

**STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN
DISSENTING IN PART, APPROVING IN PART**

Re: *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers* (WC Docket No. 03-251) (FCC 05-78)

In this decision, the Commission unwisely flashes the green light for broadband tying arrangements. Because we believe this is an area where the Commission should proceed with caution, we cannot support the outcome.

A tying arrangement occurs when a seller conditions the availability of one product on the buyer's purchase of a second product. Here, the incumbent carrier refused to sell DSL service to end-users who elected not to purchase voice service from the same carrier. Recognizing that this practice could limit consumer choice and reduce competition, Florida, Kentucky, Louisiana and Georgia chose to do something about it. Each state sought to put an end to tying practices that restricted the availability of broadband service to customers who also purchased analog voice service.

The majority responds to these state efforts with the heavy hammer of preemption. They bypass analysis of tying practices under the unjust or unreasonable practice standard in Section 201. Instead, they base their action on Section 251(d)(3), which expressly preserves state access regulations, provided that they are not inconsistent with federal requirements and do not "substantially prevent" implementation of the Commission's own rules. The majority reads too much into these provisions. The actions taken by Florida, Kentucky, Louisiana and Georgia do not flat-out conflict with federal rules; they arguably complement them. And as a result of this decision, state authority to craft local rules to promote competition is unnecessarily constrained.

Beyond this slap to federal-state relations is another ominous precedent for consumers. If it is permissible to deny consumers DSL if they do not also order analog voice service, what stops a carrier from denying broadband service to an end-user who has cut the cord and uses only a wireless phone? What prevents a carrier from refusing to provide DSL service to a savvy consumer who wants stand-alone broadband only for VoIP? Regrettably, these broader issues go virtually unexamined. They are relegated to a single paragraph Notice of Inquiry, appended to the back of this decision apparently as an afterthought. Because we believe that this situation requires more analysis and greater consideration of the impact on consumers, we dissent.

We join today's decision, however, in one key aspect. We support the effort in this action to reinforce non-discriminatory number porting, including between wireline and cable carriers. Congress was clear that number portability is a basic duty of local exchange carriers. Because this decision accurately clarifies this requirement, we approve in part.