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Issues:

Witness: Edward J. Cadieux

Sponsoring Party: NuVox Communications of
Missouri, Inc.

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Case Nos.: TO-2005-0035

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**Missouri Public
Service Commission**

NUVOX COMMUNICATIONS OF MISSOURI, INC.

REBUTTAL TESTIMONY

OF

EDWARD J. CADIEUX

CASE NO. TO-2005-0035

DECEMBER 17, 2005

Exhibit No. 30
Date Prepared Case No. TO-2005-0035
Reporter

STATE OF Missouri)
COUNTY OF St. Louis) SS.

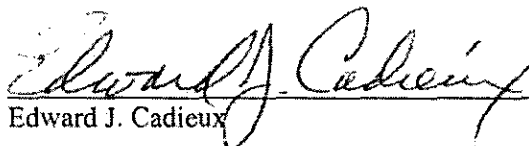
BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Second Investigation)
Into the State of Competition in the) TO-2005-0035
Exchanges of Southwestern Bell Telephone,)
L.P., d/b/a SBC Missouri.)

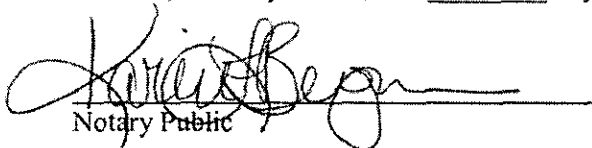
AFFIDAVIT OF EDWARD J. CADIEUX

COMES NOW Edward J. Cadieux, of lawful age, sound of mind and being first duly sworn, deposes and states:

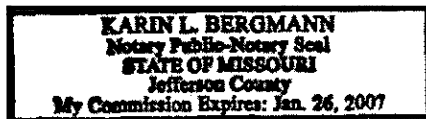
1. My name is Edward J. Cadieux. I am Executive Director, Regulatory and Public Affairs for NuVox Communications of Missouri, Inc.
2. Attached hereto and made a part hereof for all purposes is my rebuttal testimony in the above-referenced case.
3. I hereby swear and affirm that my statements contained in the attached testimony are true and correct to the best of my knowledge and belief.


Edward J. Cadieux

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 17th day of December, 2004.


Notary Public

My Commission Expires: January 26 / 2007



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**REBUTTAL TESTIMONY
OF
EDWARD J. CADIEUX
NUVOX COMMUNICATIONS OF MISSOURI, INC.
CASE NO. TO-2005-0035**

Q. Please state your name and business address.

A. My name is Edward J. Cadieux. My business address is 16090 Swingley Ridge Road, Suite 450, Chesterfield, Missouri 63017.

Q. By whom are you employed?

A. By NuVox, Inc on behalf of it and its wholly-owned subsidiary operating companies, including NuVox Communications of Missouri, Inc., ("NuVox").

Q. Please describe NuVox, its business and its regulatory status in Missouri.

A. NuVox is a facilities-based competitive local exchange company (CLEC) and is certificated in Missouri as a provider of basic local exchange, local exchange and interexchange services. NuVox offers voice, data (including broadband internet) and bundled voice/data services to small and medium-sized business customers in the St. Louis, Kansas City and Springfield metropolitan areas in Missouri and, in total, throughout forty-eight (48) cities across sixteen (16) states in the Midwestern and Southeastern United States. NuVox provides these services through a combination of its own facilities (customer premises integrated access equipment, collocated transmission equipment, and digital and ATM switches) and leased loop and transport facilities.

UNE DS1 loops¹ and UNE DS1 loop/transport combinations, otherwise known as Enhanced Extended Loops ("EELs")², that NuVox leases from the incumbent local exchange carriers (ILECs) are particularly important to its ability to provide service.

Q. Please describe your position and responsibilities with NuVox.

A. I hold the position of Senior Regulatory Counsel. In that position I am responsible for directing NuVox's state regulatory matters and for advising the company with respect thereto. I also have regional responsibility for directing the evaluation, negotiation, interpretation and enforcement of interconnection agreements for NuVox with ILECs and related matters. Additionally, I provide NuVox management advice with respect to federal regulatory decisions and developments, particularly with respect to matters that are inter-related with state regulatory activities and with interconnection agreements.

Q. Please describe your education and prior work experience.

A. I hold a Bachelor of Arts degree in Political Science from Saint Louis University and a Juris Doctor degree from Saint Louis University School of Law. I am licensed and in good standing to practice law in the State of Missouri. I have approximately twenty-five years' of experience in the field of utility regulation, with the last twenty years predominantly or exclusively in the field of telecommunications regulatory law and policy.

