

ADDITIONAL DEVELOPMENTS— TELECOMMUNICATIONS

COVAD COMMUNICATIONS CO. V. FCC

*450 F.3d 528 (D.C. Cir. 2006), reh'g denied,
2006 U.S. App. LEXIS 21377 (Aug. 17, 2006)*

The United States Court of Appeal for the District of Columbia Circuit upheld the Federal Communications Commission's (FCC) order requiring incumbent local exchange carriers (ILECs) to make unbundled network elements (UNEs) available to competitive local exchange carriers (CLECs), as part of the unbundling provisions of the Telecommunications Act of 1996 (Telecom Act). The court found that the FCC's policy choices were not arbitrary and capricious because it provided reasoned explanations for its determinations and considered all necessary factors.

The Telecom Act enables the FCC to choose which network elements to unbundle so long as the FCC considers, at a minimum, whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Specifically, the FCC ordered three network elements to be unbundled: (1) switches (machine equivalent of a switchboard operator); (2) transport trunks (wires that carry calls between switches); and (3) local loops (wires that run from switches over the last mile to consumers' telephones).

ILECs challenged the FCC order on two grounds. First, the ILECs alleged that the FCC failed to consider tariffed special access services (TSASs) as substitute services that allow CLECs to compete without demanding access to the ILECs' individual network elements. The court, however, held that the FCC provided a reasoned explanation for its decision not to eliminate unbundling solely on the basis of limited TSAS-based competition.

Second, ILECs alleged that the FCC order imposed impossibly high thresholds for assessing the state of competition in market for transport trunks and local loops, requiring unbundling in markets that could function competitively without it. The court, however, held that the FCC repeatedly justified its unbundling determinations on the basis of actual and potential competition. The ILECs failed to demonstrate that lines drawn by the FCC were patently unreasonable, having no relationship to the underlying regulatory problem.

The court sustained the FCC's order, holding that the term "impair" in the Telecom Act was ambiguous, and that the FCC's definition should be given deference if "based on a permissible construction of the statute." The FCC's policy choices would be upheld unless they were "arbitrary and capricious."

CLECs intervened in this action alleging that the FCC's unbundling order was not broad enough because it failed to unbundle digital subscriber line (DSL) capacity loops and mass market local switching (MMLS). The court rejected these "universal" impairment arguments based on the FCC's component-by-component analysis, which was reasonable, rational, and non-arbitrary.

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