STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN,
DISSENTING

Re: Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 (Dec. 15, 2004).

With this Order, the Commission officially cuts the cord on the local competition provisions of the Telecommunications Act of 1996, the companies and investors which sought to deliver on the promise of the Act, and the American consumers – to whom that promise was made. By fundamentally undermining facilities-based competition, the Commission relegates consumers to an inevitable future of higher rates and fewer choices. Regrettably, and unnecessarily, the Commission's action will ratchet up rates for both residential consumers and small businesses, which are so central to our nation's economic growth.

By not defending the Commission's prior decision before the Supreme Court, the majority placed itself in a box, in effect a coffin for telecom competition. Now, the majority buries telecom competition six feet under. The only choice I was given was where to pound in the nails. I cannot support this decision, because it will force consumers and businesses to pay higher prices and have fewer choices.

Throughout this proceeding, I have sought to take a careful and balanced view of the benefits and burdens of our unbundling rules. The record here, however, overwhelming demonstrates that competitors need access to critical bottleneck elements from the incumbents' legacy networks in order to connect their networks to their customers. Yet, today the Commission denies access to those elements with an overbroad decision that is divorced from the requirements of the statute, the direction of the courts, and the realities of providing telephone service.

Most stark is the Commission's treatment of local loops, which carry telephone traffic from customers' locations to a service provider's network. These local loops act as the on and off ramps to reach the alternative facilities-based networks that competitors have constructed at considerable expense. In this Order, the Commission adopts unbundling rules for these elements that are strangely disconnected from the operational and economic barriers a competitor would face if it had to duplicate the incumbent's legacy network. This blow to competition and choice comes with a certain slight of hand, couched by the majority as "inference tests" compelled by the courts. But "inferences" aside, there should be little doubt about the real-world implications of this Order. By cutting facilities-based competitors off from access to essential network elements, the Commission undermines choice for small and medium size business customers across the country, let alone all consumers. In my view, these small business customers have yet to realize the wave of rate increases to come.

Nowhere, though, will this disconnection be as pronounced as in the largest metropolitan markets. These are areas where competitors have been able to gain a tenuous but growing foothold, building out their own networks closer to consumers, just as this Commission repeatedly encouraged them to do. Investors, who have committed billions of dollars of private investment in facilities-based wireline competition, have argued persuasively that the type and

locations of their facilities were selected precisely to mesh with loop and transport elements leased from incumbent carriers as unbundled network elements pursuant to the Act. These investors have emphasized that their investments are "essentially worthless" and that "further investments will not be forthcoming," without access to those elements leased from the incumbents. No "inferences" are required to understand the true effect of today's decision on investment.

The message from the facilities-based competitive industry has been clear: this Order will be devastating. It will create dislocation not only for telecommunications companies and their employees, but it will disrupt service for thousands of businesses that rely on them. Given the importance of the cutting-edge services these upstarts provide, this decision is bound to be a drag on the growth of our overall economy. While some argue it will spur investment, it is more likely to diminish it, as competitors who would otherwise invest are forced out of business and incumbents face less pressure to respond to their offerings.

Today's decision also marks the demise of UNE-based competition for residential consumers. For millions of residential consumers, that translates into fewer choices and higher prices. The majority concludes here that this residential competition, predicated on the availability of unbundled local switching, is unsustainable under existing legal precedent. Despite these protestations, the majority all but ensured this result.

I note with appreciation that the majority at least took some of our suggestions. Applying strict eligibility criteria to stand-alone UNE loops would have drastically limited competitors' ability to provide data services, which this Commission has touted as the future of the telecommunications market. Also, I appreciate the majority's willingness to extend slightly the transitions available to competitors who have invested so much in the effort to fulfill the goals of the 1996 Act. I would have supported relief more in line with the Commission's transition approaches used in other proceedings, where the Commission has been granted great deference to fashion transitional remedies.

Moreover, I have serious concerns that consumers may experience unnecessary service disruptions as their providers of choice are forced to exit the marketplace or as carriers rush to convert to new systems. To safeguard against this upheaval, it will be imperative that our State commission colleagues monitor the re-absorption, like the proverbial rat in a python, of millions of consumers who have chosen competitive alternatives. Our failure to address this possibility more comprehensively shows unnecessary disregard for consumers who have signed up with competitors -- for such disruptions would come through no fault of their own.

While I strongly dissent from this Order, I want to thank my colleagues for their candor in approaching these issues. I am deeply disappointed that we cannot find common ground on this result, but I respect their opinions and our dialogue. Some may argue the dissenters drove too hard a bargain and let the perfect be the enemy of the good. I weighed heavily this concern but cannot agree. The disconnect between the Commission's pro-competitive statements and the anti-competitive policies adopted here is too wide to sanction. The Commission's lofty promises and assurances directed this summer at facilities-based competitors ring hollow in this Order. Beyond rhetoric, the harm to competition and consumers is too great a price for the constrained and ineffectual approach outlined in this Order. Finally, I find this Order dismissive of Congress's vision that the 1996 Act would allow facilities-based competitors to grow and to get

a foothold in the market by relying on elements like loops and transport that they need to do business. For all these reasons, I respectfully dissent.