C. 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 next-generation hybrid architectures, 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 for LECs alone somewhat incongruous. Moreover, data LECs 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 record rebuts these arguments. Most importantly, the presence of cable modem service in many (but not all) local markets does not seem sufficient to support a blanket finding of non-impairment for telecommunications carriers seeking to provide DSL service. I am also sympathetic to the argument that a carrier should not be forced to enter the voice telephony market simply to provide competitive DSL service. On balance, I cannot join the majority's decision to eliminate line sharing because the record demonstrates that line sharing promotes competition *and* investment. But the issue is, as noted, a close call, and I can appreciate the legal reasoning underlying the conclusion that carriers are not impaired without access to the high frequency portion of the loop (HFPL).

By contrast, I have significant concerns about the majority's post-adoption decision to grandfather existing customers indefinitely. In light of the majority's finding of non-impairment, and its resultant decision not to unbundle the HFPL, there is plainly no basis to require incumbent LECs to continue unbundling the HFPL indefinitely for existing customers. The majority attempts to couch this as a "transitional" mechanism, but these grandfathered customers are not being transitioned *to* any new carrier or arrangement. And the fact that the Commission will have an opportunity to revisit this decision during the next Biennial Review does not provide any certain end date. Rather, CLECs will continue to service such customers using the TELRIC-priced HFPL, notwithstanding the majority's unequivocal determination that the HFPL is no longer an unbundled network element under section 251(c)(3). This decision is inconsistent with the rule of law.

* * *

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 approve in part and dissent in part.

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.

SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, 02-33

Today, the Commission finally releases the Triennial Review Order, which fully explains the decisions we made on February 20th. As I stated in my February 20th statement, this Order achieves a balanced approach that provides substantial regulatory relief for broadband investment, where there is vigorous competition, while preserving and facilitating competition for local residential service – the competition that has enabled millions of consumers to benefit from lower telephone rates. While I would have liked to release the Order sooner, I appreciate everyone on the Commission's desire to explain fully their views on these very important issues. My views are explained in my February 20th statement, which is attached.

NEWS

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See MCI v. FCC. 515 F 2d 385 (D.C. Circ 1974).

FOR IMMEDIATE RELEASE
February 20, 2002

Contact: Emily Willeford
202-418-2100

COMMISSIONER KEVIN J. MARTIN'S PRESS STATEMENT ON THE TRIENNIAL REVIEW

I support this item because it achieves a principled, balanced approach. It ensures that we have competition and deregulation. We deregulate broadband, making it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire. We preserve existing competition for local service – the competition that has enabled millions of consumers to benefit from lower telephone rates. And we continue the strong role of the states in promoting local competition and protecting consumers. Finally, we accomplish these goals in a manner that is consistent with the statute and the rulings of the courts.

Deregulating Broadband and Attracting New Investment

This Order takes important steps toward deregulating broadband and encouraging new investment. I have long believed that the Commission should make broadband its top priority and create proper incentives for new investment in advanced services. The action we take today provides sweeping regulatory relief for broadband and new investments. It removes unbundling requirements on all newly deployed fiber to the home. It provides regulatory relief for new hybrid fiber-copper facilities, while ensuring continued access to existing copper. And, it adjusts the "wholesale" prices for all new investment. In fact, we endorse and *adopt in total* the High Tech Broadband Coalition's proposals for the deregulation of fiber to the home and any fiber used with new packet technology.

Companies desiring to push fiber further to the home will now be able to make a fair return on their investment. And more consumers will be able to enjoy the fast speeds and exciting applications that a true broadband connection offers.

I hope this relief will jump start investment in next-generation networks and facilitate the deployment of advanced services to all consumers, including rural America. Our actions could then revitalize the advanced services market, leading to a new period of growth in telecommunications and most importantly manufacturing.

Preserving Local Competition

This Order also works to preserve local competition. The Telecommunications Act requires that competitors have access to pieces of the incumbents' networks when they are "impaired" in their ability to provide service. The Court of Appeals has made clear that in analyzing impairment, "uniform national rules" may be inappropriate. Rather, the Commission should take into account specific market conditions and look at specific geographic areas. Today's item follows these admonitions, putting in place a granular analysis that recognizes that competitors face different operational and economic barriers in different markets. For example, the barriers competitors face in deploying equipment and trying to compete are different in Manhattan, Kansas than in Manhattan, New York.

