

**SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL
APPROVING IN PART AND DISSENTING IN PART**

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338), Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No.96-98), and Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147).

Today, the Commission concludes one of its most significant proceedings ever. The Triennial Review has been a complicated and difficult undertaking, but one that will set critical parameters for competition and broadband deployment for years to come. There are some important achievements in this Order that have long been objectives of mine—namely, substantial broadband relief. Yet, regrettably, there are some fateful decisions as well that I believe represent poor policy and which flout the law. While I am pleased that the Majority has made a number of changes to their UNE-P decision that respond to my concerns, significant legal failings remain. Accordingly, I must respectfully dissent.

I. The Order Takes Bold Steps to Promote Broadband Investment

I begin with the substantial step we take today to create a broadband regulatory regime that will stimulate and promote deployment of next-generation infrastructure, bringing a bevy of new services and applications to consumers. I have long stated that broadband deployment is the most central communications policy objective of our day. Today, we at last put some substance into that stated goal. I am proud to say that we take some vital steps across the desert from the analog world to the digital one. Today's decision makes significant strides to promote investment in advanced architecture and fiber by removing unbundling obligations consistent with a faithful application of Congress' impair standard. Consistent with the statute, the Order removes unbundling obligations that have applied to last mile "Fiber to the Home" deployments. In hybrid copper-fiber networks, the Commission has determined that incumbent LECs are not required to unbundle packet-switching functionality provided over these facilities; but competitors will continue to receive access to high-capacity loops provided over incumbent LEC Time Division Multiplexing ("TDM") networks.¹ These decisions mean that the digital migration is one step further along, as more investment flows into the deployment of these advanced networks.

To date, line sharing is the Commission's most successful broadband policy and it has

¹ In so doing, we require incumbent LECs to unbundle legacy technologies such as HDSL while removing barriers to the deployment of innovative advanced electronics such as Passive Optical Networking ("PON") components.

generated clear and measurable benefits for consumers. It has unquestionably given birth to important broadband suppliers. This additional facilities-based competition has directly contributed to lower prices for new broadband services.

I also believe the argument that removing line sharing is a form of positive regulatory relief to stimulate broadband is ill-conceived. Line sharing rides on the old copper infrastructure, not on the new advanced fiber networks that we are attempting to push to deployment. Indeed, the continued availability of line sharing and the competition that flowed from it likely would have pressured incumbents to deploy more advanced networks in order to move from the negative regulatory pole to the positive regulatory pole, by deploying more fiber infrastructure. This decision actually diminishes the competitive pressure to do so.

II. The Majority's Switching Decision Is Bad Law, Bad Policy and Ultimately Bad for Consumers

In opening this proceeding, this Commission committed itself to conduct a thorough review of its unbundling policies. This review took on greater importance in light of a slumping telecommunications sector and the D.C. Circuit's *USTA* decision vacating the rules that unbundled every element of an incumbent's network. Thus, the Commission was ordered to reconstruct its list of unbundled elements from the ground up – making an element available only if the Commission could show a competitor was significantly impaired without it. As we have endeavored to do so, the most controversial judgment rested with the switching element. The importance of this element is not in its particular functionality, but that it represents the capstone of what has become known as the unbundled platform or UNE-P. UNE-P is nothing more than a complete use of the incumbent's network, priced by element. This results in a substantially lower price than the statute allows for resale. If switching is available, it is very likely a carrier can resell the entire incumbent's network, at heavily discounted rates set by regulators, without having to provide anything in the way of its own infrastructure. After one sorts through the legal contortions of the Majority's switching decision he will find an Order remarkably similar to the prior two fatal decisions – one that preserves UNE-P as the favored mode of competition, without any meaningful consideration of the social and economic costs of unbundling. This is bad policy and bad law.

Consistently underlying my position is a commitment to promote and advance competition that is meaningful and sustainable, and that will eventually achieve Congress' goal of reducing regulation and promoting facilities-based competition.² The benefits of such a policy are straightforward:

² The Commission recognized in the last unbundling order that the goal of our regime is to “promote the development of facilities-based competition.” *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, para. 7 (1999) (“UNE Remand Order”). Today's UNE-P decision, however, does not support the established proposition that facilities-based competition is the preferred method to achieve the twin Congressional goals of deregulation and competition.

- Facilities-based competition means a competitor can offer service differentiated from the incumbent.
- Facilities-based competitors own more of their network and can control more of their costs, thereby offering consumers real potential for lower prices.
- Facilities-based competitors are less dependent on the incumbent thereby reducing the need for regulation – an explicit Congressional goal.
- Facilities-based competitors also create vital redundant networks that can serve our nation if other facilities are damaged by those hostile to our way of life.

Apparently, the Majority is a big fan of UNE-P, because it has contorted the letter and spirit of the statute and the court's interpretation of our responsibilities in an effort to ensure its indefinite preservation. What is remarkable about this decision is that one looks in vain to find a clear or coherent federal policy in the Majority's choices. Today's decision clearly steps back from a pro-facilities policy, by favoring extensive regulatory management of incumbent networks. Under this regime, state regulators set retail rates, state regulators set all wholesale rates, and state regulators determine what elements will be made available. More distressing than giving facilities providers the back of their hand, I see no meaningful federal policy put in its place, other than vague and solicitous pronouncements about the states playing the lead role in making these determinations and a commitment to "competition," no matter how anemic or artificial. Congress demanded the Commission not be so demur when it vested it with responsibility for the unbundling regime.

