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 (CC Docket 01-338).

As reflected by my vote on this Order – approving in part, concurring in part, and dissenting in part – this proceeding presented complex and difficult choices. Ultimately, I support much of this item because it is faithful to the Act, employs an instrumental partnership with our state commission colleagues, and preserves the burgeoning competition that so many inside and outside of this Commission have worked so hard to promote. Indeed, as we release this Order, most residential consumers are only now experiencing their first taste of competition for voice services, so I am pleased that the Order will allow consumers to continue enjoying these benefits. I write separately to explain further my support for much of this item and my significant concerns about other aspects.

As I said at the time we adopted this Order, our first and foremost role is to implement the law as written by Congress. We accomplish this goal by underpinning this Order with a vigorous "impairment standard" – the limiting principle which Congress set out to restrict the availability of unbundled elements. By applying this vigorous standard to the evidence before us, we respond to the concerns of our reviewing courts and ensure that our local competitions rules will be implemented as Congress intended.[1] On balance, I believe that most of the item applies this standard correctly, in accordance with the law and to the benefit of incumbents, competitors, and ultimately consumers.

Much of this item also appropriately balances the goals of promoting competition and creating the proper incentives for both incumbents and competitors to deploy their own facilities. Most notably, the switching and transport sections establish a framework that will allow nascent competition to continue to grow. At the same time, these sections provide a pathway for the elimination of unbundling obligations where carriers can either self-deploy facilities or obtain them from alternative sources, including other technology platforms.

With respect to the broadband portions of this Order, I have supported the item where possible but have significant concerns that the Order may raise significant barriers to both competition and the deployment of advanced services to residential and small business consumers. The deployment of broadband is crucial; it has the ability to bring unique benefits to the public and, indeed, to transform communities. So I support the Order's attempts to limit unbundling obligations in those cases where competitors and incumbents stand on equal footing. I must, however, dissent from other portions of the broadband section, in particular the so-called hybrid loops section. The Order's conclusions here are inconsistent with our stated goal of

[1] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1998).

promoting facilities-based competition and may pose a real danger of denying consumers the benefits of competition for advanced services.

Switching Decision Preserves Voice Competition, Benefits Consumers, and is Faithful to the Act

In this Order, we have adopted rules to address the availability of local switching in a manner that is consistent with the Act and that preserves the benefits of competition for millions of American consumers. Despite considerable pressure from the voices of dissent, we cannot ignore the reality of how difficult it is for competitors to build out and connect their networks to residential and small business consumers.

Our framework will allow competition to continue to blossom in the voice market for residential and small business customers, in those circumstances where competitors have conclusively demonstrated that they are impaired without access to unbundled local switching.[2] The reality is that competition for residential customers has relied almost completely on the availability of unbundled local switching.[3] Our state commission colleagues have labored mightily to open markets to competition by ironing out performance issues, establishing incentive plans to ensure performance going-forward, and setting prices for network elements in accordance with this Commission's pricing rules. I am pleased that they will continue to play a role in developing local competition under our Order. Many of our own Section 271 approvals granting Bell Companies authorization to provide long distance service rely on the existence of UNE-Platform competition to meet the Track A requirements for facilities-based competition.[4] The service provided using incumbent's switching has brought the clearest and most direct benefits of competition to American consumers in the form of lower prices and innovative services. As many consumer advocates told us, quite simply, it has brought the benefit of choice.[5]

Bringing the benefit of choice has been good for the American people and for American

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[2] Opponents of our decision invariably point to the current deployment switches by competitors. This argument, however, ignores critical differences in the mechanics and economics of providing service to residential and small business customers, as opposed to larger business customers.

[3] *Triennial Review Order*, para. 440 (noting that "much of the deployment relied upon by the BOCs in fact provides no evidence that competitors have successfully deployed switches as a means to access the incumbent's loops").

[4] *See* Letter from Brad E. Mutschelknaus, Counsel for Broadview Networks, to Marlene H. Dortch, Secretary, FCC (Jan. 21, 2003) (describing how all four RBOCs have relied upon the presence of UNE-P to advance their bids for section 271 authority).

