

NEWS

News media Information 202 / 418-0500
TTY 202 / 418-2555
Fax-On-Demand 202 / 418-2830
Internet: <http://www.fcc.gov>
<ftp.fcc.gov>

Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F 2d 385 (D.C. Circ 1974).

FOR IMMEDIATE RELEASE:
February 20, 2003

NEWS MEDIA CONTACT:
Michael Balmoris 202-418-0253
Email: mbalmori@fcc.gov

FCC ADOPTS NEW RULES FOR NETWORK UNBUNDLING OBLIGATIONS OF INCUMBENT LOCAL PHONE CARRIERS

Greater Incentives for Broadband Build-Out and Greater Granularity in Determining Unbundled Network Elements Are Key Commission Actions

Washington, D.C. – The Federal Communications Commission (Commission) today adopted rules concerning incumbent local exchange carriers' (incumbent LECs) obligations to make elements of their networks available on an unbundled basis to new entrants. The new framework provides incentives for carriers to invest in broadband network facilities, brings the benefits of competitive alternatives to all consumers, and provides for a significant state role in implementing these rules.

Today's action resolves various local phone competition and broadband competition issues and addresses a May 2002 decision by the U.S. Court of Appeals for the District of Columbia which overturned the Commission's previous Unbundled Network Elements (UNE) rules. Following is a brief summary of the key issues resolved in today's decision (a more detailed summary of today's action is attached):

1. **Impairment Standard** – A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, which are likely to make entry into a market uneconomic. Such barriers include scale economies, sunk costs, first-mover advantages, and barriers within the control of the incumbent LEC. The Commission's unbundling analysis specifically considers market-specific variations, including considerations of customer class, geography, and service.
2. **Broadband Issues** – The Commission provides substantial unbundling relief for loops utilizing fiber facilities: 1) the Commission requires no unbundling of fiber-to-the-home loops; 2) the Commission elects not to unbundle bandwidth for the provision of broadband services for loops where incumbent LECs deploy fiber further into the neighborhood but short of the customer's home (hybrid loops), although requesting carriers that provide broadband services today over high capacity facilities will continue to get that same access even after this relief is granted, and 3) the Commission will no longer require that line-sharing be available as an unbundled element. The Commission also provides clarification on its UNE pricing rules that will send appropriate economic signals to carriers.

3. **Unbundled Network Element Platform (UNE-P) Issue** – The Commission finds that switching - a key UNE-P element - for business customers served by high-capacity loops such as DS-1 will no longer be unbundled based on a presumptive finding of no impairment. Under this framework, states will have 90 days to rebut the national finding. For mass market customers, the Commission sets out specific criteria that states shall apply to determine, on a granular basis, whether economic and operational impairment exists in a particular market. State Commissions must complete such proceedings within 9 months. Upon a state finding of impairment, the Commission sets forth a 3 year period for carriers to transition off of UNE-P.
4. **Role of States** – The states have a substantial role in applying the Commission’s impairment standard according to specific guidelines tailored to individual elements.
5. **Dedicated transport** – The Commission finds that requesting carriers are not impaired without Optical Carrier (or OCn) level transport circuits. However, the Commission finds that requesting carriers are impaired without access to dark fiber, DS3, and DS1 capacity transport, each independently subject to a route-specific review by states to identify available wholesale facilities. Dark fiber and DS3 transport also each are subject to a route-specific review by the states to identify where competing carriers are able to provide their own facilities.

With today’s action, the Commission also opened a Further Notice of Proposed Rulemaking (FNPRM) seeking comment on whether the Commission should modify the so-called pick-and-choose rule that permits requesting carriers to opt into individual portions of interconnection agreements without accepting all the terms and conditions of such agreements.

-FCC-

Docket No.: CC 01-338

Wireline Competition Bureau Staff Contact: Tom Navin at 202-418-1580.

News about the Federal Communications Commission can also be found on the Commission’s web site www.fcc.gov.