Q. Could you please identify Schedule EJC-1 which is attached to your

¹ DS1 loops are 4-wire digital transmission facilities connecting between a customer's premises and a NuVox collocation in the customer's serving ILEC end office. DS1 facilities have a capacity of 1.544 mbps, or 24 times the bandwidth of a standard 2-wire loop.

² A DS1 EEL is a combination of a DS1 loop and a DS1 transport facility, connecting a customer's premises to a NuVox collocation in an ILEC central office other than the customer's serving end office.

1
2 **Rebuttal Testimony?**
3

- 4 A. Yes. Schedule EJC-1 contains a more detailed description of my educational background
5 and work experience.
6
7

8
9 **Q. Please state the purpose of your Rebuttal Testimony.**
10

- 11 A. The purpose of my Rebuttal Testimony is to provide information relevant to SBC's request
12 for competitive classification of its services in this case and to respond to various portions
13 of the Direct Testimonies filed by SBC. My rebuttal testimony makes the following
14 points, based in part on NuVox's five years of experience competing in the small/medium
15 business customer market in the St. Louis, Kansas City and Springfield metropolitan areas:
16
17
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21

- 22 1. **SBC is protected by substantial entry barriers in the small/medium business**
23 **customer market which limits the extent and level of competition.**
24
25 2. **The only meaningful competition that SBC currently faces in the**
26 **small/medium business customer market is from UNE-based CLECs such as**
27 **NuVox.** (So called "intermodal" competition – such as cable companies or
28 wireless carriers providing service via their own customer-connecting facilities – do
29 not compete *in any material way* in this segment of the market in the State's major
30 metropolitan areas).
31
32 3. **The FCC is in the process of implementing substantial reductions in the**
33 **unbundling obligations of SBC and other ILECs which will reduce the level of**
34 **competition SBC faces for its services in Missouri and elsewhere.**
35
36
37

38 **PART ONE**
39 **ENTRY BARRIERS RELATED TO COMPETITION**
40 **FOR SMALL AND MEDIUM-SIZE BUSINESS CUSTOMERS**
41

- 42
43 **Q. Are entry barriers relevant to the consideration of SBC's request for competitive**
44 **classification of services?**
45
46

1 A. Yes, pursuant to Section 386.020(14)(d), barriers to entry are factors to be considered
2
3 by the Commission in ruling on a request for competitive classification of services.
4

5
6 **Q. What do you mean when you refer to an "entry barrier"?**
7

8 A. Dr. Aron testifies, "a barrier to entry can be defined as an attribute of a market 'that
9
10 make[s] entry unprofitable while permitting established firms to set prices above marginal
11
12 cost, and to persistently earn monopoly revenues." (Aron Direct, p. 49). I believe that
13
14 definition is generally consistent with the FCC's analysis of entry barriers in the context of
15
16 its evaluations of impairment and, therefore, with how I use the term in this testimony.
17

18
19 **Q. Did the FCC considered in its 2003 *Triennial Review Order*³ the question of whether**
20
21 **various economic and operational factors present barriers to entry with respect to**
22
23 **competition in the local exchange market?**
24

25 A. Yes. The FCC considered that subject extensively in the context of its impairment analysis
26
27 in the *TRO*.⁴
28

29
30 **Q. Has the FCC recently revisited its *TRO* impairment analysis?**
31

32 A. Yes. Just this week (on December 15, 2004) the FCC voted on revised UNE availability
33
34 rules in its WC Docket No. 04-313, CC Docket No. 01-338. This latest UNE rulemaking
35
36 proceeding was an outgrowth of the decision of the *USTA II* decision.
37

38
39 **Q. If the FCC has just voted on new UNE availability rules in its *TRO Remand***
40
41 **rulemaking, are the FCC's *TRO* entry barrier findings relevant to the**

³ Report and order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338(August 21, 2003).

⁴ Portions of the *TRO* were reversed or vacated, and remanded by United States Court of Appeals for the District of Columbia in *U.S. Telecom Ass'n v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004) ("*USTA II*"). However, the FCC's core factual findings regarding barriers to entry to competitive loop deployment were not disturbed by that decision.

question of SBC's request for competitive classification of its services in this case?