This proceeding began properly as an exercise to determine what elements should be unbundled. It was transformed into a battle not over *what* should be unbundled, but *who* should decide – this Commission or the states. Make no mistake, the role of the states dominated this proceeding solely because states are perceived as a more favorable venue for preserving the *status quo* of aggressive unbundling rights. Indeed, this perception is not without support as the states, through the National Association of Regulatory Utility Commissions (NARUC), supported the "universal availability of UNE-P."³ Competitors who once viewed states as less than perfect protectors of competition, swapped positions and took refuge in a states rights debate that was a stalking horse for a policy of maximum unbundling. In this environment, the Majority decided to take a politically expedient course instead of the right course: they decided not to make any of the difficult calls that this proceeding demanded. Notwithstanding the tens of thousands of pages of record evidence compiled over the course of a full year and the tireless work of Commission staff, the Majority ruled that there was little basis in the record for any conclusive decision and that states, instead, should make the lion's share of unbundling determinations. The record was beside the point, the goal was to keep UNE-P in place. In so doing, the Majority's decision substantially repeats the errors of our past approaches to unbundling.

³ Letter from Joan Smith, Chair, NARUC to Chairman Michael K. Powell (December 5, 2001).

III. The Majority's Decision Does Not Establish A Meaningful Limit on Unbundled Switching As the Courts Require

A. The Majority's Decision to Unbundle Switching for the Mass Market is Flawed

I also dissent from the switching section of this *Order* because I find a Commission majority for the third time in seven years substituting its preference for a heavily permissive unbundling regime for Congress's judgment that no element should be provided unless the Commission can affirmatively conclude that a competitor is impaired without it. The Supreme Court admonished that section 251(d)(2) placed "clear limits" on the Commission's authority to order unbundling. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 388, 397 (1999). The Commission's second unbundling attempt also failed, when the D.C. Circuit vacated our rules last summer. The D.C. Circuit emphasized that the Commission could not treat unbundling as an unqualified good and had to consider the social costs as well. *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002). It also admonished that the standard employed and applied by the FCC had to demonstrate that a typical entrant was effectively prohibited from entering the market due to barriers associated with the monopoly power of the incumbent and not just typical start-up costs or costs naturally associated with entry. *Id.* at 422. In reaching its switching decision, the Majority flouts the D.C. Circuit's mandate.

I begin with a discussion of the Majority's mass market switching decision. First I question whether the Majority has adequately explained its conclusion that competitors are operationally impaired without unbundled switching as a national matter. Second, I discuss whether the Majority's economic impairment analysis provides a meaningful limitation on the availability of UNE-P. Finally, I examine the Majority's approach to UNE-P in the business market.

i. The Majority Decision Ignores Record Evidence of Hot Cut Performance as a Limitation on Unbundled Switching

In the mass market, the Majority rests its switch unbundling requirement solely on the blanket judgment that the incumbent "hot cut" process – a process that relates solely to loop provisioning – justifies unbridled switch unbundling. This speculative, nationalized finding ignores substantial record evidence and cannot be squared with this Commission's own findings that incumbent LECs perform hot cuts at sufficient levels to demonstrate that competitors are presented with a meaningful opportunity to compete. Indeed, in each and every one of the orders approving Bell Company applications to provide long distance service, the Commission has found, after painstaking state review, that this standard is met.⁴ The Majority on the other hand

⁴ Indeed we have now examined the hot cut processes in 42 states and the District of Columbia and found that each and every BOC has in place a hot cut process that provides competitors a meaningful opportunity to compete. *See e.g., Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, CC Docket No. 00-65, FCC 00-238, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18490-93, paras. 268-73 (2000); *Joint Application* (continued....)

has loftily abstracted away from the granular findings of this Commission's 271 Orders in favor of vague pronouncements that lead back to variation on that same state-sponsored process. Such a tautology cannot withstand scrutiny.

The Majority disregards this objective evidence in the record on the ground that hot cut volumes could substantially increase if UNE-P were phased out. Based entirely on speculation that such an increase could result in a degradation of hot cut performance, the Majority presumes impairment. But even here the Majority is not entirely certain of its own conclusion, stating that "it is *unlikely* that incumbent LECs will be able to provision hot cuts in sufficient volumes absent unbundled local switching in all markets."⁵ I cannot agree with a Commission finding that the hot cut process is so presumptively broken that incumbents must offer UNE-P indefinitely without a "more nuanced concept" of where and when that process might cause impairment. *United States Telecom Ass'n v. FCC*, 290 F.3d at 426. The Majority's finding likewise flies in the face of substantial record evidence that incumbents can perform at levels to meet "reasonably foreseeable demand volumes" for hot cuts. *E.g.*, *New York 271 Order*, 15 FCC Rcd at 3993.⁶ Additionally, there are other, more direct methods of ensuring that the hot cut process is working that fall short of the extraordinary remedy of unbundling the switch.⁷ I would have preferred to continue the existing partnership with state regulators to further define an incumbent's obligations in this area and, where it is demonstrated that the hot cut processes has broken down, order a narrowly tailored remedy.

ii. The Majority's Mass Market Switch Triggers Are Illusory

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by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, FCC 01-29, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6340, para. 207 (2001); *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, CC Docket No. 02-35, FCC 02-147, Memorandum Opinion and Order, 16 FCC Rcd 9018, 9145, para. 220 (2002); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, FCC 99-404, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4104-05, para. 291 (1999); *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, FCC 02-332, Memorandum Opinion and Order, 17 FCC Rcd 26,303, 26,370, para. 107 (2002).

⁵ Order para. 468 (emphasis added).

