.6; see also Jonathan Galst, "Phony" Intent?: An Examination of Regulatory-Preemption Jurisprudence, 67 N.Y.U. L. Rev. 108, 150 (1992) (arguing that preemption decisions should be reserved for "institutions that are politically accountable and possess the necessary expertise").


tor's ability to provide service, the Commission modified the language addressing the states' authority to create additional unbundling requirements in two ways.23 First, the UNE Remand Order clarified the set of standards that states should apply. In particular, the UNE Remand Order provided that “[a] state commission must comply with the standards set forth in §51.317 [the codified version of the impairment standard] when considering whether to require the unbundling of additional network elements.”24

Second, the UNE Remand Order provided that although states could not remove UNEs from the Commission's national list, a state could remove unbundling requirements for a network element that the state itself had previously added.25 Significantly, however, the Commission found that at the time, for several policy reasons, states should only be permitted to supplement the national UNE list.26 Specifically, the Commission reasoned that removal of unbundling requirements on a state-by-state basis would threaten, “at least in the near future,” certainty in the marketplace and the development of competition.27 Further, a guaranteed national list would provide competitive LECs with the certainty to develop and implement regional and national business plans.28 The Commission also recognized that state-by-state review of UNEs would lead to increased litigation at the state level, which would unnecessarily burden the parties with additional costs and delays. Most importantly, however, the Commission did not foreclose future state-by-state UNE consideration, but instead premised its decision on present market conditions.29 Thus, the Commission clearly left open the possibility of revisiting its nationwide UNE policy.

It should be noted that, from a practical standpoint, due to the UNE Remand Order's expansive unbundling requirements, the policy of allowing states to add only UNEs to the national list had limited utility. Because virtually every piece of incumbent LEC physical network was already unbundled under the Commission's rules, little was left for the states to consider. These options include requiring incumbent LECs to offer “new” unbundled loop-transport combinations, known as “EELs,” where previously competitors were required to first purchase a retail priced “special access” circuit then convert that circuit to a UNE, and unbundling switching in the few dense urban areas where incumbent LECs were not otherwise required to provide unbundled access to switching.30

C. United States Telecom Association v. FCC

On May 24, 2002, in United States Telecom Association v. FCC, the D.C. Circuit addressed both the UNE Remand Order and the Commission's rules requiring the unbundling of line sharing.31 The USTA court found the Commission's analysis in

23 See id. at 3725, para. 51 (“We find that a materiality component, although it cannot be quantified precisely, requires that there be substantive differences between the alternative outside the incumbent LEC's network and the incumbent LEC's network element that, collectively, 'impair' a competitive LEC's ability to provide service.”).
25 See UNE Remand Order, supra note 22, at 3767, para. 154.
26 See id. (“We believe that section 251(d)(3) grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of section 251 and the national policy framework instituted in this Order . . . however, we find that state-by-state removal of elements from the national list would substantially prevent implementation of the requirements and purposes of this section.”). Originally, in the 1996 Local Competition Order, the Commission held that “[s]tate commissions may identify network elements to be unbundled, in addition to those elements identified by the Commission.” Local Competition Order, supra note 14, at para. 136 (codified at 27 C.F.R. §51.317 (2003)).
27 UNE Remand Order, supra note 22, at 3768-69, para. 158.
28 See id. at 3769, para. 159.
29 See id. at 3769-70, paras. 160-61.
31 United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002), cert. denied sub nom. WorldCom, Inc. v. United States Telecom Ass'n, 123 S. Ct. 1571 (2003). Subsequent to the UNE Remand Order the Commission determined that incumbent LECs must also unbundle the high-frequency portion of the local loop to requesting carriers. Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Dkt Nos. 98-147, 96-98, Third Report and Order in CC Dkt. No. 98-
the **UNE Remand Order** lacking in several respects, the resolution of which implicates many aspects of the **Triennial Review** proceeding. Specifically, with regard to the Commission's unbundling rules, the **USTA** court was concerned that the Commission's rules were too national in scope, despite variation in competitive conditions and revenue opportunities around the country. In finding fault with the Commission's adoption of a "uniform national rule" mandating nationwide access to most UNEs, the **USTA** court held that Section 251(d)(2) requires "a more nuanced concept of impairment" that takes into account possible variations in impairment in different geographic and customer markets.