A. Yes, I believe those *TRO* findings are relevant. It should be noted that at the time of preparation of this testimony, the FCC's *TRO Remand Order* is not yet available – at this point only a press release and FCC Commissioner statements have been issued which provide the general outlines of the decision. Until the *TRO Remand Order* is issued, we will not know to what extent – if at all -- the FCC may have changed its assessment regarding entry barriers to competitive loop deployment, the subject I discuss in some detail in the testimony that follows. So at this point the FCC's *TRO* assessment of entry barriers is the most current and extensive exploration of the subject that is available in terms of actual findings by the regulatory agency that has nationwide responsibility in the area of telecommunications services.

Q. What approach did the FCC take in assessing entry barriers (and impairment) in the TRO?

A. The FCC considered the question with respect to various types of network elements (i. e., (local switching, and high capacity loop and interoffice transport facilities, etc.) and for loops and transport facilities – of different types/capacity levels. Specifically, for high capacity loops the FCC gave separate consideration to standard loops, versus DS1 loops, versus DS3 loops⁵, versus OCn loops⁶ versus dark fiber loops⁷. The FCC stressed its belief that actual evidence of CLEC facility deployment (with respect to particular network elements) is the most persuasive evidence of non-impairment without unbundled access to the network element.⁸

⁵ An DS3 loop is the equivalent of 28 DS1 loops.

⁶ OCn refers to systems using optical signaling. Without getting into too much detail, a level of OC-3, the lowest OCn level, would be equivalent to three DS3 loops).

⁷ Dark fiber refers to fiber optic cabling with no electronics or optronics.

1 **Q. What general findings did the FCC make regarding economic barriers relating to the**
2
3 **deployment of loop facilities?**

4
5 A. The FCC found that “[c]onstructing loop plant is both costly and time consuming,
6
7 regardless of the type of loop being deployed,” citing evidence in its record indicating,
8
9 among other things, that on average fiber loop deployment costs per mile range from
10
11 \$100,000 to \$300,000 for underground construction and are approximately \$50,000 per
12
13 mile for aerial construction.⁹ The FCC also made a couple of important corollary
14
15 determinations. First, it recognized that these very high loop construction costs are sunk
16
17 costs.¹⁰ Additionally, the FCC noted that the high costs of loop
18
19 deployment do not vary significantly with different loop capacities – i.e.,
20
21 regardless of whether the loop is a standard loop (i.e., 2-wire analog or DS0 loop), a DS1
22
23 loop, a DS3 loop or an OCn level loop¹¹ -- whereas there is a direct relationship between
24
25 the revenue a CLEC expects to derive from the customer served by the loop and the loop
26
27 capacity level. More generally, the FCC observed that, “facilities-based entry into the
28
29 telecommunications market requires a great deal of capital for equipment, network
30
31 construction, and operating costs while customers are gradually added to an entrant’s
32
33 network.” Those substantial capital requirements “are exacerbated by the length of time –
34
35 months or years – that it can take before investments start to turn a profit owing to the pace
36
37 of construction, the difficulties of luring customers away from incumbent LECs and the
38
39 need to invest in a great deal of equipment before serving the first customer.” [footnotes
40
41 omitted].¹²

⁸ See, *Id.* at ¶¶ 92-96.

⁹ *Id.* at ¶ 205 and n. 644.

¹⁰ *Id.*

¹¹ *Id.* at ¶ 206.

¹² *Id.* at ¶86.

1 **Q. What is the significance of the FCC's recognition that loop deployment costs**
2
3 **constitute sunk costs?**

4
5 A. Sunk costs, as described by the FCC in the loop deployment context, are costs that are of a
6
7 nature that once incurred the facility or equipment that is associated with that
8
9 cost cannot be moved even if customer demand patterns change.¹³ In other words, if a
10
11 CLEC were to incur the cost of deploying a loop to a particular customer premises and the
12
13 customer moves to another location, or switches carriers, or goes out of business, the cost
14
15 associated with deploying that loop is sunk. The FCC noted that sunk costs "increase risk
16
17 as well as an entrant's cost of failure, which in turn can increase the cost of capital and
18
19 discourage entry," concluding that sunk costs – particularly when combined with scale
20
21 economies,¹⁴ "can pose a formidable barrier to entry"¹⁵.

