PRESS STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: 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; and Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, CC Docket Nos. 01-338, 96-98, 98-147 & 02-33, Report and Order (adopted Feb. 20, 2003).

This has been a grueling proceeding for everyone involved, and I am relieved that we have finally come to closure. I am pleased to support many aspects of this Order. Most importantly, I strongly support the Commission's decision to exempt new broadband investment from unbundling obligations. We have taken bold action to restore incentives for carriers to build next-generation fiber-based facilities that will support a host of exciting new broadband applications. I am also pleased that the item ensures that facilities-based carriers will have access to the critical loop and transport elements they need to compete, and I support the further notice seeking comment on proposed modifications of the pick-and-choose regime.

I am deeply troubled, however, by the majority's resolution of the fate of unbundled switching, or UNE-P. The decision to make only vague presumptive findings on switching impairment and to delegate virtually unlimited discretion to state commissions abdicates our statutory responsibility. This approach is also inconsistent with the goals of promoting regulatory certainty and facilities-based competition. As I made clear upon coming to the FCC, I am guided by several core principles, and at the top of the list are (1) adhering to the text and structure of the Communications Act, (2) relying to the greatest extent possible on market forces rather than heavy-handed regulation, and (3) promoting regulatory clarity and certainty. The majority's approach to switching violates each of these principles. I am therefore forced to dissent from the switching section of the item. I also dissent from the majority's decision to eliminate line sharing.

I elaborate below on the two most pressing issues in this proceeding: broadband loops and unbundled switching, and I explain my reasons for dissenting from the line sharing decision.

Broadband Loops

One of the 1996 Act's most important mandates, and accordingly one of my core goals as a Commissioner, is to facilitate the deployment of broadband infrastructure. The key question posed in this proceeding is *how* we should accomplish that end. The answer, in my view, is to remove regulatory obstacles to deployment and thereby ensure that network owners have adequate incentives to make the costly and risky investments needed to deliver broadband to all Americans.

As in most important debates, no one side has a slam-dunk argument. And the stakes could hardly be higher: While the FCC has been pondering these issues, capital expenditures have fallen off a cliff. Carriers and equipment manufacturers alike have laid off thousands of workers, and bankruptcies have become commonplace. Despite our historical global leadership in communications technology and deployment, several other countries now surpass the United States in terms of broadband penetration and performance. American service providers and equipment vendors have been forced to slash research and development budgets and this trend is not easy to reverse.

Faced with this situation, the Commission is forced to balance two sometimes competing goals in the statute: preserving carriers' incentives to invest in new facilities, on the one hand, and providing competitive access to incumbents' networks, on the other. I believe that the balance we strike should vary with the degree of new investment at issue. At one end of the spectrum is fiber-to-the-home (FTTH) investment, which entails a complete replacement of legacy facilities (or entirely new construction in greenfield situations) and thus imposes immense costs and risks on incumbents as well as new entrants. The Order accordingly refrains from unbundling these new FTTH facilities. At the other end of the spectrum is existing copper plant. Granting competitors access to copper loops or to the high-frequency portion of the loop (line sharing) in my view does not create any real disincentive to invest, because the loops in question already exist and the electronics used to provide line sharing already have been exempted from unbundling. As discussed below, I therefore believe that the majority should have preserved our line sharing requirements.

The most significant debate centered on how to handle hybrid fiber/copper loops, where the incumbent deploys a next-generation digital loop carrier (NGDLC) architecture. These hybrid situations contain a mix of legacy plant and new broadband investment. I am persuaded that the best approach, which we have adopted today, is to preserve existing access rights but refrain from imposing new unbundling obligations on upgraded hybrid loops. Specifically, competitive carriers will have voice-grade access to upgraded fiber, as well as access to spare copper loops and copper subloops. In addition, competitive LECs will retain the very same access to high-capacity loops (DS-1s and DS-3s), subject to the impairment analysis set forth in the order, that they have today. Preserving this access is a critical measure to preserve competition in the enterprise market. At the same time, refraining from unbundling newly deployed packetized channels over fiber will give incumbent LECs increased incentives to make their networks capable of delivering broadband to many more Americans.