The **USTA** court, however, did not question the authority of the Commission to order nationwide unbundling rules—the court questioned only the Commission's broad analysis of the nationwide market conditions.

D. The **Triennial Review Order**

Charged by the D.C. Circuit in **USTA** with the

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147 and **Fourth Report** in CC Dkt. No. 96-98, 14 FCC Rcd. 20912, 20916, para. 5 (1999) (hereinafter **Line Sharing Order**). The court remedied the **UNE Remand Order** to the Commission for further consideration and stated that "the **Line Sharing Order** must be vacated and remanded." **USTA**, 290 F.3d at 429. The **USTA** court faulted the Commission for failing to consider the existence of intermodal competition in the market for broadband services before requiring incumbent to unbundle the high-frequency portion of the loop. See **USTA**, 290 F.3d at 428-29.

32 See **USTA**, 290 F.3d at 426.

33 See id. at 422 (reasoning that, without considering the level of impairment in any particular geographic market and customer class, the Commission's rules would result in UNEs being "available to [competitive LECs] in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have the object of Congress's [sic] concern").

54 See **Triennial Review NPRM**, supra note 3, at 22815-16, paras. 75-76. The Commission also considered and rejected the argument that states have separate unbundling authority under Section 271. **Triennial Review Order**, supra note 3, at para. 659 ("So if, for example, pursuant to section 251, competitive entrants are found not to be 'impaired' without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271(c)(2)(B)(vi).") Section 271 sets out a checklist that requires Bell Operating Companies ("BOCs") to offer nondiscriminatory access to, for example, local loops and switching in order to receive authority to provide in-region interLATA service. See 47 U.S.C. §271 (2000); see also United States v. Western Elec. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983) (restricting BOCs from providing service for calls between LATAs). In rejecting arguments that BOCs should be treated differently than non-BOC incumbent LECs when Section 251 unbundling requirements are lifted, the Commission reasoned that Congress "could not have intended the [Section 271] checklist to render section 251 itself superfluous." **Triennial Review Order**, supra note 3, at para. 660. Nonetheless, the Commission held that BOCs must continue to make the checklist elements that are no longer unbundled under Section 251 available, not at the TELRIC wholesale prices, but at "just and reasonable" prices and on a nondiscriminatory basis under Sections 201 and 202 of the 1996 Act. id. at para. 664.

35 **Triennial Review Order**, supra note 3, at para. 84 ("We find a requesting carrier to be impaired when lack of access to an incumbent LEC network poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.").

56 By way of background, in the **Triennial Review** proceeding, the BOCs generally argued that the states should have a limited role and that the Commission should find nationwide that competitive LECs are not impaired without access to many existing unbundled network elements, particularly switching, high-capacity loops, and dedicated transport. See **Triennial Review Order**, supra note 3, at para. 192 n. 609 (rejecting incumbent LEC arguments that states are preempted from regulating local telecommunications); see also id. at para. 196 n. 619 (summarizing Verizon's argument that increased state participation would create greater uncertainty due to the establishment of differing state decisions). On the other hand, the IXC and competitive LECs advocated for an expanded state role in the unbundling process and, specifically, that carriers are impaired without access to the elements listed above and all other existing elements. See id. at para. 192 n. 610 (rejecting arguments that states may implement an unbundling regime under state law, regardless of federal law).
improvement on the number of competitors that have deployed a certain type UNE in a geographic market. In sum, the revised impairment analysis, with its increased fact-finding requirements, is to be applied by both the Commission and the states to create a consistent set of unbundling regulations that are tailored to the individual characteristics of each customer and geographic market.