⁶ The Majority erroneously cites the New York Commission's conclusion that "it would take Verizon over 11 years to switch all the existing UNE-P customers to UNE-L" without disclosing that the New York Commission did not assume any increase in the incumbent's hot cut capacity scaled to meet reasonable forecasts of demand. *See* Order para. 469.

⁷ For example, state regulators could continue their existing, active approach to enforcing hot cut performance measures; unbundled switching might serve as a remedy where poor hot cut performance is demonstrated.

After wading through the complexity of the Majority's regulatory framework for mass market switching, two conclusions emerge from the tangle of conflicting pronouncements: First, the "objective" switch triggers relied upon by the Majority are an illusory limitation. Second, because the switching triggers are not a meaningful limitation, states are essentially free to do as they wish.

The Majority purports to constrain state discretion by removing unbundled switching where 3 self-provisioned switches or 2 wholesalers are present in a given market.⁸ This is no limitation at all. Indeed there may be few markets, if any, that include three competitors using self-provisioned switching to serve the mass market. Directing states to apply this trigger is therefore largely a meaningless exercise. Why? Because an honest inquiry into this area must recognize what the record amply demonstrates: there is a correlation between the availability of UNE-P and the failure of competitors to utilize their own switching capacity. I fully appreciate the challenges that carriers face in utilizing self-provisioned switching to serve the mass market. I cannot square the Majority's approach, which sets a trigger at a level that is presently satisfied almost nowhere, with a record that shows competitors are *now* widely serving mass market customers using their own switches and unbundled loops.

Furthermore, the Commission's own data is replete with findings that the average number of lines that competing carriers serve with their own switches and unbundled loops dropped sharply between the beginning of 2000 and June of 2002. In just eight of the states where carriers now make extensive use of UNE-P, competitors are connecting more than 45,000 fewer lines per month – or more than half a million *fewer* lines per year – to their own switches using unbundled loops compared to 2000.⁹ Far from fostering a transition to facilities-based networks, the Commission's data suggest that some carriers are moving existing lines from their switches to UNE-P, leaving competitor switches underutilized.¹⁰ These facts suggest that it is unreasonable to expect that competitors will utilize self-provisioned switching capacity while a

⁸ Order para. 463.

⁹ The eight states are New York, New Jersey, Massachusetts, Georgia, Florida, Illinois, California, and Texas. *Selected RBOC Local Telephone Data*, available at: <http://www.fcc.gov/wcb/iatd/comp.html> (RBOC Local Telephone Dec 1999.xls; RBOC Local Telephone June 2000.xls; RBOC Local Telephone Dec. 2000.xls; RBOC Local Telephone June 2001.xls; RBOC Local Telephone Dec 2001.xls; RBOC Local Telephone June 2002.xls).

¹⁰ The Commission's data show that the number of CLEC-owned lines other than those provided by cable decreased by half a million lines between December 2002 and June 2002, while the number of UNE-P lines increased from 5.8 to 7.5 million. See *Local Telephone Competition: Status as of June 30, 2002* (December 2002) at Tables 2, 3 & 5; *Local Telephone Competition: Status as of June 30, 2000* (December 2000) at Table 5. See, e.g., UNE Rebuttal Report 2002, Prepared for BellSouth, SBC, Qwest, and Verizon, filed with the Federal Communications Commission, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, at 30 (October 2002) ("UNE Rebuttal Report"). The failure of facilities-based CLECs to accelerate their deployment plans may likewise explain why the rollout of cable telephony has proceeded at a slower pace than many expected.

steeply discounted and long-term UNE-P alternative exists.¹¹

The purportedly “objective” and “mandatory” switch trigger is also undermined by unheeled discretion states are permitted in defining the market to which the trigger applies. Every antitrust lawyer knows that the outcome of any case is generally won or lost over how the market is defined. The same is true of the Majority’s impairment analysis.¹² While conceding that the “triggers and analysis . . . must be applied on a granular basis to each identifiable market” the Majority bounds the market definition exercise only by acknowledging that states “may not define the market as encompassing the entire state.”¹³ Under this guidance, it could be argued, that the state of Rhode Island cannot define the geographic scope of its market any larger than its 1545 square miles will permit; but next door, Massachusetts regulators are free to define the market nearly seven times larger than their Rhode Island counterparts. Never mind that it is possible for switches located in Providence to serve a customer in Boston. This is not granularity, it is gerrymandering. Put simply, states are likely to reach wildly different results in applying the trigger because the trigger is tied to state market definitions that can be as large as a LATA and as small as a wire center.¹⁴ The Majority responds that the physical location of the switch may have little if anything to do with the location of the customer served by a switch; but that rationale calls into question the very premise that states are uniquely qualified to make these judgments, which is the cornerstone of the Majority’s holding, and suggests a national finding is more appropriate. The Majority’s market-definition approach is therefore not sufficiently grounded in objective, limiting criteria.

iii. The Majority Delegates to the States the Power to Unbundle Switching Based on Economic Impairment, Without Meaningful Limits

The Majority finds impairment based solely on the basis of operational impairment and the “hot cut” process. Yet, it empowers states to find economic impairment (even after curing the operational concern) based on a laundry list of possible economic disadvantages.¹⁵ The first

¹¹ I cannot agree that the presence of a batch migration process will sufficiently counter the powerful incentive of carriers to send merely an order to obtain a UNE-P arrangement rather than utilize their own switching capacity.

¹² States are granted “discretion to determine the contours of each market” in conducting their impairment inquiries. Order para. 495.

¹³ Order para. 495.

¹⁴ See Order para. 495.