ATTACHMENT TO TRIENNIAL REVIEW PRESS RELEASE

Order on Remand

- Local Circuit Switching – The Commission finds that switching - a key UNE-P element - for business customers served by high-capacity loops such as DS-1 will no longer be unbundled based on a presumptive finding of no impairment. Under this framework, states will have 90 days to rebut the national finding. For mass market customers, the Commission sets out specific criteria that states shall apply to determine, on a granular basis, whether economic and operational impairment exists in a particular market. State Commissions must complete such proceedings (including the approval of an incumbent LEC batch hot cut process) within 9 months. Upon a state finding of impairment, the Commission sets forth a 3 year period for carriers to transition off of UNE-P.
- Packet Switching – Incumbent LECs are not required to unbundle packet switching, including routers and DSLAMs, as a stand-alone network element. The order eliminates the current limited requirement for unbundling of packet switching.
- Signaling Networks – Incumbent LECs are only required to offer unbundled access to their signaling network when a carrier is purchasing unbundled switching. The signaling network element, when available, includes, but is not limited to, signaling links and signaling transfer points.
- Call-Related Databases – When a requesting carrier purchases unbundled access to the incumbent LEC's switching, the incumbent LEC must also offer unbundled access to their call-related databases. When a carrier utilizes its own switches, with the exception of 911 and E911 databases, incumbent LECs are not required to offer unbundled access to call-related databases, including, but not limited to, the Line Information database (LIDB), Toll Free Calling database, Number Portability database, Calling Name (CNAM) database, Operator Services/Directory Assistance databases, and the Advanced Intelligent Network (AIN) database.
- OSS Functions – Incumbent LECs must offer unbundled access to their operations support systems for qualifying services. OSS consists of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information. The OSS element also includes access to all loop qualification information contained in any of the incumbent LEC's databases or other records.
- Loops
 - Mass Market Loops
 - * Copper Loops – Incumbent LECs must continue to provide unbundled access to copper loops and copper subloops. Incumbent LECs may not retire any copper loops or subloops without first receiving approval from the relevant state commission.
 - * Line Sharing – The high frequency portion of the loop (HFPL) is not an unbundled network element. Although the Order finds general impairment in providing broadband

services without access to local loops, access to the entire stand-alone copper loop is sufficient to overcome impairment. During a three-year period, competitive LECs must transition their existing customer base served via the HFPL to new arrangements. New customers may be acquired only during the first year of this transition. In addition, during each year of the transition, the price for the high-frequency portion of the loop will increase incrementally towards the cost of a loop in the relevant market.

- * Hybrid Loops – There are no unbundling requirements for the packet-switching features, functions, and capabilities of incumbent LEC loops. Thus, incumbent LECs will *not* have to provide unbundled access to a transmission path over hybrid loops utilizing the packet-switching capabilities of their DLC systems in remote terminals. Incumbent LECs must provide, however, unbundled access to a voice-grade equivalent channel and high capacity loops utilizing TDM technology, such as DS1s and DS3s.
- * Fiber-to-the-Home (FTTH) Loops – There is no unbundling requirement for new build/greenfield FTTH loops for both broadband and narrowband services. There is no unbundling requirement for overbuild/brownfield FTTH loops for broadband services. Incumbent LECs must continue to provide access to a transmission path suitable for providing narrowband service if the copper loop is retired.
- Enterprise Market Loops
 - * The Commission makes a national finding of no impairment for OCn capacity loops.
 - * The Commission makes a national finding of impairment for DS1, DS3, and dark fiber loops, except where triggers are met as applied in state proceedings. States can remove DS1, DS3, and dark fiber loops based on a customer location-specific analysis applying a wholesale competitive alternatives trigger.
 - * Dark fiber and DS3 loops also each are subject to a customer location-specific review by the states to identify where loop facilities have been self-deployed.
- Subloops
 - * See the copper loops summary above. In addition, incumbent LECs must offer unbundled access to subloops necessary for access to wiring at or near a multiunit customer premises, including the Inside Wire Subloop, regardless of the capacity level or type of loop the requesting carrier will provision to its customer.
- Network Interface Devices (NID) – Incumbent LECs must offer unbundled access to the NID, which is defined as any means of interconnecting the incumbent LEC’s loop distribution plant to the wiring at the customer premises.
- Dedicated Interoffice Transmission Facilities – The Commission redefines dedicated transport to include only those transmission facilities connecting incumbent LEC switches or wire centers.

