DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338.

I respectfully but strongly dissent to these interim rules. There is no need to mince words. The current Commission is on track to butcher the pro-competitive vision of the 1996 Act. And it is sticking consumers with higher telephone rates and fewer choices. The people who pay America's phone bills deserve better.

The majority characterizes this effort as a comprehensive plan to stabilize the market. The truth is just the opposite. In exchange for a standstill today, they commit to price increases tomorrow. After six months of stay, existing enterprise market loop and dedicated transport customers can expect rate increases of 15 percent. The news is even worse for new customers. For enterprise loops and transport, rates will race up to special access. This could mean price increases of more than 300 percent—a potentially lethal blow to any carrier that built its business plan on the core tenets of the 1996 Act. For carriers operating on slim margins in price sensitive markets, absorbing these increases may just not be possible.

Stability in the short term is good. But it is meaningless if it is accompanied by rate increases that make it impossible for facilities-based carriers to continue to operate. In a capital intensive industry, this kind of regulatory whiplash prevents companies from planning. It ruptures good business models. It scares investors. And it denies the market the clarity it needs and deserves from the FCC.

This situation is particularly harmful to carriers serving small business customers. Small businesses power this country's economy. They generate between two-thirds and three-quarters of all new jobs. They produce over half of our private sector output. The Small Business Administration tells us that in metropolitan areas, 29 percent of small business customers are served by competitive carriers, many of them using enterprise loops and transport facilities. Right now, thousands of small business consumers enjoy affordable access to innovative broadband services that were previously available only to the largest business customers. Clearly, America's small businesses are deriving huge benefits from these services, and their productivity has been increasing as a result. Why would we eliminate this opportunity? For whose benefit?

In effect, the majority justifies these price increases as pressure on the Commission to put final rules in place. But in putting pressure on the Commission, the majority points a loaded gun at industry's head. I agree wholeheartedly that we need final, judicially-sustainable rules in place as soon as possible. And I believe my colleagues will work hard to ensure this happens. But there is no reason to hold one segment of an industry hostage to a motivational framework for regulators.

The problems with the majority's framework run deep. The price increases they commit to are based on shaky legal ground. There is no analysis relating them back to the Commission's statutory duties. There is no discussion of impairment. This may come as a surprise to both Congress and the courts, because impairment is the touchstone of our unbundling policy under Section 251. It triggers a very specific pricing obligation. All elements unbundled pursuant to Section 251 must be made available to competitors at cost plus a reasonable profit. The statute provides no authority for grafting onto the current rules arbitrary price increases of 15 to 300 percent. Today's decision casts aside these legal realities, saving them, perhaps, for another day. The bad news for competitors is that they must deal with the resulting wreckage now. After so many trips to the court and back, ignoring the statute like this only invites more problems.

It didn't have to be this way. Sadly, there is no justification for the majority's insistence on price increases during the interim period. The Commission was unanimous in upholding unbundled access to DS-1 transmission facilities in the original Triennial Review Order, and nowhere does the court state that our rules requiring the unbundling of high capacity loop facilities are vacated. To suggest that special access rates apply in six months and a day is not just devastating—it is, as a legal matter, wholly unnecessary.

Similarly, we must address the future of line-sharing and how it can contribute to renewed competition in the drastically-changed and more anti-competitive environment that we now confront. We especially need to clarify that the standstill in today's decision also applies to carriers using the high frequency portion of the loop.

I hope we can hammer out greater certainty on these issues very soon. Reconsideration is a good idea. But I cannot and will not be party to any policy that permits competition-killing price increases before we achieve permanent rules. I hope permanent rules will come quickly, but given all the volatilities we face in this summer of 2004, it is not unimaginable that it might take more than six months until we achieve them. By then this Commission's version of "Survivor" might be over, and those left standing could number less than a handful. That's not what the 1996 Act, competition, consumer well-being or good regulation is all about.