¹⁵ The Majority’s list of possible sources of economic impairment could hardly be longer. Potential costs that a state commission must consider include: “the cost of purchasing and installing a switch, the recurring and non-recurring charges paid to the incumbent LEC for loops, collocations, transport, hot cuts, OSS, signaling, and other services and equipment necessary to access the loop; the cost of collocation and equipment necessary to serve local exchange customers in a wire center, taking into consideration an entrant’s likely market share, the scale economies inherent to serving a wire center and the line density of the wire center; the cost of backhauling the local traffic to the competitor’s switch; other costs associated with transferring the customer’s service over to the competitor; the (continued....)

error it makes in taking this path is that the Majority blinds itself to the significant self-provisioned switching capacity that exists in the market and the fact that a number of competitors have overcome whatever economic impediments exist and are using that switching capability to serve mass market customers.¹⁶ I believe the record supports an approach that would have enlisted states in a joint enforcement regime designed to address operational issues that might frustrate a transition to facilities-based competition. Instead, the Majority has unleashed a chaotic process that directs the states to find economic impairment that is simply not cognizable under section 251(d)(2).

As described below, states are free to do what they choose in weighting the Majority's economic criteria in divergent and subjective ways. Indeed, given these economic criteria, it would be difficult to judge whether an individual state has complied with the delegation granted to it.¹⁷ Perhaps this is why the Majority has resisted an exclusive appeal right to this Commission and suggested that federal district courts – in lieu of this Commission – are an appropriate venue to review state decisions that apply these factors.¹⁸ The significance of *Commission* oversight over this delegation should not be underestimated.¹⁹ In my view, the statute commits to this Commission the ultimate responsibility for ensuring *its* unbundling decisions are adhered to. To remain faithful to the statutory scheme and principles of federal supremacy, however, the Commission must retain the *primary* decision making authority, and we must establish *clear* standards for the states to apply.²⁰

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impact of churn on the cost of customer acquisitions; the cost of maintenance, operations and other administrative activities and the competitors' capital costs." Order para. 520.

¹⁶ See BOC UNE Fact Report 2002 at I-9, Figure 6 Use of UNE Platforms by CLECs Providing Service to 25,000 or More Residential Lines Using Their Own Switches ("CLECs providing service to 25,000 or more facilities-based residential lines include: ALLTEL, Broadview, Cavalier Telephone, Intermedia, Knology, McLeodUSA, RCA, TOTALink).

¹⁷ Federal district courts reviewing state decisions are likely to fare no better for the same reasons this Commission would have difficulty comparing state action against non-existent federal standards.

¹⁸ The Majority admits that interested parties could file a section 208 complaint or petition for declaratory ruling with this Commission to ensure oversight with the Commission's switching framework. See Order para. 426. I cannot agree, however, that a section 208 adjudicatory proceeding is an appropriate procedural vehicle for oversight of state unbundling determinations of general applicability made pursuant to section 251(d)(2).

¹⁹ For this reason, Commissioner Abernathy and I supported a specific, exclusive appeal right to this Commission to implement the transport decision; but such a right was not supported by the Majority. Transferring oversight responsibility to federal district courts under the guise of their arbitration review authority is, in my view, inconsistent with the statutory command that "the Commission shall consider" which network elements will be unbundled. 47 U.S.C. § 251(d)(2).

²⁰ For this reason, I fully support the Commission's delegation of federal authority to states to implement the Commission's unanimous transport and high-cap loop decision. In reaching the Commission's binding transport and high-capacity loop decisions we grant states a fact-finding role to implement our decision and therefore avoid abdicating our responsibilities under the Act. The Majority struggles to square the circle and harmonize its switching approach with our unanimous transport decision; but significant differences remain. First, because the (continued...)

There is no doubt that the statute does contemplate a state/federal partnership in certain areas. States are given control over the rates set for unbundled elements, but it is principally the obligation of this Commission to determine what those elements will be, faithfully implementing the impairment clause. States can assist in that effort, but our responsibilities should not be released to them. Justice Antonin Scalia, whose credentials are unchallenged as a leading voice for states' rights, eloquently addressed the division of federal and state authority when he wrote:

[t]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any 'presumption' applicable to this question it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange

AT&T v. Iowa Utils. Bd. 525 U.S. 388, 391. I could not agree more.²¹

1. The Majority's Subjective Economic Criteria Treats UNE-P as an Unqualified Good and Engages in Impermissible Bootstrapping

The *USTA* court cautioned this Commission not to rely on start up costs ordinarily associated with entry or conditions set by regulatory bodies in reaching our unbundling

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triggers are set at an appropriate level for the transport market, our transport decision establishes a meaningful limitation on unnecessary unbundling. Second, because the transport triggers establish a meaningful limitation, there is less of a need for the Commission to direct the states to engage in a subjective, multi-factor impairment analysis as in the Majority's switching decision.

²¹ Compromise within the limits of the law is undoubtedly necessary for the administrative process to function smoothly; but on the question of federal – state relations, our efforts to compromise must not run afoul of the statutory scheme. The Majority charges me with hypocrisy by citing a single sentence in a past statement taken out of context, as evidence that I should support the switching result in the item released today. Order para. 425 n. 1306. The Majority stresses their opinion that the dissenters did not make sufficient efforts at compromise; but their citations to my past statements and parts of the item to which I consented, leaves me wondering whether the Majority may be more interested in one-upsmanship than compromise. As I describe below, I continue to believe that state regulators can assist in our efforts to achieve a rational unbundling regime, but our responsibilities should not be released to them. There is no inconsistency between my past statements and my current position that the Majority simply goes too far in that direction. If questions remain about my views, there is no doubt that I have grown in my concern about the long-term viability of UNE-P. This concern was amplified after the D.C. Circuit's *USTA* decision. To the extent a judicial decision intervened to change the legal landscape and caused me to rethink and expand upon my initial position, I do so humbly and openly, mindful that "wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters*, 335 U.S. 595 (1949) (Frankfurter, J., dissenting).

decision.²² Yet the Majority repeatedly relies upon ordinary start-up costs or other impediments within the control of federal and state regulators to justify its conclusion competitors are, or could be, impaired without switching. The result is a framework that treats UNE-P as an unqualified good without sufficient regard for the costs associated with the Majority's forced sharing requirements.