Although some of my colleagues disagreed with certain aspects of this analysis, this disagreement primarily concerns the switching network element for residential customers, a small piece of the puzzle. We all agree that states should play a significant role in determining whether impairment exists for transport. We all agree that states should play a significant role in determining whether impairment exists for loop facilities. And, we all agree that incumbents should no longer be required to unbundle switching for business customers.

Some of my colleagues also wish to end the unbundling of all residential switching immediately. I believe such action would be inconsistent with recent court decisions and the state of competition in the market. It is true that there are now a significant number of residential telephone customers that receive service from a CLEC, but *the overwhelming majority of these customers is currently served through an incumbents' switch.* To declare an immediate end to the unbundling of all switching in every market in the country would ignore the Court's mandate for a more granular analysis and effectively end residential competition. Accordingly, I support the item's approach to treat residential switching as we do other network elements, removing unbundling obligations only after a fact specific market analysis.

Maintaining a Role for State Authorities

In establishing a market-specific impairment analysis for unbundling network elements, this item provides an important role for the states. During my time at the Commission, I have witnessed first hand the helpful role that the states have played in our mutual goal of implementing the Telecommunications Act. I believe that the states are best positioned to make the highly fact intensive and local "impairment" determinations required by the Court of Appeals.

All of my colleagues agree with this principle when applied to the unbundling of transport and other network elements. Some felt, however, that we should not allow the states a role in determining the unbundling of switching. In my view, the item correctly treats switching as it does other network elements, recognizing that the states are better able to make individual, factual determinations about particular geographic markets than are federal regulators in Washington. And, just as we do for other network elements, the Commission provides the states detailed guidelines of what constitutes impairment. For example, we specifically require states to

consider and resolve problems with provisioning – the so-called "hot cut" problem. We also require states to consider whether competitors have been successfully able to deploy their own switching facilities. We provide a roadmap for states to use in making their analysis, putting us on the road to facilities-based competition.

Conclusion

I believe we have crafted a balanced package of regulations to revitalize the industry by spurring investment in next generation broadband infrastructure while also maintaining access to the network elements necessary for new entrants to provide competitive services. This Order adopts clear rules and immediate regulatory relief for broadband deployment and new investment; it removes the obligation to unbundle switches for business customers immediately; and it provides a detailed roadmap for eliminating the remaining unbundling obligations for network elements.

I believe in limited government. I believe that competition – not regulation – is the best method of delivering the benefits of choice, innovation, and affordability to consumers. The 1996 Act puts in place a policy that requires local markets be opened to competition first, and then provides for deregulation. I believe we have faithfully implemented this policy today. Where there is facilities-based competition, for example from cable modems n the broadband market or CLECs in the business market, we have provided deregulation. That is what the law and the courts require.

In sum, this Order achieves a balanced approach that provides regulatory relief for incumbents' new investment in advanced services while ensuring that local competitors will continue to have the access they need to provide service to consumers. I believe these steps will benefit consumers and the industry, and I support this Order.

- FCC -

Remarks by Commissioner Kevin J. Martin
20th Annual PLI/FCBA Telecom Conference
December 12, 2002
Washington, D.C.

"At the Crossroads"

Thank you, Dick, for that kind introduction. And thank you for inviting me to speak at this annual conference. The PLI and FCBA serve the communications bar so well with these informative sessions. I recall going to this one in particular as a junior associate, and I still remember how much I relied on the discussions and primers throughout much of the next year. I'm not sure that what I'll have to say today will be quite as educational as some of the speakers I heard then, but I hope at least to keep your attention. And perhaps I'll even spark a healthy debate.

I. *Deliberation to Decision-Making*

As most of you know, the Commission has spent almost a year collecting, reviewing, and discussing various policy proposals for local competition and broadband service. These issues are of critical importance, and certainly, a significant amount of time is needed to clearly think through the complicated legal and policy issues at stake.

At some point, however, the Commission must move to wrap up the debate and must start making the tough decisions. We must move from deliberation to decision-making.

I believe we now are at the crossroads where choices must be made. We have four critical rulemakings that have been pending since the beginning of the year: the Triennial Review of unbundled network elements, the dominant/nondominant proceeding, the wireline broadband NPRM, and the cable modem service NPRM. The records are complete, we have considered and debated the issues at length, and the proceedings are now ripe for action.