22
23
24 **Q. According to the FCC, why is there little variation in loop deployment costs relative**
25
26 **to the loop's capacity?**

27
28 A. The reason for this is pretty straightforward. As the FCC found, the most significant
29
30 portion of loop costs are associated "with deploying the physical fiber infrastructure in the
31
32 ground, rather from lighting the fiber optical cable."¹⁶ It is the "lighting" of the fiber optic
33
34 cable – i.e., attaching electronics to the fiber cable – that determines the capacity of the
35
36 loop. So irrespective of whether the customer in question is – at one extreme -- a
37
38 residential or very small business customer, requiring only one or a few DS0 level loops¹⁷,
39
40 or -- at the other extreme -- is an extremely large business customer (or large multi-unit

¹³ *Id.*

¹⁴ *Id.* at ¶ 87. The FCC noted that to the extent CLECs are likely to achieve substantially smaller levels of sales that the incumbent LEC, then with scale economies the CLECs average costs will be higher, "putting them at a potentially significant cost disadvantage".

¹⁵ *Id.* at ¶ 88.

¹⁶ *Id.* at ¶ 206.

¹⁷ A DS0 loop is a regular POTS line.

1
2 commercial building complex) requiring multiple DS3 loops or an OCn-level loop, the
3
4 costs of loop deployment will be substantial and will not vary significantly.
5

6
7 **Q. Why do expected revenues vary by loop capacity levels?**
8

9 A. Generally, residential and very small business customers only require DS0 capacity loops,
10
11 whereas when you move up into the small and medium-sized business customer market
12
13 segment those customers tend to be served more efficiently via a DS1 loop. As you move
14
15 further up the scale to larger business customers, they may require multiple DS1s or even
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17 DS3 or OCn-level loop capacity to meet their needs. Obviously, the amount of revenues
18
19 a carrier can expect to receive from a residential customer or a two or three line business
20
21 customer are much less than what will be generated when serving a large business
22
23 customer with fifty, one hundred, or several hundred lines.
24

25
26 **Q. What are the relevant implications from the FCC's determination that loop**
27
28 **construction costs do not vary significantly by loop capacity level, whereas expected**
29
30 **revenues do vary with capacity?**
31

32 A. The key implication is that as a general matter the substantial economic barriers to loop
33
34 deployment can only be overcome with respect to loops connecting to customer premises
35
36 of extremely large business customers or large, multi-tenant commercial complexes. In the
37
38 *TRO* the FCC came to the conclusion that competitive carrier self-deployment of loop
39
40 facilities only becomes economically viable when the customer location being served
41
42 has demand in excess of two DS3s, which equates to the capacity of more than 1344
43
44 POTs lines.
45
46

1 **Q. Did the FCC identify other types of entry barriers beyond the economic barriers you**
2
3 **have discussed?**

4
5 A. Yes. The FCC emphasized the importance of “first mover advantages,” which in this
6
7 context are advantages held by the incumbent LEC due to its pre-existing status as
8
9 monopoly local exchange service provider. More specifically, the FCC described the
10
11 incumbent LEC’s first mover advantages as potentially including: (a) preferential access
12
13 to buildings; (b) access to rights of way; (c) the higher risk of new entrant failure
14
15 (exacerbated by high sunk costs); (d) the incumbent’s substantial sunk capacity; (e)
16
17 operational difficulties faced by a new entrant that have already been resolved by the
18
19 incumbent LEC during its operations in a monopoly environment; (f) customer reluctance
20
21 to switch carriers; and (g) advertising and brand name preference. The FCC noted that
22
23 “[f]irst mover advantages often create an absolute cost disadvantage for entrants, which, if
24
25 large enough, can be a barrier to entry. Some of these factors interact with other factors,
26
27 such as scale economies, to create barriers to entry.” [footnotes omitted].¹⁸

28
29
30 **Q. In the TRO, did the FCC make specific findings regarding entry barriers and**
31
32 **impairment relating to deployment of DS1 loops?**

33
34 A. Yes, it did. The FCC found that CLECs are impaired without access to unbundled DS1
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36 loops, noting that its record contained “little evidence of competitive LECs’ ability to self-
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38 deploy single DS1 capacity loops and scant evidence of wholesale alternatives for serving
39
40 customers at the DS1 level.” The FCC also held that its record “shows that requesting
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42 carriers seeking to serve DS1 enterprise customers face extremely high economic and
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44 operational barriers in deploying DS1 loops to serve these customers.” The FCC also
45

¹⁸ *Id.* at ¶ 89.