Many factors cited by the Majority are cost disparities universally faced by any new market entrant. For example, the Majority explicitly finds that customer churn rates – a prime example of ordinary start-up costs – contributes to impairment.²³ Thus the Commission, once again, has relied upon factors specifically rejected by the *USTA* court. The Majority goes on to note that competitor switching architecture “effectively requires competitors to deploy much longer loops than the incumbent.”²⁴ I do not contest the fact that competitors must reach their loops farther away from self-provisioned switches compared to incumbents who have deployed ubiquitous switching capability. What I do contest is the Majority's failure to adequately recognize that this network configuration demonstrates that competitors generate their own countervailing competitive *advantage* by self-provisioning switching.²⁵ While the cost of backhauling traffic to a central switching point may or may not be marginally greater than the incumbent's cost of backhaul, competitors experience more advantageous cost conditions – including UNE transport rates – by avoiding the cost of deploying ubiquitous switching to every incumbent LEC wire center, thereby mitigating impairment.²⁶

Reasonable minds could differ regarding the extent of this cost/benefit tradeoff but the law requires the Commission to confront this question in a serious manner that addresses both the benefits and social costs of unbundling – something the Majority has not done. Regrettably, given the porous nature of the switching triggers, there is simply no barrier that would preclude a

²² The Court noted that “average unit costs are necessarily higher at the outset for any new entrant into virtually any business.” *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, para. 7 (1999).

²³ Order para. 471 (“The record demonstrates that the current level of churn for carriers providing service to the mass market has significant negative revenue effects on the ability of competitive carriers to recover the high costs associated with manual hot cuts.”).

²⁴ Order para 480. The majority describes the costs of backhaul, which “include the costs of collocating in the customer's serving wire center, installing equipment in the wire center in order to digitize, aggregate, and transmit the voice traffic, and paying the incumbent to transport the traffic to the competitors switch, put [competitors] at a significant cost disadvantage to the incumbent.” *Id.* 480.

²⁵ See Separate Statement of Commissioner Michael K. Powell, Dissenting in part, CC Docket No. 96-98 (November 5, 1999).

²⁶ See *USTA* at 290 F.3d at 427 (faulting the Commission for failing to identify countervailing competitor economy of scale advantages in switching “over the entire extent of the market.”). See also *id.* at 423 (faulting the Commission for failing to consider “the advantage CLECs enjoy in being free of any duty to provide underpriced service to rural and/or residential customers.”).

state from using low retail rates or high startup costs as a way to ensure UNE-P will continue to be available. The Majority approach, in effect, begins with a default assumption of impairment. Only when all barriers to *profitability* have been eliminated does this Commission empower states to eliminate UNE-P.²⁷ This exercise is unlikely to achieve the balance called for explicitly by Justice Breyer in *Verizon* or “implicitly by the Court as a whole in its disparagement of the Commission’s readiness to find ‘any’ cost disparity reason enough to order unbundling.” *United States Telecom Ass’n, v. FCC*, 290 F.3d 415, 428.

The Commission’s task is to determine whether competitors are impaired without a given “element.” By directing states to examine factors that are chosen to focus on and overstate competitor cost disadvantages without meaningful consideration of countervailing advantages, the Commission has focused not on whether competitors are impaired without the switching *element* but, rather, the Majority has endorsed a regime that focuses on whether self-provided switching is as *profitable* as UNE-P. It is the Commission’s job to ensure that local markets are open to competition and that competitors are given a fighting chance to participate in that market. By explicitly engaging in a profitability analysis, the Commission has converted the impairment standard into a protector of individual business plans.²⁸ In so doing, the Majority asks the wrong question and provides the wrong answer.

The Majority attempts to guide states’ evaluation of switching impairment with a shotgun blast of every imaginable economic criterion. In so doing, however, it revives the very type of factors explicitly rejected by the *USTA* court. It is said that the average cost of collocation, the cost of backhauling local traffic to a competitor’s switch, the cost of capital and a competitor’s back office expenses bear on a state’s decision to find impairment.²⁹ These factors are problematic because they are almost identical to the factors rejected in the *UNE Remand* decision.³⁰ I am particularly troubled that we are – once again – importing into the impairment

²⁷ The Majority’s comparison of costs and revenues amounts to a consideration of whether entry by a competitor is profitable. See Order paras. 517, 519-520.

²⁸ Order para. 517 n. 1579 (states may conduct “a business case analysis for an efficient entrant.”).

²⁹ Order para. 520.

