SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
APPROVING IN PART, CONCURRING IN PART, DISSENTING IN PART

Re: *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338)*

Seven years ago, Congress enacted a sweeping reform of our nation's telecommunications laws. In doing so, it sought to promote competition in all telecommunications markets and replace the heritage of monopoly with the vitality of competition. Provisions to open the local markets to competition are at the very heart of this Congressional framework. The Act contemplates three modes of competitive entry into the local market—construction of new networks, use of unbundled elements and resale of services. The competition envisioned in the legislation only now is becoming a reality. Today, because of the vision of Congress and the hard work of American entrepreneurs across the country, there are nearly 25 million competitive lines serving consumers. As the Commission's own data on local competition reflect, this number has continued to grow even during the economic downturn that the telecommunications industries and the nation as a whole have suffered. This proceeding offered us the opportunity to encourage this competition and fulfill the mandate of the law, which is "to secure lower prices and higher quality for American consumers."

In some ways, our action advances that mandate. We chart a course that preserves burgeoning voice competition in the local markets and steers it in the direction of further growth. We accord the states an enhanced role in making the granular determinations about where the rules of the game may need to be changed and where they should be maintained in order to foster competition. In other equally important ways, however, we fail our charge. The majority decision plays fast and loose with the country's broadband future, denying it the competitive air it needs to breathe in order to flourish. Consumers, innovation and the Internet may well suffer.

This decision is not just a big-ticket item for telecommunications companies on one side or another of a set of complex and arcane issues. It affects us all. It is next month's telephone bill. It is also the next generation's broadband deployment. It is the future of the Internet. It will deeply affect our country's future.

As a result, this proceeding has been the subject of heated debate. Although our decision is plagued by shifting pluralities, I appreciate the willingness of my colleagues to engage in discussion to find common ground. In my own review I have tried always to keep in mind that setting competition policy is the exclusive jurisdiction of Congress. I have done my utmost to remain faithful to the public interest and to the competitive framework that Congress adopted in the 1996 Act. I believe those aspects of the decision I support and those I concur in are consistent with Congressional intent. Where I am unable to square a decision with statutory directives—no matter how hot the rhetoric—I am compelled to dissent.

I am pleased to support the rules we adopt to address the availability of local switching. In the face of intense pressure for the Commission to make broad nationwide findings on

impairment—findings that would have doomed the future of unbundled elements such as switching—we have instead managed to fashion a majority for a more reasonable process to conduct a granular analysis that takes into account geographic and customer variation in different markets. In doing so, we are able to consider the very real differences in economies of scale involved in providing service to residential and small business customers on the one hand and larger business customers on the other. We also have recognized that the states have a critical role to play in our unbundling determinations. The path to success is not through preemption of the role of the states, but through cooperation with the states. State commissions more proximate to and familiar with local markets are often best positioned to make the fact intensive determinations about impairments faced by competitors. I am therefore pleased with our decision that states should have an active role in conducting the granular analysis necessary to determine whether and where network elements such as switching should be available as unbundled network elements.

The decision regarding line sharing was a difficult one. I believe that line sharing has made a contribution to the competitive landscape. Had I the luxury of developing our list of unbundled network elements on a blank slate, I would have supported its inclusion. Our analysis in this decision, however, was etched against the very real background of the D.C. Circuit's decision ***vacating*** the Commission's line sharing rules. That decision and the record in this proceeding lead me to concur in this aspect of the Order. Circumscribed as we were here, my focus has been on providing a realistic transition and on developing carrier and consumer options. I am pleased that the decision provides an extended transition period to allow competitors to purchase the full loop facility as a network element. Carriers also may pair with competitive voice providers and collectively offer a full range of services to customers.

Critically, there are also parts of this Order with which I strongly disagree. Most importantly, I am troubled that we are undermining competition in the broadband market by limiting—on a nationwide basis in all markets for all customers—competitors' access to broadband loop facilities whenever an incumbent deploys a mixed fiber/copper loop. In essence, as incumbents deploy fiber anywhere in their loop plant, they are relieved of the unbundling obligations that Congress imposed to ensure adequate competition in the local market. The majority assures us that by somehow ignoring the intent of Congress and tearing away the infrastructure that undergirds competition, this will promote investment in advanced architectures. Rather than "new wires, new rules," I fear the majority adopts a system of "no rules, old monopolies." This is not a brave new world of broadband, but simply the old system of local monopoly dressed up in a digital cloak.

The Commission has recognized time and again that loops are the ultimate bottleneck facility. Yet, here the Commission chooses to perpetuate the bottleneck, and it does so on a nationwide basis without adequate analysis of the impact on consumers, without analyzing different geographic or customer markets and without conducting the granular, fact-intensive inquiry demanded by the courts. I fail to see how the majority finds that competitors are impaired without access to the loop, but abandons this finding the minute that fiber is found in the loop architecture. To make matters even worse, in some markets such as the small business market, there may not be any competitive alternatives if competitors cannot get access to loop

facilities. In other words, our nation's small businesses—the engines of so much entrepreneurial activity and economic growth—may be stuck without competitive choices and prices when it comes to critical broadband services. I fear this decision will result in higher prices for consumers and put us on the road to re-monopolization of the local broadband market.

As harmful as this decision is, it may not be the last battle this year in the headlong rush to deregulate broadband. Shortly, we may be considering whether to deregulate broadband entirely by removing core communications services from the statutory framework established by Congress. This strikes many, including me, as substituting our own judgment for that of the law. It is playing a game of regulatory musical chairs by moving technologies from one statutory definition to another. We will also consider whether large incumbent carriers providing broadband services should henceforth be regulated as non-dominant or lacking market power, rather than dominant and exercising market power. And we commit in this Order to reviewing the Commission's forward-looking economic cost methodology for network elements in a soon-to-be-initiated proceeding that improperly crafted could create more problems than it resolves. In light of our goals of establishing certainty and stability, I hope we can agree to not use these other proceedings to overturn our new unbundling obligations over the next few short months. But I caution that it could indeed happen.

Finally, I am troubled by the less than satisfactory process that generated this decision. When Congress passed its landmark legislation seven years ago, the Commission generally implemented its regulatory directives in a bipartisan fashion by unanimous vote, reaching consensus under extremely short statutory deadlines. By contrast, this decision was adopted in a split fashion and based on a roughly conceived outline produced under the threat of a judicial deadline. I am disappointed that we were not able to reach compromise on all of the questions and issue a unanimous decision as previous Commissions were often able to accomplish. Perhaps, given the different philosophical and regulatory approaches which exist among us, that just was not in the cards here. Nevertheless, this proceeding and our recent decision on media concentration provide serious lessons about smoothing the process within, exchanging ideas and paper earlier on, and making sure we have enough time to reach and hammer out final agreements. I also believe that the constraints placed upon independent regulatory Commissioners by laws that forbid more than two of us from meeting together, talking together and reaching agreement together hobble the regulatory process and retard our ability to tackle complex proceedings like this one. I do not know of any other institution that is forced to operate in this fashion. Perhaps the ability to manage our discussions differently would not have rescued this item—or others where the disagreement among my colleagues has been substantial—but I do think it could make a difference going forward. And we certainly have a lot of work to do going forward.

In light of the positive and negative parts of today's decision, I vote to approve in part, concur in part, and dissent in part. This has been a complex decision and a complex process. Nonetheless, I appreciate all the work that so many dedicated individuals at the Commission put in to ensure that this Order finally sees the light of day.