1 recognized that small and medium-sized business customers served via DS1 loops
2
3 “provide much lower revenue opportunities” (than large business customers) and exhibit
4
5 higher degrees of churn. Taken together, the FCC held that these factors “make it
6
7 economically infeasible for competitive LECs to deploy DS1 loops, which require the
8
9 same significant sunk and fixed construction costs as higher capacity loops. [footnotes
10
11 omitted].¹⁹
12
13

14 **Q. You noted previously in this testimony that NuVox serves customers via both stand-**
15
16 **alone DS1 loops and by DS1 EELs. Do the same or similar revenue and cost**
17
18 **characteristics apply to both types of serving arrangements?**
19

20 **A.** Yes. The expected revenue is the same because both types of serving arrangements
21
22 involve a DS1 facility connecting a small or medium size business customer to NuVox’s
23
24 network. With respect to costs of competitive facility deployment, the high capital costs of
25
26 loop deployment DS1 EELs are even greater than those described above since DS1 EELs
27
28 involve not only a DS1 facility connection between the customer’s premises and the
29
30 incumbent LEC serving end office, but also an extending DS1 transport link between that
31
32 serving end office and a neighboring ILEC central office where NuVox has a
33
34 collocation. Thus, irrespective of whether a customer is served via a DS1 stand-alone loop
35
36 or via a DS1 EEL arrangement, the same conclusion applies – there are extreme entry
37
38 barriers to competitive loop deployment.
39
40

41 **Q. Did the FCC make findings regarding economic barriers to competitive loop**

¹⁹ *Id.* at ¶¶ 325-326. While recognizing that retail business customer rates are typically higher than residential rates, the FCC found that its record reflected that “the revenues generated from small and medium enterprise customers are not sufficient to make self-deploying DS1 loops economically feasible from a cost recovery perspective,” and that CLECs “do not have the ability to recover sunk costs in self-deploying DS1 loops.” [footnotes omitted]. The FCC also held that there was “scant evidence” of wholesale alternatives to incumbent LEC DS1 loops.

1
2 **deployment at capacity levels higher than DS1?**
3

- 4 A. Yes. The FCC found that at a certain capacity level – due to the high level of expected
5 associated revenues – the economic barriers to competitive loop deployment could be
6 overcome. Based on the evidence in its record, the FCC found that capacity level to be
7 greater than two DS3s at the same location.²⁰ It is important to understand the extremely
8 high level of capacity this represents – a DS3 is equivalent in bandwidth to 28 DS1s, and a
9 DS1 is, in turn, equivalent to the bandwidth of 24 standard POTs lines. In other words, the
10 FCC found that only at locations where the CLEC’s expected customer demand would be
11 greater than 56 DS1s (equivalent to 1344 POTS lines) can competitive deployment of loop
12 facilities be economically justified.
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23 **Q. Are loops below the DS1 capacity level used to serve business customers?**
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- 25 A. Yes, very small business customers use standard loops with a 64 kpbs capacity – either
26 two-wire analog loops or DS0 digital loops. Likewise, residential customers typically are
27 served via standard loops (what the FCC refers to as “mass market” loops).
28
29
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32 **Q. Do the same economic barriers exist with respect to these standard loops as with**
33 **higher capacity loops?**
34

- 35
36 A. Yes. As noted above, the substantial fixed, sunk costs of loop deployment do not vary
37 in any material manner with differences in the loop’s capacity. At the same time, the
38 expected revenue flows from residential and very small business customers – the customer
39 classes that use standard loops – is at the low end of the spectrum. Thus, as a general
40 matter, the economic barriers to competitive loop deployment are most severe with respect
41
42
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44
45

²⁰ *Id.*, at ¶¶ 320-324.

1 to standard loops.²¹

2
3
4 **Q. Did the FCC give special consideration to certain types of mass market loops?**

5
6 A. Yes. In the *TRO* the FCC made the determination to treat what it refers to as “next-
7
8 generation” network facilities and equipment differently. Based in large part on Section
9
10 706 of the Telecommunications Act and a belief that reduced unbundling obligations
11
12 would provide additional incentives for incumbent LEC investment in broadband facilities,
13
14 the FCC ordered unbundling exemptions for mass market Fiber-to-the-home (“FTTH”)
15
16 loops²² and the packetized functionality of mass market copper/fiber hybrid loops.²³

17
18
19 **Q. In connection with its decision to remove unbundling obligations for**
20
21 **incumbent LECs related to copper/fiber hybrid loops, did the FCC make any**
22
23 **findings or policy statements regarding the continued availability of DS1 loops?**

24
25 A. Yes. The FCC emphasized that its decision to exempt certain ILEC next-generation loop
26
27 facilities from unbundling requirements “does not eliminate the existing rights competitive
28
29 LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3
30
31 service to customers,” noting that “[T]hese TDM-based services – which are generally
32
33 provided to enterprise customers rather than mass market customers – are non-packetized,
34
35 high-capacity capabilities provided over the circuit switched networks of incumbent
36
37 LECs.” [footnotes omitted]²⁴

38
39
40 **Q. Subsequent to issuance of the *TRO* decision in August, 2003, has the FCC granted**
41

²¹ *Id.* at ¶¶ 237-239.