I fully agree with the argument that competitive pressures are necessary to spur investment by incumbent carriers. But granting unbundled access to new broadband networks would be an empty gesture if it meant that such networks were never built in the first place. The record suggests that the uncertainty regarding possible broadband unbundling obligations has chilled investment substantially.

I am therefore heartened by the FCC's decision to provide significant regulatory relief for new broadband investment. I firmly believe that this decision, in due time, will

bring consumers the benefits of increased investment and innovation — which translates into better, faster, more robust services. I also believe that consumers will benefit from broadband competition — both intermodal (from cable modem, satellite, and wireless broadband providers) and intramodal (from competitive LECs using their own facilities and incumbents' loops and subloops). And because the telecom sector has become such an important driver of overall fiscal health, I expect that regulatory relief for broadband will serve as a much-needed stimulant to the economy.

Unbundled Switching (UNE-P)

While I enthusiastically support the decision to remove regulatory obstacles to broadband deployment, I am deeply disappointed by the Commission's resolution of the unbundled switching (UNE-P) issue. Rather than conducting the kind of impairment analysis mandated by the statute and the courts, the Commission has essentially washed its hands of the issue, delegating virtually unbounded authority to state commissions to make their own impairment findings. Rather than creating a clear and predicable regulatory environment, this decision will engender litigation in each of the 50 states and leave all carriers — whether CLECs or ILECs — guessing about what their rights and obligations will be in the years to come. And rather than promoting facilities-based competition, this decision creates the possibility that UNE-P will remain ubiquitously available indefinitely, despite powerful record evidence demonstrating that competitors can serve customers using their own switches in many (if not most) areas.

I fully agree with the majority that state commissions are our partners in implementing the 1996 Act. But the Act itself spells out the terms of this partnership, and the majority ignores the congressional framework. The Act unequivocally directs this Commission to "determin[e] what network elements should be made available." 47 U.S.C. § 251(d)(2). By contrast, Congress assigned the states responsibility for approving interconnection agreements, mediating and arbitrating disputes, and setting rates for unbundled network elements, among other things. 47 U.S.C. § 252. I also agree that once the FCC imposes limitations, it may appropriately delegate some authority to state commissions to make more granular findings regarding impairment. To remain faithful to the statutory scheme, however, the FCC must retain the *primary* decisionmaking authority, and we must establish *clear* standards for the states to apply. Our test for unbundled transport, for example, generally establishes that impairment exists on a route that is served by fewer than two wholesale providers or three total providers. The states will play an important role in carrying out this standard, but the critical fact is that this Commission has established a clear, economically justified, and predominantly federal framework. With respect to switching, by contrast, the Commission has neither justified the vague impairment presumptions it makes nor provided a meaningful framework to cabin state discretion.

It is no answer to claim that the Commission is unable to provide clarity regarding switch impairment. The record demonstrates that competitors have widely deployed circuit switches — over 1,300 in all — in most areas of the country. More than 200 competitive LECs have their own switches. They primarily serve business customers, but

a number serve residential customers as well, in spite of the lower margins available. While reasonable minds can differ about the appropriate conclusions to draw from the record, and line-drawing is undoubtedly difficult, the Commission was bound to make *some* effort to analyze the data on switch deployment and alleged impairments. For example, the Commission could have made impairment findings based on wire center density, drawing on the analysis of carriers such as WorldCom and SBC.[1] We alternatively could have focused on a threshold number of switches deployed in a LATA or wire center — an approach backed by two respected former Chairpersons of NARUC's Telecommunications Committee.[2] Another approach would have made UNE-P available as an acquisition tool to give competitors a limited period to aggregate a base of customers before transitioning to UNE-L, in order to mitigate costs associated with individual hot cuts and customer churn. Any of these approaches also would have given the state commissions a significant supervisory role in ensuring that the hot cut process would not create an operational or economic impairment. I worked hard to develop proposals incorporating these ideas to ensure that the federal standard addresses potential impairments associated with the UNE-L entry strategy. I also made clear my eagerness to explore other compromise proposals advanced by outside parties and my colleagues. The one thing I was *not* willing to do — which unfortunately is what the majority has done here — was to shirk our statutory obligation to decide the circumstances in which unbundled switching will be available.