- * The Commission finds that requesting carriers are not impaired without access to unbundled OCn level transport.
 - * The Commission finds that requesting carriers are impaired without access to dark fiber, DS3, and DS1 transport, except where wholesale facilities triggers are met as applied in state proceedings using route-specific review.
 - * Dark fiber and DS3 transport also each are subject to a granular route-specific review by the states to identify where transport facilities have been self-deployed.
- Shared Transport – Incumbent LECs are required to provide shared transport to the extent that they are required to provide unbundled local circuit switching
 - Combinations of Network Elements – Competitive LECs may order new combinations of UNEs, including the loop-transport combination (enhanced extended link, or EEL), to the extent that the requested network element is unbundled.
 - Commingling – Competitive LECs are permitted to commingle UNEs and UNE combinations with other wholesale services, such as tariffed interstate special access services.
 - Service Eligibility – Service eligibility criteria apply to all requests for newly-provisioned high-capacity EELs and for all requests to convert existing circuits of combinations of high-capacity special access channel termination and transport services. These criteria include architectural safeguards to prevent gaming.
 - Certification – Each carrier must certify in writing to the incumbent LEC that it satisfies the qualifying service eligibility criteria for each high-capacity EEL circuit.
 - Auditing – Incumbent LECs may obtain and pay for an independent auditor to audit compliance with the qualifying service eligibility criteria for high-capacity EELs. The incumbent LEC may not initiate more than one audit annually.
 - Modification of Existing Network/“No Facilities” Issues – Incumbent LECs are required to make routine network modifications to UNEs used by requesting carriers where the requested facility has already been constructed. These routine modifications include deploying multiplexers to existing loop facilities and undertaking the other activities that incumbent LECs make for their own retail customers. The Commission also requires incumbent LECs to condition loops for the provision of xDSL services. The Commission does not require incumbent LECs to trench new cable or otherwise to construct transmission facilities so that requesting carriers can access them as UNEs at cost-based rates, but it clarifies that the incumbent LEC’s unbundling obligation includes all transmission facilities deployed in its network.
 - Section 271 Issues – The requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling, under checklist items 4-6 and 10, regardless of any unbundling analysis under section 251. Where a checklist item is no longer subject to section 251 unbundling, section 252(d)(1) does not operate as the pricing standard. Rather, the pricing of such items is governed by the “just and reasonable” standard established under sections 201 and 202 of the Act.

- Clarification of TELRIC Rules – The order clarifies two key components of its TELRIC pricing rules to ensure that UNE prices send appropriate economic signals to incumbent LECs and competitive LECs. First, the order clarifies that the risk-adjusted cost of capital used in calculating UNE prices should reflect the risks associated with a competitive market. The order also reiterates the Commission’s finding from the *Local Competition Order* that the cost of capital may be different for different UNEs. Second, the Order declines to mandate the use of any particular set of asset lives for depreciation, but clarifies that the use of an accelerated depreciation mechanism may present a more accurate method of calculating economic depreciation.
- Fresh Look – The Commission will retain its prior determination that it will not permit competitive LECs to avoid any liability under contractual early termination clauses in the event that it converts a UNE to a special access circuit.
- Transition Period – The Commission will not intervene in the contract modification process to establish a specific transition period for each of the rules established in this Order. Instead, as contemplated in the Act, individual carriers will have the opportunity to negotiate specific terms and conditions necessary to translate the Commission’s rules into the commercial environment, and to resolve disputes over any new contract language arising from differing interpretations of the Commission’s rules.
- Periodic Review of National Unbundling Rules – The Commission will evaluate these rules consistent with the biennial review mechanism established in section 11 of the Act. These reviews, however, will not be performed *de novo* but according to the standards of the biennial review process.

Further Notice of Proposed Rulemaking

- The Commission opens a further notice of proposed rulemaking to seek comment on whether to modify the Commission’s interpretation of section 252(i) – the Commission’s so-called pick-and-choose rule. The Commission tentatively concludes that a modified approach would better serve the goals embodied in section 252(i), and sections 251-252 generally, by promoting more meaningful commercial negotiations between incumbent LECs and competitive LECs.