³⁰ The item’s approach is virtually identical to the discredited “totality of the circumstances” test of the *UNE Remand Order*. See Order para. 458. Under the guise of granularity, it appears that the majority merely renamed the cost, quality, and ubiquity factors vacated by the D.C. Circuit by focusing the state analysis on precisely the alleged “impairments” analyzed by the Commission in the *UNE Remand* decision. Compare *UNE Remand Order* para. 263 (finding non-recurring costs of collocation constitutes impairment) with Order para. 520 (finding that states should consider whether non-recurring costs of collocation constitute impairment); Compare *UNE Remand Order* para. 266 (finding that loop cutovers costs constitute impairment) with Order para. 512 (finding that states should consider whether loop cutovers costs constitute impairment); Compare *UNE Remand Order* para. 256 (finding that geographic specific factors may determine impairment) with Order para. 520 (finding that states should consider whether geographic specific factors determine impairment); Compare *UNE Remand Order* para. 262 (finding that self-provisioning switching costs constitutes impairment) with Order para. 520 (finding that states should consider whether self-provisioning switching costs constitutes impairment).

analysis problems that do not result directly from denying competitors access to unbundled switching. To the extent collocation is a problem for competitors attempting to deploy their own switches, it is difficult to argue that this problem directly results from denying competitors access to unbundled switching.³¹

The Majority approach is more indefensible because through regulation we have addressed competitor collocation rights, and for the first time, solidified this area of competition policy with a judicial endorsement of their consistency with the Act.³² Yet despite this success, the Majority would pervert these stable rules into sources of regulatory instability and impairment. Never mind that after this order, competitors will enjoy forward-looking prices for hot cuts, collocation and unbundled transport.³³ Never mind that Congress provided a direct remedy for competitor collocation in section 251. Instead, somehow the super-efficient pricing of collocation, hot cuts and transport (which is set by regulators) has been twisted into a source of competitive disadvantage and possible reason to order forced sharing of the incumbent's switch. This bootstrapping flies in the face of the Court's admonition that factors set by regulators can hardly justify economic impairment.³⁴

The Majority's bootstrapping of UNE rights further ignores the fact that the rates for collocation and hot cuts as well as other UNEs, are not within the control of the incumbent LEC and therefore are not cognizable under section 251(d)(2).³⁵ The Majority has threaded its impairment analysis with characteristics that are not linked to natural monopoly in direct contravention of the *USTA* decision. The state commissions are ultimately responsible for setting the rates for collocation and unbundled transport. State commissions are likewise responsible for setting retail local phone rates. We stray too far from a reasonable interpretation of section 251(d)(2) when we cite these government-controlled prices as the reason that private

³¹ See Separate Statement of Commissioner Michael K. Powell, Dissenting in part, CC Docket No. 96-98 (November 5, 1999).

³² Indeed the costs, delays, and physical constraints associated with collocation have already been addressed through the Commission's default provisioning interval. See *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Fourth Report and Order*, CC Docket No. 98-147, 16 FCC Rcd 15435, 15454, para. 36 (2001) (Collocation Remand Order), *aff'd sub. nom. Verizon Telephone Cos. v. FCC*, 292 F.3d 903 (D.C. Cir. 2002).

³³ When geographic differences point to the elimination of an unbundling requirement, the Majority is all too happy to assume away these differences in favor of a national finding. See Order para. 470 ("Although hot cut costs vary among incumbent LECs, we find on a national level that these costs contribute to a significant barrier to entry.").

³⁴ Order para. 91 ("We examine those barriers to entry that are solely or primarily within the control of the incumbent LEC.") See also *USTA* at 427 (linking impairment to "natural monopoly" characteristics not conditions outside of control of incumbent LEC).

³⁵ Rather they are generally set according to state ratemaking authority found in section 252(d)(1)(A)(i). The statute does provide for interconnection agreements outside of the section 252 framework; but those arrangements are *bilateral* negotiations the terms of which are not entirely within the control of incumbent LECs.

companies should be required to unbundled their networks. The Majority's approach risks the possibility that government will sponsor competition through indirect decisions and endorsement of continued implicit subsidies designed to prop up synthetic competition.

When Congress adopted section 251(d)(2), it granted this Commission a toolbox to open local telephone markets to competition. One of those specific tools was unbundling. Unbundling is specifically designed to address impairments within the incumbent's control. The Majority's reliance on such things as collocation, CLEC-CLEC cross-connects, transport availability and retail rate structures is simply too far afield from the question of whether competitors are impaired without access to unbundled switching. I cannot support a decision to use the impairment standard as a hammer, a wrench, a screwdriver, etc., to fix every perceived problem that may ail rational competition in telecommunications markets.

I also have serious concerns that the Majority's switching approach is, in practice, unworkable.³⁶ The Majority's impairment model is dependent upon hundreds of assumptions about local exchange markets and costs. Simply by making different assumptions about local exchange networks, or by picking different input values for the costs, the Commission and implementing state commissions can reach widely varying conclusions, undermining a coherent federal regime and distorting entry decisions.³⁷ This uncertain environment disadvantages competitors and incumbents alike as neither is in a position to make rational investment decisions based on stable rules.

Finally, even in circumstances where a state has found no mass market impairment, the Commission has seen fit to allow unbundling for three full years. Given the *USTA* court's emphasis on the significant social costs that unbundling imposes, it is legally problematic to require unbundled switching for *three years* when there has been an *express finding* of no impairment. I concede that the Commission is permitted to afford a reasonable transition to avoid undue customer disruption, but this period is nothing of the sort. Its true intent is made obvious by allowing unbundling clear through the Commission's next comprehensive

³⁶ "Factor based" unbundling requirements have been tried by this Commission before, to little consistent effect. In the *UNE Remand Order*, the Commission created a straightforward 4-part test for unbundled packet switching. Despite this objective test, state commissions took diametrically opposed views of whether packet switching should be required. *Compare* Arbitration Award, Case No. 01-1319-TP-ARB, at 52 (Pub. Utils. Comm'n of Ohio, Nov. 7, 2002) ("the criteria" of the FCC's packet switching rule "should be evaluated on an RT-by-RT basis or location-by-location basis") *and* Final Order on Arbitration, Docket No. 010098-TP, order No. PSC-02-0765-FOF-TP, at 16 (Fla. Publ. Serv. Comm'n, June 5, 2002) (FCC's packet switching rule "contemplates a case-by-case analysis of whether [the four] conditions are met at specific remote terminals") *with* Order on Rehearing, Docket No. 00-0393, at 36 (Ill. Comm. Comm'n, Sept. 26, 2001 ("We reject Ameritech's notion that these situations must be viewed on an RT by RT basis.")).