²² *Id.* at ¶¶ 273 and n. 802. The FCC defined FTTH loop as “a local loop consisting entirely of fiber optic cable (and attached electronics), whether lit or dark fiber, that connects a customer’s premises with a wire center (*i.e.*, from the demarcation point at the customer’s premises to the central office).”

²³ *Id.* at ¶ 288.

²⁴ *Id.*, at ¶ 294.

incumbent LEC requests for further reduction in their unbundling obligations?

A. Yes. In separate, subsequent decisions the FCC extended the *TRO*'s FTTH unbundling exemptions to multi-unit developments that are primarily residential in nature,²⁵ and to "fiber-to-the-curb" ("FTTC") situations.²⁶

PART TWO
THE ONLY MEANINGFUL COMPETITION TO SBC IN THE MARKET FOR
SMALL AND MEDIUM SIZE BUSINESS CUSTOMERS IS FROM UNE-BASED CLECS

Q. In the *TRO* did the FCC evaluate that level and nature of competition that non-wireline technologies present in the telecommunications marketplace?

A. Yes. In the course of its impairment analysis the FCC evaluated the nature and extent of competition from non-wireline technologies – what the FCC refers to as intermodal competition.

Q. How did the FCC structure its analysis of intermodal competition?

A. As with its overall evaluation of impairment issues, the FCC assessed intermodal competition separately with respect to the mass market versus the enterprise market.

Q. What were the FCC's findings regarding intermodal competition in the context of mass market loop impairment?

A. The FCC observed that while the evidence indicated minimal deployment of alternative (to the ILECs') local loop facilities in the mass market strictly for telecommunications services, its record did contain evidence "that other types of network facilities deployed primarily for other purposes (*e.g.*, cable television systems, satellite technologies) can and

²⁵ See, generally, *Order on Reconsideration*, CC Docket No. 01-338, (released August 9, 2004).

²⁶ See, generally, *Order on Reconsideration*, CC Docket No. 01-338, (released October 18, 2004).

1
2 are increasingly being modified to support the delivery of narrowband and broadband
3 services, particularly telephony and high-speed Internet access services, to the mass
4 market.²⁷
5
6

7
8
9 **Q. Did the FCC assess specifically telecommunications competition in the mass market**
10 **from cable companies?**
11

12
13 A. Yes. The FCC noted evidence in its record that cable companies have widely deployed
14 broadband service in the form of high speed Internet access service offered via cable
15 modem. Specifically, the FCC found that as of mid-2002 cable companies were providing
16 more than 9.1 million high speed lines for Internet access to consumers nationwide and
17 that such service was available to 70 million of the nation's homes.²⁸ However, at the
18 same time the FCC found that cable company deployment of voice telephony service was
19 significantly lagging behind those companies' broadband high speed modem service.
20 According to information supplied to the FCC by the Bell companies, at that point cable
21 companies were providing voice telephony service to less than two percent of the nation's
22 homes.²⁹ The evidence indicated that circuit switched cable telephony was then available
23 to approximately 10 million of 108 million homes nationwide, and that a number of cable
24 operators were awaiting their ability to deploy telephony via packet-switched platforms.³⁰
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38 **Q. Similarly, did the FCC evaluate the state of competition in the mass market from**
39 **wireless carriers?**
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41

²⁷ *Id.* at ¶ 222. The FCC observed that these intermodal systems are generally not made available on a wholesale basis in a manner that might substitute for ILEC loop facilities.

²⁸ *Id.* at ¶ 229, citing to its *High Speed Services December 2002 Report* at Table 1.