Over the past several months, when asked about this rulemaking, all of my colleagues have invoked the mantra of "regulatory certainty." We have called for creating a more stable and predictable regime that will allow service providers to craft long-term business plans and enable investors to make rational decisions. Having worked for both a CLEC and an ILEC, I am well aware of the costs associated with an uncertain regulatory climate. Unfortunately, the majority's decision to refrain from adopting a concrete standard for unbundled switching is the exact opposite of what the telecom economy needs. By prolonging the uncertainty indefinitely, I fear that this Order will deal a serious blow to our effort to restore rational investment incentives. While the President and Congress are striving to provide an economic stimulus, the majority unfortunately has stymied that effort.

Simply spelling out the framework of the majority's approach to switching demonstrates the lack of clarity and direction. While lawyers will thrive in this environment, the carriers will become mired in a regulatory wasteland. The majority declares that competitors are presumptively impaired without access to ILECs' switches,

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[1] *See* Letter from Gil M. Strobel, Lawler, Metzger & Milkman (Counsel to WorldCom), LLC, to Marlene H. Dortch, Secretary, FCC (Jan. 8, 2003) (arguing that, if certain operational impediments were addressed and WorldCom were given time to build market share, it could pursue a UNE-L strategy in larger wire centers (e.g., those with 25,000 or more lines)); Letter from James C. Smith, SBC, to Chairman Michael K. Powell (Jan. 14, 2003) (arguing for finding of non-impairment in wire centers with 5,000 or more lines).

[2] *See* Letter of R. Steven Davis, Qwest, to Chairman Michael K. Powell (Jan. 30, 2003); Joint Statement of Bob Rowe, Chairman, Montana Public Service Commission, and Joan Smith, Commissioner, Oregon Public Utility Commission (Jan. 30, 2003).

but it fails to elucidate the precise nature of this impairment. The majority then directs state commissions to *consider* a list of potential impairment factors, to make their own largely subjective judgments about how to weigh them, and ultimately to decide whether the impairment is of a permanent nature or rather can be alleviated by restricting UNE-P availability to three-month intervals. If (and only if) states decide to limit UNE-P in some areas, the embedded base of customers would be transitioned over a three-year period. In short, neither incumbent LECs nor competitive LECs have a clue about the markets in which unbundled switching will be available on a going-forward basis. Rather than developing sound business plans in response to the Commission's decision, carriers will spend the next several years in litigation before the state commissions and in the federal district courts.

In addition to jettisoning the principle of regulatory certainty, the majority's decision tramples on the goal of promoting facilities-based competition. While this has been a watchword for most of my colleagues, now that we had an opportunity to translate our words into action, the majority shied away from doing so. The majority instead has established a regime under which UNE-P may remain permanently available in all markets. Moreover, by inviting states to give added weight to whether a certain number of switches have been deployed by CLECs, the majority's decision seems to give CLECs a *dis*incentive to invest in their own switches — for doing so could jeopardize the continued availability of UNE-P and the premium margins it affords.

A further source of concern — and additional uncertainty — is the significant prospect that the majority's approach will not survive judicial scrutiny. As noted above, section 251(d)(2) directs *the FCC* to apply the impairment standard, and the Supreme Court has confirmed the Act's shift of ultimate authority and responsibility to the federal jurisdiction. As Justice Scalia's opinion for the Court in *Iowa Utilities Board* made clear, "the question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to matters addressed by the 1996 Act, *it unquestionably has*."[3] Indeed, in considering the appropriate role for the states, the Court opined that the notion of "a federal program administered by 50 independent state agencies is surpassing strange."[4] The majority perhaps could have shored up its sweeping grant of authority to the states by establishing a right of appeal to the FCC, so that the ultimate decisionmaking authority resided here. But it refused to do even that. And while the majority relies on the ability of incumbent LECs to pursue appeals in federal district court under section 252(e)(6), it remains to be seen how a reviewing court can gauge a state's compliance with the federal regime when the FCC has refused to provide any specific guidance on what that regime should be.