³⁷ The majority makes much of the fact that its approach responds to the *USTA* court's demand for granularity. Yet, in response to this decision, the states have already organized themselves into regional and national cooperatives that appear to be a far cry from the localized, market-specific findings the majority expected them to arrive at. *See* www.naruc.org/programs/trip/index.shtml.

unbundling review. This is not a decision that supports the transition to facilities-based networks; it is a decision that cleverly pushes UNE-P along until the next UNE review.

2. The Majority's Approach to Revenue Impairment is Inconsistent with the *USTA* Decision

Since we voted this item on February 20th, the Majority has attempted to harmonize the switching framework with other sections of the item. Turning heads to tails, the Majority now argues that dissenting criticisms of the switching approach rest on a mischaracterization of the *USTA* decision and are otherwise inconsistent with sections of the Order to which I have approved. This criticism boils down to a disagreement over the manner in which the impairment standard is *applied*. For example, the Majority's switching decision conflates an impairment standard that properly asks whether entry is "uneconomic" with the question of whether entry is profitable.³⁸ Under its profitability analysis the Majority directs states to consider whether price and revenue *reductions* that result from additional competitive entrants can form the basis of impairment.³⁹

First, I cannot agree that the very entry this Commission should rightly encourage can form the basis for a continuing impairment. This is a staggering endorsement of a centrally managed artificial competition standard that pays little attention to the positive consumer benefits that result from facilities-based competition. Second, I am at a loss to understand how a well-intentioned state commissioner can implement this decision. Is a 10 percent price reduction cause for impairment? 20 percent? It is quite simply an *ad hoc* calculation, permitting any result whatsoever. Third, this approach endorses a least common denominator circularity that is not faithful to the statute. If a first mover enters a market and is followed by a second entrant, can this be grounds to say that the third is impaired? The third entrant is not impaired, rather there is merely one too many for the market to sustain. Such regulatory calculus impedes the proper functioning of a market, which signals the right levels of scale and scope. The Majority's switching construct ignores the fundamentals of economics.

Furthermore, it is widely accepted that because of universal service cross subsidies, many residential rates are priced below cost and, thus, the retail revenues associated with those services may, in some cases, not cover the costs incurred to provide the service. The D.C. Circuit, however, rejected the notion that competitors' decision not to enter subsidized markets

³⁸ Order at para. 84.

³⁹ The Majority notes that "potential revenues could be outweighed by a combination of even higher economic and operational costs, such as untimely and unreliable provisioning of loops, transport, or collocation by the incumbent LEC at high non-recurring charges and significant costs to purchase equipment and backhaul the local traffic to the competitor's switch." Order para. 458.

with their own facilities demonstrates impairment.⁴⁰ In this situation, it is the retail rate structure that causes impairment, not the incumbent's monopoly position in the market. Thus, to the extent that the Majority's approach to revenue-impairment includes an analysis of artificially low retail voice rates, it is specifically barred by *USTA*.

B. The Majority Fails to Reach a Conclusive Finding of No-Impairment in Competitive Business Markets

In the business market, the Majority permits states to unbundle switching for business customers without a thorough analysis of sufficiently granular facts. As discussed above, my primary objection to the Commission's initial vote was the complete transfer of decision making authority to state commissions through a series of unreviewable presumptions of impairment.⁴¹ I am pleased that in the released decision the Majority has jettisoned its initial presumptive approach to business switching.⁴² In its place however, it has provided a procedural mechanism that provides for UNE-P in a segment of the market where facilities-based competitors have been the most successful. The record shows that more than 200 competitors have deployed more than 1,300 switches nationwide addressing 86 percent of Bell Operating company wire centers.⁴³ I

⁴⁰ The D.C. Circuit stated that "[I]f competition performed with ubiquitously provided ILEC facilities counts, the more unbundling there is, the more competition," but then explained that if fact this competition does not support the goals of the Act because it is "completely synthetic." *USTA*, 290 F.3d at 422, 424.

⁴¹ I appreciate the willingness of my colleagues to reform parts of their unbundling approach in response to my concerns at that time; but ultimately the Majority's approach has fallen short of the mark. On February 20, I dissented to the Majority's switching approach because unlike our impairment frameworks for transport and high-capacity loops, the Majority's switching decision made no findings at all and ensured that the transfer of ultimate decision making to the states was complete by withdrawing an appeal right to this Commission. Today the released version of the item does not use a pure presumptive approach but finds that the "hot cut" process currently inflicts a nationwide impairment on competitive LECs for mass market customers that only unbundled switching cures. The Majority declares that "[o]ur national finding of impairment is based on the combined effect of all aspects of the hot cut process on competitors' ability to serve mass market voice customers." Order para. 473. In the business market, today's order adopts a national non-impairment finding, but provides a vehicle for state commissions to place switching on the list. I remain concerned that this approach renders the finding inconclusive and permits states to overturn the Commission's judgment.