²⁹ *Id.* and n. 695

³⁰ *Id.*

1 A. Yes. The FCC noted the wide availability of narrowband services available from CMRS
2
3 (wireless) carriers, estimating that over 64 million households (61 percent) use wireless
4
5 phones in some manner. The FCC found that while wireless service continues “to be
6
7 primarily a complimentary technology to wireline narrowband service,” it is growing as a
8
9 substitute for wireline service in the mass market – with an estimated 3 to 5 percent of
10
11 wireless subscribers using it as a replacement for primary fixed wireline service.³¹ On the
12
13 other hand, the FCC acknowledged evidence that wireless service is not generally equal to
14
15 traditional landline local loop service in quality, in its ability to handle data traffic and its
16
17 ubiquity, and that wireless service was not yet capable of providing broadband services to
18
19 the mass market.³² The FCC concluded that [n]either wireless nor cable has blossomed
20
21 into a full substitute for wireline telephony.³³

22
23
24 **Q. Did the FCC consider the status of other alternative technologies in mass market**
25
26 **telecommunications competition?**

27
28 A. The FCC also considered fixed wireless and satellite services and other even newer
29
30 approaches such as voice service over power lines. It concluded that these technologies
31
32 are nascent or serving relatively few subscribers, and so do not serve as a current substitute
33
34 for narrowband or broadband services in the mass market.³⁴

35
36
37 **Q. Did the FCC make any findings regarding cable, wireless or other alternative loop**
38
39 **technologies with respect to the enterprise market?**

40
41 A. The FCC made some very limited findings in this area. It noted that in the enterprise
42

³¹ *Id.* at ¶ 230.

³² *Id.*

³³ *Id.* at ¶ 245.

³⁴ *Id.* ¶¶ 231-232.

1 market -- unlike the mass market -- there is a potential for carriers to focus on individual
2
3 buildings and customers and “determine which technology is the optimal means of
4
5 reaching each customer.” The FCC observed that “creating mechanisms to identify
6
7 intermodal alternatives on an individual customer basis in the mass market is impractical,
8
9 whereas it is feasible, *in certain cases*, in the enterprise market.” (emphasis supplied).³⁵
10

11
12 **Q. In making these observations, did the FCC cite to any specific record evidence**
13
14 **regarding the extent of alternative technology loop utilization in the enterprise**
15
16 **market?**

17
18 A. No, it did not.
19

20
21 **Q. In making its impairment findings regarding enterprise market loop deployment, did**
22
23 **the FCC base those findings on the availability of alternative loop technologies?**
24

25 A. No, it did not.
26

27
28 **Q. What is NuVox’s experience in Missouri regarding the extent to which cable**
29
30 **companies, wireless providers or other alternative loop technologies offer competition**
31
32 **in the market for providing voice, bundled voice/high speed internet or stand-alone**
33
34 **high speed internet to small and medium size business customers in the cities NuVox**
35
36 **serves?**

37
38 A. NuVox’s experience is that such competition in the market for small and
39
40 medium size business customers in its Missouri cities -- St. Louis, Kansas City and
41
42 Springfield metro areas -- is quite limited. Voice and broadband Internet access service via
43
44 cable modem and coaxial cable plant continues to be primarily a residential service, since
45

³⁵ *Id.* at ¶ 309.

1 those services overlay the digital cable TV system. CMRS (cellular wireless) services are
2 complimentary to, not substitutes for, traditional wireline voice and broadband services for
3 small and medium size business customers – i.e., the customers NuVox calls on are not
4 abandoning their wireline services in favor wireless cellular services, and only in limited
5 situations has NuVox encountered fixed wireless arrangements as a competitor. In the vast
6 majority of NuVox sales contacts with business customers, the competition is SBC or, to
7 a more limited extent, another CLEC such as Birch, McLeod or MCI.
8
9
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16

17 **PART THREE**
18 **NEW REDUCTIONS IN UNE AVAILABILITY**
19 **WILL REDUCE THE LEVEL OF COMPETITION SBC FACES**
20

21 **Q. Do you anticipate reductions in UNE availability from that described in the TRO?**

22
23 A. Yes. First, as noted above the FCC has already trimmed back the unbundling
24 obligations of the TRO by its more recent decisions extending the TRO's FTTH
25 unbundling exemptions to include primarily residential multiple dwelling unit locations
26 and to and to cover ILEC FTTC serving arrangements. Second, as the Commission and
27 the parties are well aware and as I have noted above, the FCC is in the process of re-
28 writing the UNE rules in response to the *USTA II* decision and just prior to the filing of this
29 testimony -- on December 15, 2004 – the FCC voted (by a 3-2 majority) on new rules that
30 will, in fact, further reduce the availability of UNEs. As I have also noted, the actual text
31 of the FCC's order and of the new UNE rules is not yet available, and is not expected to
32 become available for at least several weeks. What is available currently are an FCC press
33 release and statements by the Commissioners. A copy of these materials is attached hereto
34 as Schedule EJC-2.
35
36
37
38
39
40
41
42
43
44
45
46