For certain UNEs, such as enterprise loops, circuit switching, and transport (and the other UNEs such as shared transport and signaling networks that are available only if circuit switching is unbundled) the Commission has asked the states to conduct a granular fact-finding inquiry, under specific deadlines, to determine whether impairment exists. For other UNEs, such as mass market loops, line sharing, and packet switching, the Commission has made a final unbundling determination, and states may not increase or decrease unbundling obligations with respect to those elements. Notably, in order to minimize customer and market disruptions, where the Commission has removed unbundled access to an incumbent LEC facility that is presently unbundled, such as line sharing, the Commission provides a transition mechanism to avoid customer and market disruptions. For example, although the Commission has removed line sharing from the UNE list, existing line sharing providers have up to three years to continue to obtain customers at wholesale rates. After the three year period runs, however, competitive LECs will either serve their xDSL customers with the competitive LEC’s own facilities or develop a new business model.

The lynchpin of the states’ role is the Commission’s “trigger” tests that the state commissions apply to determine whether competitive LECs are impaired without access to a particular UNE. Realizing the resources and the institutional knowledge that states have of their respective customer and geographic markets, the Commission reasoned that, where a network element’s inherent economic characteristics differ based on a geographic area or customer class served, the states are better positioned to conduct a detailed fact-finding inquiry to determine if these triggers are met. One such trigger, for example, is contained in the analysis of dedicated transport. Under the transport triggers, states will make detailed findings of the number of transport providers on each particular route. If a certain number of competitive providers are present, or a certain number of wholesale alternatives (other than the competitive LEC) are available, then incumbent LEC transport on that particular route will no longer be unbundled.

In short, based on the D.C. Circuit’s guidance that the Commission magnify its analysis of local market conditions to be more “granular,” this new impairment standard analysis considers several additional “barriers to entry” that make competitive entry in a particular market uneconomic. Moreover, the Commission’s new impairment analysis not only considers supply-side factors such as scale economies, sunk costs, and first mover advantages, but also considers demand-side factors such as the particular needs of the business market (referred to as the “Enterprise Market”) and the residential market (referred to as the “Mass Market”). Set out below are brief summaries of the
Triennial Review Order's key UNE determinations describing whether that UNE is available on an unbundled basis, and what role the states play with respect to that element:

- Mass Market Local Loops: All 2-wire and 4-wire analog and digital copper local loops are unbundled. "Hybrid" local loops that are time division multiplexed ("TDM-based") are subject to unbundling. Packet-switched loops are not unbundled. Fiber-to-the-home loops are generally not unbundled.

- Line Sharing: Unbundling of line sharing is phased out over three years. States generally have no role with regard to determining impairment for this UNE.

- Enterprise Market Local Loops: OCn level local loops are no longer unbundled. Dark fiber loops, DS3 loops (limited to 2 DS3 loops per competitive LEC per customer location) and DS1 loops are unbundled, except where states determine that impairment does not exist using the Commission's "triggers," i.e., states can remove these loops if the triggers are met. States must conduct this inquiry within nine months of the effective date of the Triennial Review Order.

- Subloops: Incumbent LECs must offer national unbundled access to subloops necessary to access wiring at or near multiunit customer premises. This requirement includes inside wire and applies to all types of capacity level and loops.

- Network Interface Devices ("NIDs"): Incumbent LECs must offer unbundled access to NIDs on a stand-alone basis to competitive LECs. States generally have no role with regard to determining impairment for this UNE.

- Dedicated Transport: Transport is redefined to include only transmission facilities that connect incumbent LEC switches and wire centers—entrance facilities/backhaul—between incumbent LEC end office and competing LEC points of presence are not un-

\[\text{ barriers to entry.}\]

\[\text{For the sake of brevity, technical descriptions of the functions of each UNE are omitted. Each of the three landmark Commission orders discussed herein, the Local Competition Order, the UNE Remand Order and the Triennial Review Order, provide extensive discussion of each element's function and its place in the local network architecture.}\]