**Separate Statement of Chairman Michael K. Powell
Dissenting in Part**

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338), Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No.96-98), and Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147).

Today, the Commission concludes one of its most significant proceedings ever. The Triennial Review has been a complicated and difficult undertaking, but one that will set critical parameters for competition and broadband deployment for years to come. There are some immensely important achievements in this Order that have long been objectives of mine—namely, substantial broadband relief. Yet, regrettably, there are some fateful decisions as well, which I believe compromise some important principles to which I adhere unwaveringly. To those, I must respectfully dissent.

I begin with the momentous step we take today to create a broadband regulatory regime that will stimulate and promote deployment of next generation infrastructure, bringing a bevy of new services and applications to consumers. I have long stated that broadband deployment is the most central communications policy objective of our day. Today, we at last put some substance into that stated goal. I am proud to say that today we take some vital steps across the desert from the analog world to the digital one. Today's decision makes significant strides to promote investment in advanced architecture and fiber by removing impeding unbundling obligations. The digital migration journey is one step further along.

I do, however, dissent from the Majority's decision to immediately eliminate line sharing as an unbundled network element. Most of our policies to promote the goals of the Telecommunications Act have produced little yield to date. However, line sharing has clear and measurable benefits for consumers. It has unquestionably given birth to important competitive broadband suppliers. That additional competition has directly contributed to lower prices for new broadband services. By some estimates, 40% of DSL providers use line shared inputs. The decision to kill off this element and replace it with a transition of higher and higher wholesale prices will lead quite quickly to higher retail prices for broadband consumers.

I also believe the argument that removing line sharing is a form of positive regulatory relief to stimulate broadband is ill-conceived. Line sharing rides on the old copper infrastructure not on the new advanced fiber networks that we are attempting to push to deployment. Indeed, the continued availability of line sharing and the competition that flowed from it likely would have pressured incumbents to deploy more advanced networks in order to move from the negative regulatory pole to the positive regulatory pole, by deploying more fiber infrastructure. This decision actually diminishes the competitive pressure to do so.

Today, we also issue a very important further notice on our “pick and choose” rule and tentatively conclude that it should be eliminated. This is an important and underappreciated step. The pick and choose rule has in many ways undermined the goals of the Act by squelching any incentive to reach commercially negotiated terms and conditions, which Congress hoped would eventually overtake the heavier handed regulatory process for developing terms and conditions of commercial arrangements. I look forward to completing that proceeding. I now turn to the majority’s decision on switching, which I cannot in good conscience support.

Switching

In opening this proceeding, this Commission committed itself to conduct a thorough review of its unbundling policies. This review took on greater importance in light of a slumping telecommunications sector and the D.C. Circuit’s *USTA* decision vacating the rules that unbundled each element of an incumbent’s network. Thus, the Commission was charged with reconstructing its list of unbundled elements from the ground up. As we have endeavored to do so, the most controversial judgment rested with the switching element. The importance of this element is not in its particular functionality, but that it represents the capstone of what has become known as the unbundled platform. If switching is available, it is very likely a carrier can resell the entire incumbent’s network, at heavily subsidized rates, set by regulators, without having to provide much in the way of its own infrastructure.

A Retreat from Facilities-based Competition

The Majority apparently is a big fan of UNE-P, because it has contorted the letter and spirit of the statute and the court’s interpretation of our responsibilities in an effort to ensure its indefinite preservation. What is remarkable about today’s decision is that one looks in vein to find a clear or coherent federal policy in the choices made by the majority.

Consistently underlying my preferences in this area is a commitment to promote and advance facilities-based competition that is meaningful and sustainable, and that will eventually achieve Congress’ stated goal of reducing regulation. The benefits of such a policy are straightforward: Facilities-based competition means a competitor can offer real differentiated service to consumers—the switch is the brains of one’s network and to be without one is to be a competitor on life support fed by a hostile host. Facilities-based competitors own more of their network and can control more of their costs, thereby offering consumers real potential for lower prices. Facilities-based competitors offer greater rewards for the economy—buying more equipment from other suppliers (like Lucent, Corning and Nortel) and creating more jobs (the reason CWA supports such a course). And, facilities providers create vital redundant networks that can serve our nation if other facilities are damaged by those hostile to our way of life.