Moreover, industry conditions cry out for answers. Companies are struggling under too much debt, unable to recoup the past investments they have made. Markets are valuing companies at depressed levels, leaving companies with little capital. Carriers are postponing the purchase of the equipment necessary to deploy competitive local and advanced services, leaving the manufacturers to suffer the consequences.

As more manufacturers founder, we risk being left with too few domestic providers of critical infrastructure for advanced services, a significant threat to our national security. Finally, investors are questioning whether communications continues to be a profitable industry in which to risk capital.

I believe the prolonged uncertainty regarding such critical issues as local competition and broadband may have aggravated existing market troubles. Prolonged uncertainty can serve as a

disincentive to invest in new and upgraded facilities, as a barrier to entry for potential competitors, and as a deterrent against modifying outdated business plans. Companies need to know the rules of the road, and they need to be able to rely on them.

It is time to eliminate uncertainty and instability. We must make the difficult policy choices and conclude these four proceedings. Our decisions are vital to industry, to national security, and to the consumers who ultimately will benefit from more competitive and advanced services.

Last May, I expressed my desire that the Commission take action on these pending proceedings by the end of year. Given the potential significance of our decisions on the economic conditions, I did not think that was an unreasonable goal. Indeed, last November the Commission committed to completing the Broadband proceedings by the end of this year,[1] and the D.C. Circuit has expressed their expectation that we complete our Triennial Review this year, as well.[2] I am disappointed that we will not make it, but I am hopeful that we will act soon.

The Commission recently sought another extension of the D.C. Circuit's USTA decision mandate until February 20th, and I am beginning to become concerned with whether we will be able to make that deadline. If we are to meet that deadline, I believe we need to begin a more specific dialogue with the public, and with affected industries in particular, regarding the policy direction the FCC intends to take.

If I'm going to call for FCC action by the end of this year, however, I too must be prepared to share what I am thinking on these critical issues. Therefore, I offer the following thoughts in order to spur debate, respond to my own deadline, and to help the Commission finish its deliberative process and reach finality on these issues.

II. Principles for Decision-Making

I believe it is important for the Commission to begin with certain core values and goals. Once we have articulated and prioritized these principles, we can begin to evaluate concrete actions. Following are three principles that I believe should govern our decision making.

First, the Commission should make its top priority new investment and deployment of advanced network infrastructure. We have a number of issues before us that are vital to the marketplace and need timely resolution. Nevertheless, we must begin somewhere. I believe the

[1] *See Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, Memorandum Opinion and Order, 16 FCC Rcd 20719 at 20754 (2001).

[2] *See United States Telecom Ass'n v. Federal Communications Commission*, 290 F.3d 415 (D.C. Cir. 2002).

Commission should focus first on creating the right incentives for companies to invest in and deploy advanced services.

Until we create a stable regulatory framework for deploying and providing such services, our country's communications network and services will remain stagnant, not improving, not developing. The many people without access to advanced services now, particularly consumers in rural America, will remain without. And competition – the driver of innovation, growth, and effective pricing – will remain minimal.

Even if we correct the incentives with respect to the provision of basic telephony, and even if the market corrects its valuations of telecom carriers, companies will not invest in advanced services until we ensure that the governing regulations will not deprive companies of the ability to make a return on their investment.

Second, the Commission must minimize further questions and avoid creating greater uncertainty or prolonging ambiguity in this area. After having already taken a year to review a set of issues and debate various policy outcomes, we should resolve all of the issues, not just definitions, but also the implications on wholesale obligations. To put off the decisions that have the greatest impact on the marketplace to another day will only aggravate current market conditions and prolong the angst and uncertainty that surround the deployment of advanced services.

Third, the Commission must be responsive to the courts by outlining a clear standard on the necessary and impair test while remembering Congress's goal of ensuring that the local markets are truly open to competition. In so doing, we must address the court's criticism regarding our existing unbundling framework, while also ensuring access to essential facilities.

Priority I: A Regulatory Environment that Encourages New Investment

As you know, telecommunications has been responsible for much of this nation's economic growth during the past decade. The availability of advanced telecommunications is essential to the economy in the 21st century, dramatically reducing the costs of exchanging information, improving efficiency and productivity, and allowing previously local businesses to serve the world.

