STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand (adopted Dec. 15, 2004).

Section 251 of the Communications Act directs the Commission to make unbundled network elements available to competitors, but it provides little guidance as to *which* elements should be made available in *which* markets. Three times in the past eight years the Commission has endeavored to answer those bedeviling questions, and three times our rules have been rejected as overbroad by the courts of appeals (including by the U.S. Supreme Court). Regardless of one's policy views regarding the appropriate degree of mandatory unbundling, we must put an end to the debilitating cycle of court reversals and the resultant marketplace uncertainty. As a veteran of the competitive sector, I have great sympathy for carriers that crafted business plans in compliance with our rules, only to have the rug later pulled out from under them. The only responsible solution to this problem is to adopt rules that comply faithfully with the decisions of the D.C. Circuit and the Supreme Court, so that we can *finally* move forward with stable rules in place.

Notwithstanding that non-negotiable constraint on our discretion, the Commission worked hard to find ways to make transmission facilities available wherever true bottlenecks exist, consistent with the court's guidance. Building on our earlier decisions to eliminate unbundling obligations for most broadband facilities and optical-capacity transport and loop facilities, we have phased out the unbundling of circuit switching and significantly curtailed unbundling of higher-capacity (DS-3 and dark fiber) transmission facilities. These decisions recognize, as the court directed, that the costs of unbundling outweigh its benefits in markets where high revenue potentials have already led to significant competition or create a strong potential for it to develop. At the other end of the spectrum, we have established an obligation to unbundle the vast majority of DS-1 loop facilities, and significant amounts of DS-1 transport, in light of the many factors that typically make duplication of such facilities uneconomic. In short, while the issues are extremely complex and defy facile solutions, the Order we are adopting succeeds in promoting facilities-based competition while faithfully complying with judicial mandates.

Where I part ways with my dissenting colleagues is my unwillingness to vote for proposals — such as nationwide impairment findings or tests that focus exclusively on actual competition, to the complete exclusion of potential competition — that are flatly inconsistent with the D.C. Circuit's decision in *USTA II*. That decision is unquestionably the law of the land, and we are duty-bound to adhere to it. Were it not for past overreaching, the D.C. Circuit in all likelihood would have accorded us greater deference and also refrained from *vacating* (as opposed to merely remanding) our unbundling rules. In any event, it would be a pyrrhic victory for competitive carriers if the Commission at this stage were to reinstitute unbundling frameworks that have already been rejected and cannot be sustained on appeal. The ensuing disruption and dislocation that would result

— particularly if the court did not permit a further freeze on unbundling requirements that are vacated once again — would prove crippling to the competitive industry. I am confident that this Order on Remand, by contrast, can serve as the blueprint for sustainable facilities-based competition, and, in turn, a high degree of innovation, choice, and other consumer benefits.