Some on this very panel have talked glowingly about facilities-based competition, but when one reviews this *Order* one will ask “where’s the beef.” Today’s decision clearly steps back from a pro-facilities policy, by favoring extensive regulatory management of incumbent networks to supply the competitive market. More distressing than giving facilities providers the back of their hand, I see no meaningful federal policy put in its place, other than vague and solicitous pronouncements about the states playing the lead role in making these determinations and a commitment to “competition,” no matter how anemic. Congress demanded the Commission not be so passive and demur when it vested it with responsibility for the unbundling regime.

Legal Peril

I also dissent from the switching section of this *Order*, because I find a Commission majority for the third time in seven years substituting its preferences for a heavily permissive unbundling regime for Congress’s judgment that no element should be provided unless the Commission can affirmatively conclude that a competitor is impaired without it. The Supreme Court admonished that the FCC had to put forth a meaningful limiting principle in making its decisions. The Commission’s second attempt also failed, when the D.C. Circuit vacated our rules last summer. The court emphasized that the Commission could not treat unbundling as an unqualified good and had to consider the social costs as well. It also admonished that the standard employed and applied by the FCC had to demonstrate that a typical entrant was effectively prohibited from entering the market due to barriers associated with the monopoly power of the incumbent and not just typical start up costs or costs naturally associated with entry. Today, the majority flouts the D.C. Circuit mandate.

The legal errors of today’s decision are many to my mind, but I emphasize a few of the most egregious. First, the majority places switching on the list without making an affirmative finding of impairment based on a thorough analysis of sufficiently granular criteria. Cleverly, they state only a presumption that there is impairment that can subsequently be addressed by state commission proceedings to either defeat the presumption and take switching off the list, or affirm it and leave switching on the list. Remarkably, however, the national rule requires the switching element on little more than a presumptive intuition and even fails to really apply the Commission’s own articulated impairment standard. I believe this to be reversible error.

Moreover, the majority delegates its own responsibilities under the statute to the states, but fails to invoke any meaningful limiting principles in doing so. States are free to add or subtract elements at will. The majority does provide a laundry list of micro-economic criteria that a state may consider, but the list is not exhaustive and states are free at bottom to do what they choose. State decisions are unreviewable by the Commission.

This *Order* is legally suspect if for no other reason than it is nearly identical at its core to the ill-fated *UNE Remand Order of 1999*. In substance and in spirit it endeavors again to reverse the presumptions of the statute by treating unbundled switching as an

unqualified good that should be provided by an incumbent to an entrant, unless the incumbent proves that the “presumption” of impairment is unwarranted. I think this basic paradigm turns the statute on its head and flies in the face of the Court’s ruling.

Bad for the Market and bad for the economy

I believe this decision will prove too chaotic for an already fragile telecom market. In choosing to abdicate its responsibility to craft clear and sustainable rules on unbundling to the State Public Utility Commissions the Majority has brought forth a molten morass of regulatory activity that may very well wilt any lingering investment interest in the sector. And, I fear as much or more for CLECs as I do ILECs, for the prolonged uncertainty of rights and responsibilities may prove stifling.

The nation will now embark on 51 major state proceedings to evaluate what elements will be unbundled and made available to CLECs. These decisions will be litigated through 51 different federal district courts. These 51 cases will likely be decided in multiple ways—some upholding the state, some overturning the state and little chance of regulatory and legal harmony among them at the end of the day. These 51 district court cases are likely to be heard by 12 Federal Courts of Appeals—do we expect they will all rule similarly? If not, we will eventually be back in the Supreme Court of the United States to resolve any conflicts—the same Court that vacated our excessively permissive unbundling regime in 1999. This process will take many years and will hardly be the quieting and stabilizing regime that was so craved by a rocky market.