\[\text{Triennial Review Order, supra note 3, at para. 249 (noting that "no party seriously asserts that stand-alone copper loops should not be unbundled in order to provide services to the mass market"). Previously, the Commission declined to incorporate distinctions based on loop-capacity levels in its rules. UNE Remand Order, supra note 22, at 3777, para. 176. The Triennial Review Order revises the local loop rules to incorporate several local loop categories, both based on general capacity and make-up of the loop, for example, whether certain parts of the loop are copper or fiber. See Triennial Review Order, supra note 3, at paras. 197, 200.}\]

\[\text{See id. at para. 249 (noting that "no party seriously asserts that stand-alone copper loops should not be unbundled in order to provide services to the mass market"). Previously, the Commission declined to incorporate distinctions based on loop-capacity levels in its rules. UNE Remand Order, supra note 22, at 3777, para. 176. The Triennial Review Order revises the local loop rules to incorporate several local loop categories, both based on general capacity and make-up of the loop, for example, whether certain parts of the loop are copper or fiber. See Triennial Review Order, supra note 3, at paras. 197, 200.}\]

\[\text{See Triennial Review Order, supra note 3, at para. 213.}\]

\[\text{See id. at paras. 292-94. The Commission also concluded, under its Section 706 analysis, that the costs of unbundling packet-switched local loops would outweigh the potential benefits of unbundling. See id. at para. 295.}\]

\[\text{See id. at 275 (for fiber-to-the-home loops that have been built over top of existing copper network (this is also known as an overbuild or a brownfield build), incumbent LECs must make available a copper loop or provide 64 kbps channel over the fiber-to-the-home loop).}\]

\[\text{Line sharing occurs when the incumbent LEC offers voice service to the customer, and the competitive LEC leases the high frequency portion of the loop, typically to provide xDSL service. See id. at para. 255. Arguably the two most hotly contested UNEs in the Triennial Review proceeding were line sharing and circuit switching. Circuit switching was controversial because it is the centerpiece of UNE platform ("UNE-P") providers, competitive LECs that represent a significant portion of the competitive LEC industry amounting to approximately 7.5 million lines in 2002. See id. at para. 41 n. 130 (describing UNE-P as a combination of the loop, switching, and shared transport UNEs). Generally, without local circuit switching, UNE-P providers would either have to deploy their own switch or purchase switching from another provider. For practical purposes, line sharing was controversial because the removal of it as a UNE greatly alters the business plans of competitive LECs that focus on xDSL. Without the ability to acquire the high frequency portion of the incumbent LECs' local loops, these companies argued that they would be unable to either build the lines themselves or purchase the element from a wholesale source. See id. at para. 255.}\]

\[\text{Line splitting, which is where two competitive LECs split the loop into narrowband and broadband services, must be supported by the incumbent LEC. See id. at para. 211.}\]

\[\text{See id. at para. 315. The Commission found persuasive the fact that competitive LECs have actually deployed OCn loops to commercial buildings. See id. Also, the Triennial Review record shows that "there does not appear to be any evidence of demand for incumbent LEC OCn level unbundled loops." See id. at para. 315.}\]

\[\text{See id. at para. 315.}\]

\[\text{The Commission's triggers consider, among other factors, whether self-provisioning is feasible, as evidenced by existing deployment by competitive LECs, and whether wholesale alternatives other than the incumbent LEC are available. The Commission's rules provide when specific numbers of each of these alternatives are available, then that loop type is no longer unbundled in that market.}\]

\[\text{See id. at para. 339.}\]

\[\text{See id. at para. 347.}\]

\[\text{See Triennial Review Order, supra note 3, at paras. 343-357.}\]

\[\text{See id. at paras. 356-58.}\]
bundled. Dark fiber, DS3 (DS3s are limited to twelve per competitive LEC per route) and DS1 facilities are unbundled, except where states determine that, on a route-by-route basis, impairment does not exist using the Commission's "triggers," i.e., states can remove transport if the triggers are met. States must conduct this inquiry within nine months of the effective date of the Triennial Review Order. Once the initial state proceedings are completed, states may conduct further reviews to identify additional transport routes that satisfy the triggers.

