

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
DISSENTING**

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338)*

Eight years ago, the Commission adopted its pick-and-choose rule. It provided structural assurance that interconnection, service and network elements would be available to all carriers at nondiscriminatory rates, terms and conditions. The rule was based on the strongest statutory reading of Section 252(i). It was designed to minimize contracting costs and was grounded in principles of equal treatment.

We have no looming judicial charge that compels us to depart from our pick-and-choose policy. Quite the contrary: the pick-and-choose rule was upheld by the Supreme Court five years ago. The highest court characterized the rule as “not only reasonable,” but also “the most readily apparent” interpretation of the statute. This is strong stuff for a Commission whose policy pronouncements do not always pass muster with the courts of the land.

I am not convinced that dismantling the pick-and-choose rule and replacing it with an all-or-nothing approach will usher in a new era of negotiation and unique commercial deals. While statements about enhancing give-and-take negotiation have intuitive appeal, their logic here is thin. Trade-off, compromise and concession are good. They are features of any negotiation, including negotiation in a pick-and-choose environment. But in the wireline market, the only wholesaler is also the dominant force in retail competition. I know of no other industry where this is true. It makes contracting difficult. The hurly-burly and give-and-take that go on in so many commercial dialogues are not guaranteed in this one. Take-it-or-leave-it bargaining means competitors will walk away without any wholesale alternatives. To understand this difficulty, look no further than the lack of widespread commercial agreement reached during the months since the *USTA II* decision.

Pulling apart the fabric that supports competition will not speed its arrival. Discarding the pick-and-choose policy will increase the costs of contracting for smaller carriers. It will make it harder for them to compete. The real losers are consumers—residential and small business customers—who will face a dwindling set of choices and more limited competition as a result. For these reasons, I respectfully dissent.