

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

Re Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), CC Docket No. 01-338, WC Docket Nos. 03-235, 03-260, 04-48.

I concur in part and dissent in part to this decision to relieve the Bell Operating Companies from the unbundling requirements of Section 271 for high-speed fiber loops capable of delivering advanced data, video and voice service to the mass market. I am disappointed, however, that this expert agency fails to back up many of the assertions in this item with hard data and in-depth analysis. With the U.S. ranked 13th in the world in broadband penetration, this Order should be based on a careful, comprehensive and independent analysis of the broadband marketplace. Unfortunately, this Order makes bold predictions about broadband competition but fails to apply the careful and thorough analysis requisite to our delicate forbearance authority.

Particularly with respect to the capital-intensive investments required to deploy new fiber networks to customers' premises, I have taken the view that we should carefully balance the costs and benefits of unbundling, a view affirmed recently by the D.C. Circuit Court of Appeals.¹ In past Orders, that approach has led me to support measured unbundling relief for broadband investment in so-called "greenfield areas," where there is no existing loop plant and competitors and incumbents stand on equal footing.

For similar reasons, I again support the lifting of unbundling requirements for greenfield deployments of fiber-to-the-home facilities used to serve mass market customers.² In reaching this decision, I acknowledge the extraordinary investment required to bring high-speed fiber to mass market customers' premises and the consumer benefits that will result, including the potential for new competition in the video marketplace. Given these benefits, granting providers additional incentives to build these next generation networks through targeted unbundling relief is warranted.

I can only concur in my support, however, because I believe that this Order falls far short in providing the careful market analysis required under the statute and Commission precedent.³ Under current case law, we must presume that the petitioners exercise market power in their provision of advanced services, in the absence of a finding of non-dominance.⁴ In previous

¹ See *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

² In past Orders, I have supported relief for the deployment of functionally equivalent facilities, such as fiber to the curb and fiber to multi-dwelling units, to serve mass market customers in greenfield areas. My support for the unbundling relief in this Order extends similarly to these investments.

³ See 47 U.S.C. § 160 (enumerating forbearance criteria and directing the Commission to consider "competitive market conditions"); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket 01-337, FCC 01-360 (2001) (describing the Commission's approach to market definition and market power analysis).

⁴ See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, FCC 02-340, CC Docket 01-337 (2002) (*Advanced Services Forbearance Order*).

Orders, the Commission has carefully considered the ability of such carriers to use market power to affect the reasonableness of rates for consumers. Yet, the Commission makes little serious attempt in this Order to evaluate specific product or geographic markets, the competitive market conditions in all areas of the country, or the petitioners' abilities to exercise market power for broadband services. In my view, the Commission should have conducted the requisite market analysis first.⁵ The Commission could have then lifted unbundling requirements in markets in which we determined the carrier does not exercise market power. This sort of careful review would help allay concern about the impact of Section 10 forbearance on the ability of State commissions to ensure just and reasonable wholesale rates where competitive alternatives are lacking.

A decision based on the statutory forbearance criteria requires us to make reasoned judgments to ensure the protection of consumers and competition consistent with the public interest. This undertaking requires a comprehensive and rigorous review to ensure that we do not inadvertently harm the very communities and burgeoning competition that we are trying to protect. Despite the Order's lack of in-depth market analysis, I must nonetheless make a determination on the petitioners' forbearance requests based on the best information available. My support for measured unbundling relief here recognizes that the petitioners currently have less market share than the leading provider in the rapidly developing, but still emerging, market for mass market broadband services, albeit on a national basis. Should we find in the future that circumstances are changed, the Commission's approach here may well need to change.

My support for targeted relief here does not signal that the Commission need not remain vigilant about the evolution of this marketplace to ensure that consumers continue to gain the benefits of lower prices and increased bandwidth offerings. Similarly, the Commission should move to address distinctions between the mass market and the enterprise market, given the importance of competitive choice to small businesses throughout the nation.

I note that my support for this Order does not speak to the different context of access to networks provided to information service providers under our rules. Any reconsideration of those rules, which have served to ensure the open character of the Internet, may involve a very different set of considerations than those faced here.

For these reasons, I concur in part and dissent in part.

⁵ I note that the Commission opened an as-yet-uncompleted proceeding to conduct precisely this sort of market analysis almost three years ago. *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket 01-337, FCC 01-360 (2001).