I am confident that spurring investment in the deployment of new facilities and advanced network infrastructure will lead to a new period of growth.

I believe that at the outset, there are three immediate steps the Commission can take to speed that growth and ensure that all Americans have greater access to advanced services.

1. Adjust TELRIC Pricing

First, we need to adjust the TELRIC pricing formula for all new investment on a going forward basis.

In my view, the TELRIC pricing formula provides incumbent service providers with an insufficient return on investment capital for new infrastructure.

In a nutshell, the existing TELRIC formula fails to accurately measure the true risk of capital investment under current economic conditions, and creates an unnecessary barrier for the deployment of broadband facilities.

We also need to adjust the depreciation schedules within the TELRIC formula to more adequately account for new investment. I believe that greater flexibility in depreciation time frames will provide a greater economic incentive for service providers to invest in and deploy new network infrastructure.

We therefore should conclude in the Triennial Review proceeding that we must adjust the TELRIC formula on a going forward basis to spur deployment in new facilities and services.

2. Deregulate New "Fiber to the Home"

Secondly, I believe we also need to adopt the principles set forth in recent proposals regarding the regulatory framework for new fiber investment deployed to a customer premises.

Under these proposals, "fiber to the home" facilities would be relieved from unbundling requirements and incumbents would be relieved of any obligation to deploy copper facilities in new build situations where fiber to the home is deployed. Incumbents also would have several options and obligations with respect to the existing copper plant in new build situations.

In the recent DC Circuit decision overturning our unbundled network element regime, the Court criticized the Commission for not fully taking into account the ability of new entrants to invest in and deploy new network infrastructure. I believe that it is not "necessary" for a competitor to have access to a new fiber loop.

I believe that if incumbent service providers decide to build new fiber local loops to a customer premise, they should be free of "old-style" legacy rules. Legacy rules are ill-suited for new facilities and new services in the supercharged IP and fiber broadband worlds of tomorrow.

3. Provide Regulatory Relief for Hybrid Facilities but Ensure Continued Access

In my view, new entrants should only use incumbent facilities that are truly necessary for

new entrants to provide service. That does not mean that we should allow incumbents to stop providing any elements overnight, and we need to acknowledge the distinctions among what different competitors may need to compete for small and medium-sized business or residential customers.

We also ought to reexamine how our unbundling and/or pricing rules apply to incumbent deployment of new facilities. For example, once we have determined that a particular state's market "is fully and irreversibly open to competition," how is access to yet-unbuilt new facilities at super efficient prices necessary to enable a new entrant to compete, especially if existing facilities or their equivalent capacity are maintained at current prices?

I must give Tom Tauke of Verizon credit for this policy construct. About a year and a half ago, shortly after I joined the Commission, I heard Tom give a speech where he laid out the concept of "new rules for new wires."

I believe that the Commission should freeze the service capacity level that must be made available on new or upgraded facilities to the service capacity level provided by the ILEC prior to the new investment in a hybrid facility. For example, under this approach competitors receiving access capacity at 1.54 mbs per second using pre-existing ILEC facilities would be able to continue to receive such access capacity at the same bit rate under newly deployed hybrid facilities.

I believe that incumbents should be given the proper incentives to push fiber deeper into their networks and closer to the American consumer. And such an approach actually facilitates the deployment of electronic loop provisioning which would solve many provisioning problems.

At the end of the day, ILECs should receive the benefits of making investments in new infrastructure deployment, but competitors should maintain the ability to receive access to end user customers at the service capacity levels that they currently receive.

Priority II: Minimize Further Questions and Uncertainty

These are turbulent economic times for the telecom industry and the economy as a whole. In such times, the Commission should be particularly cognizant of the impact of its decisions and that it can contribute to market stability by establishing a more stable and reliable regulatory environment. Broad proceedings that remain pending for extended periods can contribute to uncertainty. Protracted uncertainty can prolong financial difficulties. Regulatory uncertainty and delay can function as entry barriers in and of themselves, limiting investment and impeding deployment of new services.

Particularly given the current financial conditions, we should act quickly on our major pending rulemakings, particularly as they relate to new investment. Prompt decision making will provide greater certainty and stability to the marketplace.

We should work to be faster and be more reliable in our decision making. Prolonged proceedings with shifting rules ultimately serve no one's interest, regardless of the substantive outcome. It is time for the Commission to take action not only on the UNE Triennial, but also on performance measures and the broadband proceedings.