[5] *See, e.g.* Letter from Robert S. Tongren, President, National Association of State Utility Consumer Advocates to Michael Powell, Chairman, FCC (Dec. 16, 2002); Letter from James Bradford Ramsey, General Counsel, NARUC, to Office of the Secretary, FCC (Feb. 14, 2003); Letter from Consumers Federation of America and Consumers Union to Michael Powell, Chairman, FCC (Feb. 13, 2003).

businesses. Companies are forging partnerships to offer bundled services that are attractive to consumers and can spur demand. Recently, AT&T Corporation announced that it had worked out a resale deal with its former subsidiary, AT&T Wireless Service, Inc., in which the two companies created an alliance to bring a wireline/wireless service offering. The availability of unbundled switching has allowed the nation's long distance carriers to provide bundled long distance and local services. The Bell Companies are following suit. They have begun rolling out programs that allow customers in some states to make unlimited local and national calls for one flat monthly rate. There is growth in these businesses, and it is made possible by technology and changing consumer habits. The companies providing these bundled packages are seeing them as a way to secure market share. I do not believe that these plans would have become so readily available if we had not preserved access to the UNE-Platform where competitors are unable to deploy their own facilities.

The switching rules adopted in this Order are solidly grounded in the Act and address the concerns of the reviewing courts, most notably the U.S. Court of Appeals for the District of Columbia in *USTA v. FCC*.[6] In response to that decision, our Order employs a more granular analysis that examines particular customer classes and geographic areas. Using this analytical framework, unbundling will only be required in those areas where competitors are impaired. In addition, the Order applies an impairment standard that takes into account not only actual competitive deployment but the ability of competitors to self-deploy or obtain elements from alternative sources. The Order also takes into account the incentives created by unbundling rules. Indeed, we apply the same impairment standard that is endorsed by all five members of the Commission. Moreover, where we ask state commissions to analyze geographic and market-specific factors, we enumerate specific national triggers and criteria that are functionally identical to those endorsed by the full Commission in the transport section.

Finally, we have taken additional proactive steps to limit unbundling of the switching element. Where we determine there to be impairment without access to switching, we adopt mechanisms designed to mitigate impairment and thereby reduce the overall amount of unbundling.[7] For example, we include a baseline rolling use of unbundled switching for customer acquisition purposes. We have concluded that impairment in a given market can be mitigated by granting competitive carriers access to unbundled circuit switching for a temporary period during which it could accumulate customers and later migrate them through a batch hot-cut process to their own switching facilities. This temporary, rolling access can help address certain barriers to entry associated with the switching element. It can also help address high

[6] *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[7] First, we ask our state commission colleagues to evaluate whether competitors could rely on their own switches if they had access to a "batch hot cut" process that would enable them to transfer larger numbers of their customers over to their own switches. Such a process would minimize the costs and operational difficulties for competitors. Second, we ask our state commission colleagues to consider whether the use of unbundled switching on a "rolling" basis would cure whatever additional economic and operation barriers they determine to exist in discrete geographic markets.

customer churn, which some carriers say is as high as 50% for new customers during the first three months of service. This "rolling" availability of switching can aid competitors in their efforts to build up an adequate customer base and then cut over to the use of their own switches, facilitating the transition to facilities-based competitive service. This is about enhancing competitive entry and subsequent opportunity, and not hamstringing it before it is ripe. Indeed, the switching majority's decision takes critical steps to ensure that competitors do not rely on the UNE-Platform in perpetuity.

Overall, I am confident that this decision sets up a framework that responds to the D.C. Circuit and that will allow consumers to see lasting benefits of competition.

Broadband Decision Provides Inconsistent Incentives for Providers

As I have said before, speeding the deployment of broadband to all Americans is one of the most critical tasks before us. That is our clear mandate from Congress. So I support portions of the Unbundled Local Loops section of this Order that create appropriate incentives for competitors and incumbents to build out next generation facilities. I find, however, that the Order takes an uneven approach to creating incentives for broadband deployment and, accordingly, I must dissent from significant portions of the section.