- Circuit Switching for the Enterprise Market: Circuit switching at the DS1 and above capacity levels is no longer unbundled for customers served by DS1 capacity and above loops. States, however, may rebut this finding and require unbundling of enterprise switching. States must perform this inquiry within ninety days of effective date of the Triennial Review Order. States must make an affirmative finding of impairment in a particular market and petition the Commission for a waiver of the finding of no impairment.

- Circuit Switching for the Mass Market: Circuit switching at the DS0 level remains unbundled on a nationwide basis. States, however, may remove the unbundling requirements in markets where incumbent LECs are able to transfer mass quantities of loops (referred to as a "batch hot cut process"), or where states determine that such a process is unnecessary, i.e., competitive LECs could economically deploy switching even without a batch hot cut process in place. States must conduct this inquiry within nine months of the Triennial Review Order. States may also remove mass market circuit switching where certain triggers are met (similar to loops and transport). Lastly, states may consider whether temporary availability of mass market switching cures impairment, e.g., a state may consider if the availability of unbundled switching to the competitive LEC for the first ninety days it has the customer is enough to cure impairment, rather than leaving mass market circuit switching unbundled for the indefinite future.

- Shared Transport: Remains unbundled, but only to the extent circuit switching remains unbundled. Thus, the states' decisions for the circuit switching UNE control whether shared transport is unbundled.

- Packet Switching: No longer unbundled. This applies to packet switching, routers, and Digital Subscriber Line Access Multiplexers ("DSLAMs"). States generally have no role with regard to determining impairment for this UNE.

- Signaling Networks: Unbundled, but only where a competitive LEC purchases circuit switching. Other than the connection with circuit switching, states generally have no role with regard to determining impairment for this UNE.

within nine months, by applying Commission triggers, whether these customers could economically be served by a DS1 or higher capacity loop. Id. at para. 525.

See id. at para. 359.

See id. at paras. 405, 412.

See id. at para. 417.

See id. at para. 418 (noting States have six months from the filing of a petition to complete these further reviews).

See id. at para. 419. The UNE Remand Order set out a "carve-out" whereby circuit switching serving four-line DS0 customers in zone one of a top 50 MSA was not unbundled. UNE Remand Order, supra note 22, at 3828-31, paras. 290-98. The Triennial Review Order maintains this requirement on an interim basis whereby state commissions must determine
II. THE COMMISSION'S AUTHORITY TO RESTRICT AND DELEGATE STATE UNBUNDLING

Several challenges lie ahead for the Commission's Triennial Review rules. Significantly, courts will likely be forced to consider whether the Commission has the authority to preempt the states from employing their own impairment triggers.

To date, the Triennial Review Order represents the Commission's most rigorous and defined set of procedures regarding UNEs that states must follow. That is, states choosing to participate in the UNE analysis may only, under the Commission's rules, consider a defined set of factors in reaching their determinations.86 Below is a discussion of the Commission's authority, as a federal agency acting on congressionally delegated authority, to preempt the states from deviating from the Commission's defined fact-finding tests.

A. General Preemption Authority of Federal Agencies.

The Supremacy Clause of Article VI of the Constitution provides Congress with the power to preempt state law.87 In Louisiana Public Service Commission v. FCC, the Supreme Court set out the analysis for determining whether Congress or a federal agency has lawfully preempted state authority.88 Generally, preemption of state law occurs where "Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law."89 Further, "pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."90