I also believe that under this decision there will be other negative consequences for the economy. I fear we will see more job loss as carriers cut their capital expenditures and refuse to move forward with new investment and growth against this Picasso-esque regulatory backdrop. I can only imagine how a business plan gets written by a CLEC hoping to enter the local market, not knowing now and not likely to know for years what they will ultimately be entitled to and for how long.

Harmful to Consumer in the Long-run

This decision also could prove harmful to consumers in the long-run, and I cringe to see their welfare raised on the staff of the majority’s decision. Make no mistake, UNE-P may have very limited merits as a transitional strategy, but it is fatally flawed as sustainable local competition. This is not the low lying plateau on which the high aspirations of the 1996 Act should be planted. It is a model that only works if hundreds of stars align perfectly and stay that way. Every state needs to continue to make every last element available. Every decision to do so must be sustained by every court that examines it. The FCC must never tamper with it and Congress better not ever alter the rights. The regulatory arbitrage bubble expands ever more perilously with each regulatory variable and is sure to eventually pop, like dot coms of old, if government policy does not diligently steer the balloon to stable ground.

“States Rights”

To explain their decision, the majority has cloaked itself in the drape of “State’s Rights.” (a classic conservative mantra not generally associated with a majority of democrats). This is a trivial misuse of a cherished constitutional precept. Congress has established a federal statute and federal policy to promote competition. Even the majority concedes that it is delegating federal authority to state offices and not intruding on the traditional general police powers of a state that normally comprise its constitutional “rights.” Justice Antonin Scalia, whose credentials are unchallenged as a leading voice for states’ rights himself eloquently quashed this peccadillo in *Iowa Utilities*. It is worth repeating:

[T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any ‘presumption’ applicable to this question it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange. . . This is, at bottom, a debate not about whether the states will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. . . To be sure, the FCC’s lines can be even more restrictive than those drawn by the courts—but it is hard to spark a passionate ‘states rights’ debate over that detail.

I could not agree more.

I emphasize, however, that I do see the implementation of this statute as a state/federal partnership. States are given control over the rates set for unbundled elements, but it is principally the obligation of the FCC to determine what those elements will be, faithfully implementing the impairment clause. States can assist in that effort, but our responsibilities should not be released to them.

I must also note that the impulse to leave much more telecom policy to state commissions may run against the winds of technological change. Communications is converging, distance is fading as a meaningful construct in an internet, cyber-space world, mobility is ascending. These are the circumstances that necessitate, at a minimum, a coherent national framework of rules. States can play important roles in such a regime, but I am of the view that primacy must rest with the national government.

Conclusion

There are great strides being made today in the march of Digital Migration, which realize some of my most important objectives. I am disappointed, however, by today’s decision on UNE-P. Nonetheless, it is the fair result of a democratic institution in which majority rules. I also recognized that State PUCs will now have an enormous task before them and I sincerely wish them the very best as they struggle through what the FCC

could not. I pledge to work with them in partnership to yield the best result for the nation. And, I sincerely hope that those carriers who fought so fiercely for this result will now prove their value in the marketplace and actually deliver the local competition, lower prices and more innovative services that they insisted they would if they prevailed. I, for one, will be watching. This has been a tough proceeding, but I look forward to getting it behind us and moving to other matters pressing for the Commission's attention.

PRESS STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability; and Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, CC Docket Nos. 01-338, 96-98, 98-147 & 02-33, Report and Order (adopted Feb. 20, 2003).

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

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

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

Broadband Loops

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

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

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

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

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

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

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

Unbundled Switching (UNE-P)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Line Sharing

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

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

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

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

* * *

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

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

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

Seven years ago this month, Congress enacted a sweeping reform of our nation's telecommunications laws. In doing so, it sought to promote competition in all telecommunications markets and to replace the heritage of monopoly with the vitality of competition. Provisions to open the local markets to competition are at the 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 of the incumbent's network, and resale. The competition envisioned in the legislation is now, and only now, becoming a reality. Today, because of the vision of Congress and the hard work of American entrepreneurs across the country, there are 20 million competitive lines serving consumers, and the number continues to grow in spite of the severe economic downturn that the telecommunications industries, and the nation, have suffered. This Triennial Review offered us the opportunity to encourage this competition and to fulfill the mandate of the law, which is “to secure lower prices and higher quality services for American consumers.”

