SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
APPROVING IN PART, CONCURRING IN PART, DISSENTING IN PART

RE: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

Today, I'm voting on my first item at an open meeting as a new Commissioner. I'm just glad it's an easy one.

I want to thank Bill Maher and his team in the Wireline Competition Bureau for all of the hard work that has gone into this item, including work over holidays, snow days, and late nights. The task was monumental. I've only experienced two months of the intense lobbying on this, and can only imagine what you've been through. And I want to thank my own legal advisor on this matter, Lisa Zaina, who lost a lot of sleep in this process – both by worrying about it, and by working so many late hours on it. She has made enormous contributions to the final product, and deserves a lot of appreciation for it.

We have seen a lot of heated debate over this matter, and rightfully so. It goes to the fundamental question of what the Telecom Act of 1996 means – and what Congress intended to accomplish with it. What is the state of competition in this country? What remains for the FCC to do to open markets? And where is existing competition sufficient to warrant deregulation as envisioned by the Act?

The importance of getting the answers right is underscored by the huge economic challenges now facing the telecommunications industry. We've seen more than half a million jobs lost in the past 18 months. Capital expenditures are plummeting. Equipment manufacturers are engaged in unprecedented layoffs. All this threatens the quality of our telecommunications system, which suffers as investment in the network declines. Ultimately, consumers will pay the price if service quality goes down, or they can't get access to the latest technologies for a reasonable price.

So the real goal of Congress was to promote investment in our telecommunications infrastructure so that consumers could benefit from the most advanced technologies at reasonable prices. This means we must create a stable and clear regulatory environment that promotes competition without burdening incumbents with unnecessary obligations to unbundle elements that are otherwise available without impairment.

In a debate of this complexity, the difference between the right and wrong proposal can be a matter of degree. I had hoped we could work within that middle ground to find consensus on this item. Consensus can generate a policy framework that addresses all of the competing factors in the debate, and it enhances the sustainability of the final outcome. The fact that we couldn't agree on all aspects reveals major policy differences over the proper role of the states and what the Commission must do to facilitate competition, particularly in the switching and broadband markets.

There has been a great deal of comprise in this process. I am very comfortable with some of the decisions, while others quite frankly give me pause. This item does not reflect a perfect solution. But then this is neither a perfect world nor a perfect process.

We are voting on this item before we have seen a draft reflecting the latest cuts. This is especially troubling to me on issues of this magnitude. The lights were burning brightly on the eighth floor late last night, and offices reached some agreements on major issues at the eleventh hour – and I mean that literally, around 11:00. So we understandably haven't yet had the opportunity to review all the language reflecting those cuts. In no way do I want to suggest that the Bureau staff has fallen short by noting the fact that language reflecting late agreements among commissioners is not yet drafted. But I am very uncomfortable voting on this item before the offices have seen the draft order, because as we all know, the devil is in the details.

In this field, I've learned that it's rare to find an answer that's wholly right or wholly wrong. This is where the difficulty lies. As such, I decided coming into this process that I would rely on some key principles to guide my deliberations.

First and foremost, my role is to implement the law as written by Congress, not to impose my own policy preferences upon it. In following the statute, it is imperative to come up with a solution that is legally sustainable, since the court is the final arbiter of whether a decision comports with the law. This is the Commission's third attempt at trying to get the UNE process right, and hopefully we will learn that "third time is a charm" and not "three strikes and you're out."

Second, the basic thrust of the Telecommunications Act is to promote competition. If a competitor is impaired without access to a network element, an incumbent is required to unbundle it until the impairment no longer exists or is remedied.

Third, the Act envisions deregulation in areas where competition has firmly taken hold. This holds true for the impairment analysis. If impairments no longer remain, network elements no longer need to be unbundled. Deregulation follows competition under the Act, not vice versa.

Fourth, the Act envisions State Commissions as our full partners in its implementation. In evaluating impairments, the states should play a key role in determining, in a granular fashion, where they remain and where they no longer exist, subject to clear guidance from the Commission.

Finally, we are here to protect the public interest. The Telecommunications Act of 1996 was ultimately written for consumers. It was meant to ensure that everyone has access to the best network in the world at reasonable rates.

After careful consideration and extensive consultation with my colleagues, I am confident the switching and transport portion of this item are faithful to all of these principles.

Whether competitors are impaired without access to the UNE platform has fueled a lot of debate in this proceeding. Competitors say that without it, they will no longer be able to compete. Many State Commissioners say that they must have the opportunity to include the elements that make up the platform on the list even if the Commission determines not to include them. And many incumbents tell us that requiring them to provide the platform is a disincentive for investment.

Today we have tried to walk the fine line between all of these concerns. The Act looks to the Commission to balance the tension between requirements to unbundle and the subsequent effect on investment, by both the incumbents and the competitors. That is the balance we strove to achieve in this order.

For example, the record indicates that customer churn in the first three to six months of offering local telephone service to new customers causes an impairment unless UNE-P is available as an entry device. I am therefore very pleased that this order makes available a "rolling" UNE-P as an acquisition tool.

We have worked hard to ensure this item addresses the concerns of the US Court of Appeals for the District of Columbia Circuit in United States Telecom Association v. Federal Communications Commission (USTA). The DC Circuit raised profound concerns about national findings that were not reflective of the unique nature of some markets and geographical areas. I firmly believe this product is faithful to the partnership created in the Act between the Federal Communications Commission and State Commissions by implementing the Act's market-opening provisions in a granular fashion impelled by the court in USTA. We have done the best we could with the record before us.

As I've said before, I believe speeding the deployment of broadband is one of the main goals of the Telecom Act. I support efforts to spur investment in broadband. For example, the portion of the item that does not require unbundling of fiber to the home loops for brand new builds may make a lot of sense. But I am concerned that other aspects of this integrated broadband package, agreed upon late last night, may well undermine the ability of competitors to drive deployment in the future as the network moves from copper to fiber. I am simply not satisfied to rely on a rationale based on the "potential" existence of intermodal competition in the future.

It is difficult to agree to such a major limitation on competitors' access to facilities that are needed to make broadband available to most American homes. I will respectfully dissent on those provisions, despite my belief that substantial relief is in order to spur investment in new broadband network infrastructure.

Again, I commend the staff for its excellent work in bringing together a very complex and difficult item.

Having this proceeding in my first three months was quite a baptism by fire. I feel like I'm ready for just about anything now.