

**FHH Telecom Law**  
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**Unbundling Network Elements, IV**  
**FCC Tries, Tries Again to Satisfy Court Ruling**

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The FCC has adopted yet another set of rules regarding the obligations of incumbent local exchange carriers (ILECs) to make elements of their networks available to competing carriers. This action responds to a March 2004 decision by the U.S. Court of Appeals for the D.C. Circuit, which overturned portions of the Commission's Unbundled Network Element (UNE) rules enacted in its Triennial Review Order (TRO). The court decision reversed or remanded most of the rules adopted in the TRO -- the third time an appellate court has upset the FCC's unbundling rules. A majority of the commissioners emphasized the need to craft rules that will pass judicial review, regardless of other policy preferences. The unbundling obligations on ILECs are significantly reduced as a result. Still, ILECs reacted with frustration that the FCC did not go far enough, while CLECs, consumer groups, and a minority of FCC commissioners predicted the end of competition as we know it.

The FCC's actions include the following:

*Mass Market Local Switching.* ILECs have no further obligation to provide CLECs with unbundled access to mass market local circuit switching. A 12-month period will enable competing carriers to transition the embedded customer base, but does not permit CLECs to request switching UNEs for new customers. During the transition, competitive carriers will retain access to the UNE platform (UNE-P) -- *i.e.*, the combination of an unbundled loop, unbundled local circuit switching, and shared transport -- at a preset rate.

*High-Capacity Loops.* CLECs will lose unbundled access to DS3-capacity loops in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators, and similarly will lose access to unbundled DS1-capacity loops in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. These changes should affect only a very limited number of end-users, primarily businesses in dense urban areas where competition is flourishing. Here, too, there will be a transition period at preset rates for the embedded customer base.

If history is any predictor, it is likely that these new rules will also be appealed. In the meantime, while the new rules will have a negative impact on competitors who largely rely on the UNE-P, competitors such as Covad are entering into agreements with ILECs to purchase network elements at negotiated prices that make commercial sense to both the ILEC and the CLEC. Many other facilities-based competitors, including cable TV

companies, do not lease much from ILECs, and thus are not significantly affected by the new rules. Furthermore, the growth of VOIP and the increasing consumer substitution of cellular phones for wireline will likely provide more competition to ILECs than UNE-P ever could. The ride to local telecom competition will continue, but watch out for the bumps.