⁴² The Order's initial approach completely released its unbundling decision to the states without a right of appeal to this Commission, thereby "totally abdicat[ing] its ultimate responsibility for enforcing the [statutory] provision." *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1574-75 (D.C. Cir. 1987). Now the Majority relies on a state waiver process to protect against charges that it has avoided its responsibilities to determine which network elements should be unbundled.

⁴³ See BOC UNE Fact Report at I-9. The Majority's national business switching "findings" are presumptions by another name. Indeed the Majority notes that states may "rebut that finding based on a more granular inquiry." Order para. 451 n. 1375. In adopting this approach the Majority tests the limits of its authority and may well have, in effect, avoided the statutorily prescribed impairment test by means of a rebuttable presumption. The D.C. Circuit has explained that an "agency is not free to ignore statutory language by creating a presumption on grounds of policy to avoid the necessity for finding that which the legislature requires to be found." *United Scenic Artists, Local 829 v. NLRB*, 762 F.2d 1027 (D.C. Cir. 1987).

am concerned that state decisions endorsing UNE-P, particularly to serve small enterprise customers, may devalue the assets of providers serving these markets and exert pressure on legitimate facilities-based providers to begin using UNE-P. Instead of providing for a waiver process that allows states to unbundle UNE-P for business customers, I believe the record fully supports conclusively removing unbundled switching to serve business customers, subject to an appropriate transition to protect against customer disruption.

IV. The Majority Made Incongruous Compromises

I am concerned that there are incongruous compromises apparently designed only to preserve UNE-P. Take the Majority's decision on line sharing. Companies such as Covad presented specific, credible arguments that competitors are impaired without line sharing. The public statements of some of my colleagues make very clear that a majority of the Commission actually supported line sharing, yet it was sacrificed to secure votes to achieve the higher priority of indefinitely preserving UNE-P.⁴⁴ Courts have been quick to reverse agencies when they engage in "unprincipled compromises of Rube Goldberg complexity." *Schurz Communications Inc. v. Federal Communications Commission*, 982 F.2d 1043, 1050 (1992). With this in mind, we need to more fully explain the claim that competitors are not impaired without line sharing. One could have responsibly accepted or rejected Covad's arguments, but the claims should rise or fall on the merits. Here, members of the Commission seem to credit the merits, but nonetheless sacrificed parties who rely on line sharing in order to achieve something wholly unrelated and of little interest to companies like Covad.⁴⁵

V. Conclusion

I believe this decision will prove too chaotic for an already fragile telecom market. In choosing to abdicate its responsibility to craft clear and sustainable rules on unbundling to the state commissions the Majority has brought forth a molten morass of regulatory activity that may very well wilt any lingering investment interest in the sector. And, I fear as much or more for competitors as I do incumbents, for the prolonged uncertainty of rights and responsibilities may prove stifling.

The nation will now embark on 51 major state proceedings to evaluate what elements

⁴⁴ "I would have preferred to maintain this access, known as line sharing." Separate Statement of Commissioner Michael Copps, February 20, 2003. "There has been a great deal of comprise [sic] in this process. I am very comfortable with some of the decisions, while others quite frankly give me pause." Separate Statement of Commissioner Jonathan S. Adelstein, February 20, 2003.

⁴⁵ I expect that even this decision is cold comfort for providers who depend on line shared inputs to provide service. When the Commission voted on this item on February 20th, it was clear that it did not grandfather existing customers. Today, the Commission decides that carriers are impaired for grandfathered customers and orders continued access to line sharing. At the same time, however, the Majority concludes that this impairment mysteriously vanishes for new customers because of the presence of whole loop alternatives. The item does not explain why whole loop alternatives are not good enough for grandfathered customers.

will be unbundled and made available to competitors. These decisions will be litigated through 51 different federal district courts. These 51 cases will likely be decided in multiple ways—some upholding the state, some overturning the state and little chance of regulatory and legal harmony among them at the end of the day. These 51 district court cases are likely to be heard by 12 Federal Courts of Appeals—do we expect they will all rule similarly? If not, we will eventually be back in the Supreme Court of the United States to resolve any conflicts—the same Court that vacated our excessively permissive unbundling regime in 1999. This process will take many years and will hardly be the quieting and stabilizing regime that was so craved by a rocky market. It is, in short, a litigation bonanza.

This Majority's UNE-P decision could prove harmful to consumers in the long-run, and I cringe to see their welfare raised on the staff of the Majority's decision. Make no mistake, UNE-P may have very limited merits as a transitional strategy, but it is fatally flawed as sustainable local competition. This is not the low lying plateau on which the high aspirations of the 1996 Act should be planted. It is a model that only works if hundreds of stars align perfectly and stay that way: every state needs to continue to make every last element available; every decision to do so must be sustained by every court that examines it; the Commission must never tamper with it and Congress better not ever alter the rights. The regulatory arbitrage bubble expands ever more perilously with each regulatory variable and is sure to eventually pop, like dot coms of old, if government policy does not diligently steer the balloon to stable ground.

There are great strides being made today in the march of Digital Migration, which realize some of my most important objectives. I am disappointed, however, by today's decision on UNE-P. Nonetheless, it is the fair result of a democratic institution in which Majority rules. I also recognized that state commissions will now have an enormous task before them and I sincerely wish them the very best as they struggle through what the Commission could not. I pledge to work with them in partnership to yield the best result for the nation. And, I sincerely hope that those carriers who fought so fiercely for this result will now prove their value in the marketplace and actually deliver the local competition, lower prices and more innovative services that they insisted they would if they prevailed. I, for one, will be watching. This has been a tough proceeding, but I look forward to getting it behind us and moving to other matters pressing for the Commission's attention.