I approve this Order's finding that incumbents and competitors stand on roughly equal footing when making new fiber-to-the-home deployments (*i.e.*, "greenfield" construction projects). Where barriers to deployment are equivalent, we should give providers every incentive to invest in and roll-out next generation facilities that will bring the benefit of advanced services to American consumers. Indeed, requiring unbundling in such circumstances would be the sort of overbroad approach for which this Commission has been rebuked in the past. By eliminating unbundling for greenfield fiber-to-the-home projects, we will speed the deployment of these large information pipes, which have the greatest potential to deliver a wealth of innovative and beneficial services to consumers.

A more difficult choice was presented in the decision to eliminate the high frequency portion of the loop. Were I to look at this question without the overlay of existing judicial precedent, I would likely have reached a different outcome. Availability of this element has made a positive contribution to the competitive landscape by enabling competitors to provide advanced services through "line sharing" arrangements. Nevertheless, I concur in this section out of recognition that the *USTA* court has directly spoken to this issue[8] and with my expectation, which is being borne out in the current marketplace, that the ability of competitors to access whole loops will enable them to continue to roll-out broadband services to residential and small business consumers. Given the necessity of this action, I am pleased that we are able to provide a sufficient transition that will not disrupt service to the many consumers who currently receive

[8] *USTA v. FCC*, 290 F.3d at 428-430.

broadband services *via* line sharing arrangements and that will allow competitors an opportunity to adjust their business plans to our new unbundling rules.

Regrettably, I cannot join the Order in other broadband findings. Portions of the Order disregard Congress' touchstone, the impairment standard. This is particularly so in those cases where incumbents are deploying fiber as part of their existing networks in the form of "hybrid loops," which combine copper and fiber plant. In these cases, I find the Order's conclusion that Section 706 of the Act outweighs the impairment standard of Section 251 to be unfounded. The decision to limit competitors' access to unbundled local loops, long recognized by this Commission and reviewing courts as the ultimate bottleneck facility,[9] strikes me as wholly inconsistent with the Commission's roundly-supported efforts to promote loop-based competition. More broadly, I fear that this decision may not only undermine competition but also drastically limit consumer choices for broadband, in many cases to one provider. Functionally, the Order forces many residential and small business consumers to choose narrowband, dial-up service in order to reap the benefits of competition.

Conclusion

While many, including me, would have preferred this Order to have been released on the day of adoption, the complex issues, the divergent viewpoints expressed, and the fact that significant portions of the drafting were not begun in earnest until after the vote prevented a simultaneous release. We have strived to finalize this Order as quickly as possible. In so doing, we faced the daunting task of addressing two court remands and the more than three thousand comments filed in this proceeding – many of which included sophisticated, and often contradictory, economic studies and analyses. The result is a five hundred page order that incorporates the views of different majorities to reach conclusions about particular elements. The complexity of the issues and the diversity of views may have slowed the process of finalizing the Order, but we have worked hard in fleshing out the final details of the Order to address many of the concerns raised by those in dissent. Of course, I would have preferred that this be a unanimous decision and I worked with both sides to try to find common ground. However, in the final tally, all five Commissioners agreed on an impairment standard that satisfies the statute and the courts; we simply disagreed on how it is applied to the evidence for particular elements.

Throughout this process, we have been fortunate to have been aided by the exceptionally-talented and enormously-dedicated staff here at the Federal Communications Commission and to have had the benefit of a well-developed record reflecting the views of all types of service providers, equipment manufacturers, state utility commissioners, and, most importantly, consumer interests. While there are few who support every outcome in this item, I express my

[9] *See Triennial Review Order*, para. 205 (noting that "[c]onstructing loop plant is both costly and time consuming, regardless of the type of loop being deployed"); Verizon v. FCC, 535 U.S. 467 at n.27 (acknowledging that loop facilities are "very expensive to duplicate").

thanks to all of my colleagues, the dedicated staff, and the members of the communications industry and the public who contributed to this item.