B. Commission Authority Under the 1996 Act to Create Nationwide Unbundling Rules.


80 See id. at para. 551.
81 See id. at para. 560. The Commission also held that customized routing must be provided in a manner that allows competitive LECs to "efficiently access" either the competitive LEC's or a third party's Operator Service/Directory Assistance platform. See id. at para. 560 n. 1735.
82 See id. at para. 561.
83 See Triennial Review Order, supra note 3, at para. 566.
84 See id. at para. 575. In order to obtain an EEL, a competitive LEC must have state authorization to provide local voice service, local voice service must be provided to each circuit, including local number assignment and E911 capability, and various architectural safeguards must be met that generally ensure that the EEL is not used to circumvent special access services. See id. at paras. 590-611.
85 See id. at paras. 569-626. Formerly EELs were typically obtained by first purchasing a special access circuit then converting that circuit to an EEL, thus reducing the cost for that circuit, but also incurring a penalty to cancel the special access contract.
86 Chairman Powell and Commissioner Abernathy both ask, in their separate statements to the Triennial Review Order, whether these factors are adequately defined for the local circuit switching UNE. See generally Triennial Review Order, supra note 3, Separate Statements of Commissioners Michael K. Powell and Kathleen Q. Abernathy in CC Dkt. Nos. 01-338, 96-98, 98-147, FCC 03-36 (Aug. 21, 2003).
87 U.S. Const. art VI, cl. 2 ("the Laws of the United States . . . shall be the supreme Law of the Land.").
89 See id. at 368. Congress may also preempt state authority, [w]here there is outright or actual conflict between federal and state law, compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, where or the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Id. at 368-69.
90 See id.
Communications Act of 1934, confers rulemaking authority on the Commission: “The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.” The 1996 Act left this Section intact and in Iowa Utilities Bd., the Supreme Court held that Section 201(b) explicitly gives the Commission jurisdiction to make rules governing matters to which the 1996 Act applies. As discussed above, the Iowa Utilities Bd. Court upheld the Commission’s authority to create pricing rules, emphasizing that there can be no question “whether the Federal Government has taken the regulation of local telecommunications away from the states . . . [because] it unquestionably has.” Although he disagreed that the Commission had been given clear authority to create pricing rules, Justice Thomas, in his concurring opinion, explained: “Section 251 specifically identifies those subjects upon which the Commission may regulate. The Commission has authority to regulate . . . those network elements that the carrier must make available on an unbundled basis for purposes of §251(c).”

In Iowa Utilities Bd., numerous parties challenged the Commission’s TELRIC rule arguing that it displaced the states’ authority to “establish” or approve rates in arbitration proceedings under the 1996 Act. The Supreme Court, however, upheld the TELRIC rule as a legitimate exercise of the Commission’s rulemaking authority under Section 201(b) of the Act. Specifically, the Court held that the Commission has broad jurisdiction under the 1996 Act to prescribe a pricing methodology that the states could then take and “establish” rates by applying and implementing the TELRIC methodology.

Similarly, the key issue in the Triennial Review proceeding is whether the Commission has the authority to restrict the analysis that the states will apply to add or remove UNEs in light of Section 251(d)(3) which preserves state authority to “establish” unbundling obligations. Here, as in Iowa Utilities Bd., the Commission has prescribed a methodology that the states will use to reach certain conclusions, i.e., establish unbundling determinations, by conducting detailed fact-finding inquiries. With unbundling, as in the pricing rules at issue in Iowa Utilities Bd., the statute reserves the “establish” function for the states. As Justice Thomas noted, however, the key difference with unbundling is that, via Sections 251(c) and (d), the Commission has clear authority to prescribe unbundling rules. Thus, because the Commission’s pricing rules were upheld, even in light of the fact that states traditionally exercised plenary authority over pricing, it follows, a fortiori, that the Commission’s explicit statutory authority to implement unbundling allows it to both limit state unbundling activity, which cannot be said to be a traditional state function, and to prescribe specific guidelines for the states’ analysis that is consistent with the Commission’s overall implementation of Section 251.

The remaining issue then is whether the Commission may require the states to perform an unbundling analysis, or whether the Commission was stripping states of a “traditional local ratemaking” function. Here, unbundling is not a traditional function of the states—prior to the creation of the competitive local market by the 1996 Act, unbundling generally did not exist.
may only request that the states perform the analysis. Generally, a state’s participation in carrying out federal telecommunications regulation is not mandatory. For example, if a state commission declines or fails to participate in arbitration or review of interconnection agreements, responsibility for regulation falls to the Commission. That is, there is no requirement or obligation in federal law that a state participate in this regulation. Further, a state or state commission’s decision not to act is generally not subject to review. The state commission is “free to accept or reject such participation as a gratuity without abstaining from any lawful activity within its power.” A state commission may simply decline the invitation to regulate local competition on behalf of the federal government and allow that power to return to the Commission. In sum, while Congress can obtain a state’s voluntary consent to federal jurisdiction, Congress cannot “commandeer” state regulatory agencies.

