SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Second Report and Order in CC Docket No. 01-338 (adopted July 8, 2004).

I strongly support the Commission's decision to bolster incentives for marketplace negotiations by eliminating the "pick and choose" rule. In enacting the Telecommunications Act of 1996, Congress envisioned a sharing regime built primarily upon negotiated access arrangements, rather than governmental mandates. To be sure, the Commission was required to establish default unbundling rules, and state commissions were expected to set UNE prices and resolve interconnection disputes. But Congress anticipated that competitors and incumbents would establish most terms and conditions at the bargaining table, rather than in regulatory tribunals and courtrooms.

Unfortunately, this vision has not been realized. Instead, we have endured eight years of pitched regulatory battles and resource-draining litigation, and industry participants of all stripes agree that incumbent LECs and new entrants almost never engage in true give-and-take negotiations. There are undoubtedly many complex reasons why the Act's implementation took this course, many of which have nothing to do with the "pick and choose" rule. But I believe that the record in this proceeding confirms something I have long suspected: the "pick and choose" rule impedes marketplace negotiations and is not necessary to prevent discrimination. When the Supreme Court upheld the "pick and choose" rule as a valid interpretation of the Act, it recognized that the rule might "significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions)," and suggested that the Commission would be able to change course if that came to pass.[1] That absence of genuine trade-offs is precisely what has occurred, as incumbent LECs have proven reluctant to make significant concessions in negotiations as long as third parties can later come along and avail themselves of the benefit without making the same trade-off as the contracting party.

By requiring that competitors opt into interconnection agreements on an "all or nothing" basis, we ensure that third parties take the bitter with the sweet. In doing so, I am optimistic that we will promote more meaningful negotiations. Given the almost-complete dearth of marketplace deals, this change can only improve negotiations, notwithstanding claims that it will diminish competitors' leverage. In fact, I expect that the continuing application of the statutory duty of good faith, together with competitors' ability to opt into any negotiated or arbitrated agreement (on an all-or-nothing basis), will be sufficient to prevent discrimination.

The reform we adopt today is part of a much broader transformation. The "pick and choose" rule, along with a remarkably expansive unbundling regime, has fostered an expectation that the government will micromanage every aspect of the relationship between an incumbent LEC and its wireline competitors. The courts have now made

[1] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999).

unmistakably clear that the Commission must impose meaningful limits when adopting new unbundling rules. While I have no doubt that the Commission will continue to mandate the unbundling of bottleneck transmission facilities, it is equally apparent that the concept of maximum unbundling of all elements in all geographic markets cannot be sustained. As we move toward adopting new rules under which competitors will be increasingly required to rely on their own facilities and to differentiate their services, the availability of customized interconnection agreements will be all the more vital. I expect that our elimination of the "pick and choose" rule will help pave the way toward a regime that is more dependent on negotiated access arrangements and less dominated by regulatory fiat.