Much of the buzz that I hear from others on the potential outcome for the Broadband proceeding is centered on deregulation of the retail offering of broadband service. My sense, however, is that the question that most parties want answered is how we will ultimately decide the wholesale or input question. In other words, I think most people already assume that we are going to treat Internet access as an information service. The question that matters is the regulatory treatment of DSL and cable modem transmission.

I recognize that the Commission itself may have contributed to the continuing confusion on this issue as a result of our ambiguous and somewhat contradictory statements in the Wireline Broadband Proceeding and the Cable Modem Proceeding. In both of these items we attempted to address the appropriate regulatory framework for broadband services.

In the Cable Modem Proceeding,

(1) we determined that cable modem high speed Internet access is an information service;

(2) we decided that the Commission's Computer II unbundling obligations did not automatically apply to cable modem service; and

(3) we sought comment on whether some form of access obligations should ultimately be imposed on Cable Modem service.

In other words, in the Cable Modem Proceeding we addressed the definitional issue **and** left open the issue of whether we would impose discretionary unbundling obligations.

In the Wireline Broadband Proceeding, the Commission tentatively concluded that DSL high speed Internet access is an information service, and we asked about the implications of the Computer Inquiry II obligations and other unbundling obligations.

Some in and around the Commission have suggested that the Commission should use the same process we set forth in the Cable Modem proceeding in the Wireline Broadband proceeding.

In other words, they advocate that the Commission should address only the definitional issues and leave undecided – until some time later next year – whether and to what extent the unbundling obligations apply in the Wireline context.

I'm very concerned about – and at this stage I would not support – such an approach. We should be cognizant and clear on what the implications of that suggested approach would be.

In the Cable Modem proceeding, inaction resulted in no regulation being applied.

In the case of DSL, however, the impact of the current presumption under the Commission's decision is that unbundling obligations do apply.

Inaction by the Commission therefore leaves all of the unbundling regulations firmly in place – and only applies them to one of the two competitors.

Therefore, I see three potential courses of action:

We could treat DSL services similar to cable modem service.

In doing so, we would need to change our Computer II rules so that incumbent providers would no longer be required to provide underlying transmission services as retail service offerings. Providers nevertheless would have the incentive to provide broadband transport to unaffiliated ISPs on reasonable terms, because only by doing so could they maximize the value of their investments. Such offerings would be made available on a private carriage basis and not as unbundled tariffed offerings.

The Commission could, on an interim basis, guarantee ISPs access to broadband transmission services in a nondiscriminatory manner. Specifically, ILECs would be required to offer unaffiliated ISPs the same transmission services that the ILEC offers to its own affiliates through private carriage agreements. This nondiscrimination requirement could be put in place for two or three years, but then sunset unless the FCC extends it to all broadband providers.

Second, we could treat cable modem services similar to DSL services. Under this alternative, the Commission could leave the Computer Inquiry rules in place and apply them to all broadband providers with common carrier status. In effect, the FCC would impose the same regulatory framework on cable modem service that currently applies to wireline DSL service.

As for the third option, I believe the only other logical alternative is to classify wireline broadband as a telecommunications service, with the accompanying nondiscrimination requirements, and to acknowledge that the Commission was wrong when it declared cable modem service to be an information service. Instead, the Commission could determine that cable modem service is a cable service subject to the panoply of Title VI regulations currently applicable to cable service providers, such as local franchise obligations and service regulations.

At this stage, of the three options I have just outlined, I believe the first option – treating DSL service similar to cable modem service – is the better choice. I recognize, however, that there are merits to all three – I fail to see any merits, however, in refusing to answer the underlying question.

Priority III: Responding to the Courts

As you know, the U.S. Court of Appeals for the DC Circuit has remanded the Commission's *UNE Remand Order* – the Commission's most recent effort to set out a list of network elements that incumbent local exchange carriers must make available on an unbundled basis to competing carriers.

The Court criticized the FCC's unbundling requirement as being overly broad. The Court found the FCC had failed to take into account the competitive nature of particular geographic and customer markets. At the end of the day, we need to develop an unbundling framework that can be implemented at a more granular level and takes into account the unique issues found in rural and underserved areas.