Indeed, courts have recognized that Congress “certainly can invite the states to act on its behalf in carrying out [the 1996 Act].” Congress, however, cannot force the state commission to act. In Printz v. United States, the Supreme Court addressed the federal government’s authority to require state action. Printz involved the federal government directing, through the Brady Act, state law enforcement officers to administer a federal regulatory scheme whereby local officers were ordered to perform background checks for gun purchases. The Court held that “the Federal Government may not compel the States to ‘implement,’ by legislation or executive action, federal regulatory programs.” More precisely, “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the states’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” The Court reasoned that the Brady Act violated the constitutional system of dual sovereignty, i.e., the Constitution empowers only the president to execute the laws, and Congress generally cannot force state governments to absorb the financial burden of implementing a federal regulatory program. Thus, under Printz, while the Commission may request the state commission to act, it does not appear that the Commission may order either state commissions or state legislatures to promulgate or implement any additional unbundling rules.

III. CONCLUSION

As discussed above, for those elements which the Commission cannot conduct a sufficiently granular analysis, the Triennial Review Order sets out interim rules that remain effective until the states, if willing, complete their own granular fact-finding inquiries using the Commission’s trigger tests. Because the Commission, however, can only define the boundaries of state unbundling efforts, and cannot require the states to act, there are at least three potential outcomes (assuming

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102 Generally, as discussed more fully below, because not all state commissions may have jurisdiction to mandate unbundling, due to lack of authority in their enabling statutes, there is a risk that a particular state may never actually conduct a UNE review.

103 See AT&T v. BellSouth, 238 F.3d 636, 646 (5th Cir. 2001) (stating that the “Act permissibly offers state regulatory agencies a limited mission, which they may accept or decline: to apply federal law and regulations as arbitrators and ancillary regulators within the federal system and on behalf of Congress”).

104 For example, the Virginia state commission has declined to resolve petitions to interpret and enforce interconnection agreements, thus requiring the Commission to entertain regulatory responsibility over these disputes. See Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, Memorandum Opinion and Order, 15 FCC Rcd. 11277 (2000); see generally Kristin Calabrese, Does State Participation in Regulation Under the 1996 Telecommunications Act Constitute a Waiver of Sovereign Immunity, 70 U. Cin. L. Rev. 1127 (2002) (discussing the Supreme Court’s preference for finding sovereign immunity in the context of appeals of state arbitration decisions).

105 See id. at 935 (citations omitted).

106 See, e.g., id. at 343 (recognizing the role of the states as a “deputized” federal regulator).


108 Id. at 902-03.

109 See id. at 925-26.

110 Id. at 935 (citations omitted).
the Commission's rules withstand judicial scrutiny). First, if the Commission finds, with respect to a certain UNE, that impairment exists nationwide, then there is nothing left for the states to decide regarding that UNE, e.g., residential analog voice loops remain unbundled. Incumbent LECs seeking to remove unbundling requirements for these UNEs must wait until the Commission's next UNE review proceeding. Second, if the Commission finds nationwide impairment does not exist (in the case of mass market switching), or exists (in the case of enterprise loops and transport), and the state rebuts these findings, then parties believing that a particular state unbundling determination is inconsistent with the limits of Section 251 (d) (3) and the Commission's rules, may seek a declaratory ruling from the Commission seeking to require the states to amend their decisions to conform with the Commission's. 113 Third, if the states refuse to act, then parties may petition the Commission to take the place of the state. In this case, the Commission will perform the granular fact-finding analysis. 114