In some ways, today's action advances that mandate. We preserve voice competition in the local markets and we allow it to grow. 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. One month ago, these gains were not expected.

In other and equally important ways, however, we fail our charge. Some competitive strategies are harmed by today's decision and, I believe worst of all, we are playing fast and loose with the country's broadband future, denying it the competitive air it needs to breathe in order to flourish. Consumers and the Internet itself may well suffer.

Today's item is not the one that I would have written had I been given *carte blanche*. Each of my colleagues could make the same statement. I have agreed to join certain decisions that are not my preferred outcome in an effort to find compromise and to avoid even more damage to the competitive landscape. I appreciate the willingness of my colleagues to engage in these discussions to find common ground. There are, however, aspects of this Order with which I cannot agree. As I reviewed the decisions we make today, 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. Where I am unable to square a decision with the statutory directives, I am compelled to dissent.

Permit me to highlight a few of the most important issues.

On the positive side, 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 cobble together a majority for a more reasonable process to conduct a granular analysis that takes into account geographic and customer variation in different markets. We have recognized that the States have a significant role to play in our unbundling determinations. We have understood in many parts of this Order that the path to success is not through preemption of the role of the States, but through cooperation with the States. State Commissions with closer proximity to the markets are often best positioned to make the fact-intensive determinations about impairments faced by competitors in their local markets. I am therefore pleased with our decision that States should have an active part in conducting the granular analysis necessary to determine whether and where network elements such as switching should be available as unbundled network elements.

On transport, I believe the item is significantly improved from where it might have been. Dark fiber remains on the list of network elements; limitations on high-capacity transport were done in a manner that was responsive to the facilities-based competitors' concerns; and transport is not removed without a specific finding on a route, rather than based on some notion of contestability in the market.

There are aspects of this Order that are certainly not my preferred approach, but which I have had to accept in order to reach compromise. In particular, there is the decision to eliminate access to only part of the frequencies of the loop as a network element. I would have preferred to maintain this access, also known as line sharing. I believe that line sharing has made a contribution to the competitive landscape. Instead of recognizing this contribution and encouraging it, we provide today only an extended transition period to allow competitors to purchase the entire loop facility as a network element, or to pair with a voice provider, to offer the full range of services to a customer.

Finally, there are parts of this Order with which I strongly disagree. Most importantly, I am troubled that we are undermining competition, particularly 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. That means that as incumbents deploy fiber anywhere in their loop plant -- a step carriers have been taking in any event over the past years to reduce operating expenses -- they are relieved of the unbundling obligations that Congress imposed to ensure adequate competition in the local market. The Commission has recognized time and again that loops are the ultimate bottleneck facility. Yet, this Commission has chosen in this instance 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. To make matters even worse, in some markets such as the small and medium business market, there may not be any competitive alternatives if competitors cannot get access to loop facilities.

I fear that this decision may well result in higher prices for consumers and put us on the road to re-monopolization of the local broadband market. Additionally, I worry about the negative impact of this decision on facilities-based carriers which are practicing the kind of competition we all talk about encouraging. They face enough challenges in these difficult economic times without having us add to their burdens.

A word to the wise: Other decisions are hurtling towards us. As harmful as this decision is, it may not be the last battle this year in the headlong rush to deregulate broadband. In a few short months, maybe sooner, we will consider whether to deregulate broadband entirely by removing core communications services from the statutory frameworks established by Congress. Opponents of this change argue that this is substituting our own judgment for that of the law, and playing a game of regulatory musical chairs by moving technologies and services 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. In light of our goals of establishing certainty and stability, I hope we would proclaim today that we will not overturn these unbundling obligations in those proceedings over the next few short months. But I caution that it could indeed happen.

It is no secret that some parties urged us to go much further today toward a wholesale upending of the current telecommunications landscape just when competition was beginning to take hold. Instead of preserving, protecting and defending competition, their idea seemed to be tearing away the infrastructure that undergirds that competition. Today's decision is not just a big-ticket item for telephone companies on one side or another of some admittedly arcane issues. It affects us all. It's next month's phone bill, but it's also the next generation's broadband and the future of the Internet. It will deeply affect our country's future. We've got to make good, smart decisions. On broadband, at least, we haven't done this.

