SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
APPROVING IN PART, DISSENTING IN PART

Re: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 04-164.

Section 252 of the Communications Act establishes a framework for the negotiation and arbitration of interconnection agreements between incumbent carriers and new entrants. Section 252(i) provides a valuable tool for preventing discrimination between competitive carriers and incumbents, by requiring incumbents to make available "any interconnection, service, or network element" to other requesting carriers. Since 1996, the Commission's rules have implemented this provision by affording new entrants the ability to choose among individual provisions contained in publicly-filed interconnection agreements. That approach, called the "pick and choose" rule, was affirmed by the Supreme Court as the "most readily apparent" reading of the statute.

In the realm of our local competition rules, I am reticent to cast aside rules that have been affirmed by the Supreme Court. Maintaining some level of regulatory stability in this sector warrants such an approach. I nonetheless join today's Order to the extent that it provides incumbents and competitors with greater flexibility to develop comprehensive negotiated agreements. As a practical matter, the availability of the pick and choose rule appears to have influenced virtually all negotiations between incumbents and competitors, even if the parties to a specific negotiation did not invoke the pick and choose option. By affording parties the ability to balance a series of trade-offs, we should provide additional incentive for negotiated agreements.

The question remains whether this change will provide sufficient incentive for incumbents and competitors to reach mutually-acceptable agreements. The experience of the past 8 years, and particularly the past few months, has demonstrated how difficult it is for competitors and incumbents to reach negotiated agreements for access to unbundled network elements and other critical inputs. Competitors raise legitimate concerns about whether current market conditions create adequate incentives for both parties. The pick and choose rule has served to balance, to some degree, disparities in market power, and it is difficult to predict the effect of its wholesale elimination.

While I support providing parties with some avenue for reaching agreements outside of the pick and choose framework, I cannot fully support this item. Particularly in light of the Supreme Court's conclusion that our current rule "tracks the pertinent language of the statute almost exactly," I would have supported a more measured approach. For example, the Commission could have adopted its "all or nothing" approach for negotiated agreements, but allowed the limited use of the pick and choose rule for new entrants seeking to include previously-arbitrated provisions in new interconnection agreements. These arbitrated provisions have been reviewed by State commissions for consistency with the Act and our rules, and they do not reflect the give-and-take of purely negotiated agreements. Such an approach, though not compelled by our rules, would be a measured way to grant additional flexibility, now that we have concluded that multiple interpretations of the statute are permissible. Allowing the use of the pick and choose rule for previously-arbitrated issues would also address concerns raised by

competitors, some state commissions, and consumer advocacy groups that adopting the "all or nothing" approach would lead to more arbitrations, potentially increasing cost and delay for smaller carriers.

This Commission should be cautious about an approach that may permit parties to delay unreasonably making available even those provisions of interconnection agreements that have been arbitrated by state commissions. We should at minimum commit to monitoring the implementation of this new approach. Parties forcefully dispute whether the relief we provide here will lead to mutually-acceptable, non-discriminatory agreements or towards greater litigation costs because parties are forced to arbitrate more agreements. The difference in these outcomes is far from academic, but rather will be reflected in the existence and number of options available to consumers of telecommunications services. Our vigilance, and the commitment of our State commission colleagues who will review these agreements, is essential if we are to ensure that consumers continue to enjoy the benefits of choice.