Provisioning Issues

First, as I have stated previously, in responding to the court, the Commission cannot ignore and must address provisioning and "Hot Cut" problems that new entrants have highlighted in the record in order to ensure that impairment does not exist and to allow for access to the residential market.

Switching

I believe the Commission can adopt a relatively simple and straightforward test with regard to whether "unbundled local switching" is necessary for the provision of competitive services to consumers.

If other alternative facilities based providers exist in a market and the impairment associated with provisioning problems is addressed then switching would not need to be provided.

In other words, (1) alternative facilities providers would be required to use their own facilities, and (2) if a sufficient number of alternative providers are present, the Commission would assume that a wholesale market for switching is viable.

The unbundling obligations that reside in the Act, however, still remain viable and serve a pro-competitive purpose. In my view, the unbundling obligations are necessary and need to stay in place in those rural and underserved areas that lack alternative facilities based service providers.

At the end of the day, however, we need to recognize that if we fix existing provisioning problems that will allow competitors to easily migrate customers from the ILEC to their own facilities, then we cannot continue to require unbundling in markets where such competitive facilities exists.

Any shifts in regulatory direction, however, should be cushioned by transitional measures

and safeguards.

Several states have requested that they become more involved in our impairment analysis.

In my view, much of the current talk about state preemption is premature. I believe that the States are best positioned to make those highly fact intensive and local determinations.

During my stay at the Commission, I have witnessed first hand the role that the States have played in being helpful partners in our mutual goal to implement the Act.

I believe that the States should be implementing our standard by making the factual determination regarding the existence of alternative facilities based providers and whether, and to what extent, impairment exists with respect to the ability of new entrants to access the market.

Line Sharing

Besides addressing our unbundling framework, the DC Circuit's USTA decision also vacated the Commission's Line Sharing Rules.

The Court stated that we failed to adequately take into account alternative facility providers, specifically cable and satellite. No one denies` that Cable is the dominant provider of residential high speed Internet access services.

In my view, the Commission has no choice but to recognize this fact as it decides whether incumbent DSL providers should be treated as dominant carriers when they provide high speed Internet access services.

Therefore, I'm in favor of declaring the incumbents non-dominant in the residential high-speed Internet Access market and not re-imposing our Line Sharing obligations where a cable competitor exists for residential high speed services.

III. Conclusion

In sharing with you this afternoon my vision of how the Commission should proceed and what the future landscape should look like, I have covered a lot of ground. I'd like to leave you with some parting thoughts.

In today's marketplace, many residential consumers do have competitive, facilities-based choices for broadband services. Where a competing provider, such as cable, offers broadband service, our regulations need to recognize this reality.

In the residential narrowband, or voice-centric world, however, less facilities-based competition exists. And our regulations also need to reflect that reality. That is why it is critical that we establish a framework, working with the States, that evaluates the true extent of

facilities-based competition in markets throughout the country. We must not leave behind American consumers that live in rural and underserved areas.

I am optimistic that if the Commission follows the steps I have just outlined, we could develop a framework to encourage investment in new infrastructure and that would ensure the availability of next generation network technology for all consumers through out the nation.

By taking these steps, the Commission can establish a framework that would result in an effective tiered capacity approach agnostic to the nature of the service provider or the technology it is using, while still ensuring access to competitive providers for consumers. This framework puts cable operators and telephony providers on similar footing.

Both types of providers would have basic service obligations that remain regulated. Cable operators would be required to continue to offer basic cable; they would be subject to must carry obligations and basic tier pricing. Incumbent local exchange carriers would continue to be subject to unbundling and state supervision.

Access to capacity above that level, however, would be constrained primarily by market forces. Both types of service providers would be similarly situated with regard to how they provide broadband service. Both would be free to innovate, deploy additional capacity, and offer service in a completely unregulated tier.

As I have said, the Commission at some point must move from deliberation to decision-making. I believe we are now at the crossroads where the tough choices must be made. I recognize that I envision a very different world that exists today. The proposal I have set forth is provocative, and one with which everyone will not agree. Indeed, I will not be surprised if there are aspects with which you agree, but you do so silently, and points with which you disagree, and you do so loudly. But in the end, if the Commission is to move forward, we must engage more directly and specifically. I therefore welcome your reaction, criticism, and suggestions. Your move.

Thank you for your time.

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 businesses. Companies are forging partnerships to offer bundled services that are attractive to

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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).

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 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

[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.

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

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

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

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[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").