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[3] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999) (emphasis added). The Act expressly preserves state authority to adopt local competition regulations, but only to the extent that such regulations are "consistent with the requirements of [section 251] and [do] not substantially prevent implementation of the requirements of [section 251] and the purposes of [Part II of Title II]." 47 U.S.C. § 251(d)(3).

[4] *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

An equally significant legal vulnerability is that the majority makes no real effort to adopt a meaningful limiting principle regarding switch unbundling. The Commission has twice been reversed on this exact ground, and I fear this may be strike three. The Supreme Court and the D.C. Circuit have made clear section 251(d)(2) permits the Commission to unbundle an element only when we can affirmatively justify doing so. Turning this mandate on its head, the majority declares that switching will be unbundled because they cannot rule out that some impairments may exist. In fact, the majority does not even make a concrete finding of impairment to justify its requirement that switching be unbundled; instead, the majority *presumes*, without any clearly articulated basis, that competitors are impaired nationwide in the absence of unbundled switching, subject only to the caveat that state commissions may, based on their consideration of various nonbinding factors, convert the permanent availability of UNE-P to a temporally limited access right. The majority makes no attempt to square its decision with the record evidence showing extensive switch deployment by competitive LECs, including a number of carriers serving mass market customers on a UNE-L basis. While states *may* limit the availability of switching in such circumstances, the fact that they are under no obligation to impose any limits whatever (and are not subject to Commission review) makes that an illusory constraint. Making matters worse, the Commission, without any coherent explanation, has abandoned its previous constraint on access to unbundled switching — namely the three-line limit in the top 100 MSAs adopted in the *UNE Remand Order*. It is especially hard to see how *expanding* the availability of unbundled switching, without any affirmative justification, comports with the *USTA* decision.

For all these reasons, I am forced to dissent from the Commission's decision to order the unbundling of switching without applying the impairment standard.

Line Sharing

Finally, I also dissent from the majority's decision to eliminate line sharing. This is a close call, but, on balance, I believe that line sharing provides substantial procompetitive benefits without unduly constraining investment by incumbent LECs. Unlike the prospect of unbundling fiber-to-the-home loops or NGDLC systems, the record suggests that line sharing spurs ILEC investment in DSL, rather than retarding it. The reason is that, by definition, line sharing is available only over legacy copper loops — there is simply no loop upgrade that incumbents are deterred from making. Thus, as we weigh the goals of competitive access and promoting investment in new facilities, the balance favors reinstatement of a line-sharing obligation.

I am certainly mindful of the arguments against line sharing. For example, cable modem providers, rather than DSL providers, currently lead the broadband marketplace, making a line sharing obligation somewhat incongruous. Moreover, data LECs arguably can obtain an entire unbundled loop and provide a combination of voice and data service, as the incumbent LECs do. Yet I believe that the Commission could have overcome these arguments: The presence of cable in the broadband market does not seem sufficient to support a finding of non-impairment for telecommunications carriers seeking to provide DSL service. Moreover, I am sympathetic to the argument that a carrier should

not be forced to enter the voice telephony market simply to provide competitive DSL service.

As noted above, this is not an easy issue. In the end, however, I cannot join the majority's decision to eliminate line sharing because they have not advanced a clear rationale that overcomes the record evidence that line sharing promotes competition *and* investment. In fact, I fear that this decision will compromise our efforts to spur broadband deployment, because the decline in intramodal competition will ease pressures on incumbents to invest in upgraded facilities. I am also troubled by the majority's decision to establish a three-year transition period for the elimination of line sharing. I believe that the majority should own up to the fact that, by cutting off data LECs' access to line sharing, it has shut down residential broadband competition over the copper loop. Any talk of a glide path is fanciful, because, in all likelihood, there will regrettably be no providers left to participate in a transition three years from now.

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In conclusion, the Order is a decidedly mixed result in my view. It scores a big win for consumers by promoting broadband investment, but it potentially undermines that victory by turning unbundled switching into a regulatory morass that carriers will be stuck in for years to come. I therefore voted to approve in part and dissent in part.