The third outcome, with the Commission conducting, for example, route-by-route transport inquiries, has the potential to create a significant burden on the Commission, particularly because many states have several incumbent LEC territories with each territory containing wide ranging customer market characteristics. At the end of the day, however, this possibility is unlikely given that the states heavily lobbied the Commission during the Triennial Review proceeding for an increased role in unbundling. That is, based on their stated willingness to enter the fray, particularly with regard to consideration of local circuit switching, it appears likely that the states will not hesitate to conduct their own Triennial Review proceedings. 115

Undoubtedly, the courts will be forced to consider the validity of every provision of the Triennial Review Order, including the Commission's refinement of the impairment standard interpretation. Indeed, one need look no further than the Chairman's dissent to the Triennial Review Order for a laundry list of issues that the courts will consider. 116 Only after the courts have resolved (1) whether the Commission has properly interpreted the Act's impairment standard; (2) whether the Commission has reached reasonable conclusions regarding whether impairment exists on a nationwide level; and (3) whether the Commission must perform the granular analysis itself or may delegate the authority to the states to both add and remove UNEs, will industry participants have the certainty that they have desperately sought since 1996. Moreover, these issues must be determined in this order because the new impairment standard is the foundation for both the Commission's conclusions and the forthcoming state proceedings. Only after the impairment standard is upheld will the courts be able to consider the validity of the Commission's delegation of a detailed fact-finding role to the states.

Lastly, the courts will likely address whether the Commission's instructions to the states are sufficiently precise so that the states can perform the requisite analysis. Prior to the Triennial Review Order, states had relatively unfettered authority to require additional unbundling of UNEs, but not to remove UNEs from the Commission's national list. 117 Moreover, before the Triennial Review Order, the Commission provided little guidance for

113 Although the Triennial Review Order does not use the term "presumptively" to describe its rebuttable findings of impairment, Chairman Powell, in his dissent, disagrees with the Commission's finding that hot cut switching is "presumptively broken." Triennial Review Order, supra note 3, at 5 (separate Statement of Commissioner Michael K. Powell).

114 An additional potential delay in state action arises in the context of state commissions that have not been given the express authority under their respective enabling acts to order unbundling. In these cases, the outcome may depend on whether the enabling legislation is sufficiently ambiguous so as not to prevent the state commission from implementing unbundling proceedings. See Philip J. Weiser, Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C. L. Rev. 663, 679-80 (2001) (discussing "whether state agencies should be presumptively authorized to implement federal law where state enabling legislation is otherwise ambiguous on the topic").

115 See Gayle Kansagor & Margaret Boles, NARUC Task Force Forges Ahead with 'Triennial Review' Analysis, TRDAILY, Aug. 23, 2003, at 6 (describing various state commissions' efforts to open proceedings consistent with the Triennial Review Order).

116 See generally Triennial Review Order, supra note 3 (separate Statement of Commissioner Michael K. Powell criticizing the majority's findings with regard to mass market switching and unbundling for ignoring record evidence). In addition to the appeals of the Triennial Review Order itself, the Commission's resources will also be taxed by appeals of its eventual pre-emption decisions. Harding & Jamieson, supra note 101, at 557-58 (arguing that federal courts should defer to swift Commission assessment and adjudication of preemption petitions).

117 See, e.g., Comments to Triennial Review Order, supra note
the states other than two flawed interpretations of the impairment standard that were rejected by the Iowa Utils. Bd. and USTA courts. Now, in the interest of creating certainty that will stabilize the industry, bring renewed investment, and increase sustained competition, the Commission has provided tests that are intended to be administratively practical for states to apply. In doing so, states will conduct proceedings that reveal actual deployment with regard to the particular markets, routes, and equipment that competitive LECs are employing. Thus, regardless of the outcome of any appeals, these state inquiries may very well produce state records that show a clearer, more “granular” picture of the local market. Ultimately, armed with such a record, the Commission would be far better prepared at the outset of either the next scheduled review of its rules or any remand from the courts.

30, at 8 n.16 (describing the additional unbundling proceedings of several state commissions).

See, e.g., Triennial Review Order, supra note 3, at para. 6.