I am also worried about process here. Seven years ago, when Congress passed the landmark Telecommunications Act, the Commission implemented its regulatory directives in a bipartisan fashion by unanimous vote, reaching consensus under extremely short statutory deadlines. Today, by contrast, we adopt one of our most important decisions to date by a split decision plagued by shifting pluralities. 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 wasn't in the cards here. Nevertheless, I believe we have some lessons to learn 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 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 don't know of any other institution that is forced to operate this way. Maybe the ability to manage our discussions differently would not have rescued this item, but I do think it could make a

difference going forward. And we have a lot of work to do going forward. One item that requires our immediate attention is performance metrics. Ideally, a decision on this would have preceded today's decision, so that incumbents and competitors alike would know what is expected of them regarding the now fewer regulatory requirements they must meet.

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. Although the bottom lines have been decided, the devil is more often than not in the details. I am unable to fully sign on to decisions without reservations until there is a final written product. As we finalize the draft in the coming days, I hope all of the agency's resources will be working towards implementing the majority opinion on all aspects of the Order so that it can withstand the inevitable litigation that is sure to follow. If we do not dedicate all our resources to perfecting this Order, we will be vulnerable to the accusation that we are throwing up our hands and expecting the courts to step in. That's not good government.

The FCC Team has an uncommonly high share of bright, talented and dedicated people - among the country's best, inside or outside of government. I want to thank Bill Maher and his team for their tireless efforts and for the dedication exhibited by the Wireline Competition Bureau staff throughout this proceeding. I'd like to thank each member of the team individually because I know how hard they worked and how late they burned the midnight oil. Most of all, I want to thank my Senior Legal Adviser, Jordan Goldstein, for the endless hours, the encyclopedic knowledge and invariably good judgment he brings to all these issues. For his work here, he deserves both a Silver Star and a Purple Heart.



NEWS

News media Information 202 / 418-0500
TTY 202 / 418-2555
Fax-On-Demand 202 / 418-2830
Internet: <http://www.fcc.gov>
<ftp.fcc.gov>

Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See *MCI v. FCC*, 515 F.2d 385 (D.C. Circ 1974).

FOR IMMEDIATE RELEASE:
February 20, 2003

News Media contact:
Jordan Goldstein at (202) 418-2000

COMMISSIONER MICHAEL J. COPPS:
FCC DECISION “PRESERVES COMPETITIVE TOOLS” BUT
“ENDANGERS BROADBAND CONSUMERS AND COMPETITION”

FCC Commissioner Michael J. Copps stated today that through the Commission’s Triennial Review decision: “We preserve voice competition in the local markets and we give competitors the tools to grow. 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. One month ago, these gains were not expected.”

At the same time, Copps expressed disappointment with the Commission’s treatment of broadband services. “We are playing fast and loose with the country’s broadband future” Copps stated. “Today we may be choking off competition in broadband. Consumers and the Internet itself may well suffer.”

Commissioner Copps agreed to the parts of the Order that protected competition, but concurred with or dissented from other sections that undermined Congress’s vision for local competition.

Copps continued: “It is no secret that some parties urged us to go much further today toward a wholesale upending of the current telecommunications landscape just when competition was beginning to take hold. Instead of preserving, protecting and defending competition, the idea seemed to be to tear away the infrastructure that undergirds that competition. Today’s decision is not just a big-ticket item for telephone companies on one side or another of some admittedly arcane issues. It affects us all. It will determine the size of your phone bill. It will support or undermine the future of broadband and the Internet. It will deeply affect our country’s future. We’ve got to make good, smart decisions. On broadband, at least, we haven’t done this.”

Today’s Order concerns the rules Congress instructed the FCC to create to develop local competition for telecommunications services, as part of the Telecommunications Act of 1996. Local competition benefits customers through lower prices, greater innovation, and improved service quality.



NEWS

Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-5322

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action.
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 in 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 -

**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 compromise 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.