1
2 **Q. Based on the information that is currently available, can you provide a general**
3
4 **description of how UNE availability under this most recent decision compares with**
5
6 **what the FCC's *TRO* rules permitted?**
7

8
9 A. Pursuant to this *TRO Remand* decision, it appears that unbundled local switching is
10
11 eliminated as a UNE, which eliminates the UNE-P serving method. It appears that no new
12
13 orders for UNE-P will be permitted prospectively and that a 12-month transition period is
14
15 established during which time a CLEC with UNE-P circuits must determine whether to
16
17 attempt to transition the embedded UNE-P customer base to another serving method (i.e.,
18
19 UNE-L) if feasible, or to disconnect those circuits and discontinue service to those
20
21 customers. Also, it appears that during that 12 month transition those UNE-P circuits that
22
23 remain in service will be subject to a one dollar per line/per month rate increase.³⁶ For
24
25 high capacity facilities (DS1 and higher, loops and transport), the availability of those
26
27 facilities will be rolled-back to varying extents based on wire center criteria – i.e., wire
28
29 center access line counts and the existence of fiber-based collocators. The trigger
30
31 thresholds for eliminating high capacity loop and transport availability in or between
32
33 particular wire centers varies somewhat depending on the specific type and capacity of the
34
35 facility. For example, DS1 loops will no longer be available as UNEs for service to
36
37 customers located in those wire centers which have 60,000 or more access lines AND four
38
39 or more fiber-based collocators. DS1 transport will no longer be available as a UNE on
40
41 routes where the wire centers on both ends have 38,000 or more access lines, OR where the
42
43 wire centers on both ends have at least four fiber-based collocators.³⁷
44

³⁶ See Schedule EJC-2

³⁷ *Id.*

1
2 **Q. Will the elimination of UNE-P affect the level of competition faced by SBC**
3
4 **in Missouri?**

5
6 A. The elimination of UNE-P will clearly reduce the amount of competition SBC encounters
7
8 in Missouri. As the Commission is aware, the large IXC/CLECs – AT&T and MCI –
9
10 between them have millions of residential customers nationwide that are served via
11
12 UNE-P. Although I am not privy to the internal business decisions of AT&T and MCI, I
13
14 seriously doubt that they will find it feasible to convert substantial portions of their
15
16 embedded UNE-P customer bases to UNE-L, since that serving arrangement requires a
17
18 collocation in the customer's serving end office. Instead, I believe there is a substantial
19
20 likelihood that those carriers will be forced to abandon significant numbers of their
21
22 UNE-P customers. It is likely that a significant portion of those customers will end up
23
24 back with SBC as their service provider.
25

26
27 **Q. Do you know how many lines in SBC's Missouri territory are served via UNE-P?**

28
29 A. SBC witness Unruh states that as of June 2004 there were 230,137 UNE-P lines. (Unruh
30 Direct, p. 21).
31

32
33 **Q. Would it be relevant in your opinion for the Commission to have some**
34
35 **information from the CLECs that are the significant users of UNE-P regarding to**
36
37 **what extent, if any, they will attempt to migrate their UNE-P customers to a UNE-L**
38
39 **platform?**

40
41 A. Yes. To the extent those CLECs may make an assessment that it is economically or
42
43 operationally infeasible to migrate their UNE-P customers to UNE-L service, that would
44
45 reduce the level of competition SBC currently faces. But absent contrary information from
46

1 such companies, the Commission should presume that such lines will soon revert back to
2
3 SBC.
4

5
6 **Q. You have discussed UNE-P in the context of residential service. Do some CLECs use**
7
8 **UNE-P to provide service to business customers?**
9

10 A. Yes, some CLECs do serve small business customers via UNE-P, although I do not have
11
12 any information available to me that would identify the number of business customer lines
13
14 served by CLECs in SBC's Missouri territory via UNE-P. SBC may have that data,
15
16 although I am not certain whether they have identified a residential versus business split of
17
18 UNE-P lines. Whatever that number may be, those UNE-P lines will also be affected by
19
20 this most recent FCC decision and, similar to the discussion above regarding UNE-P for
21
22 residential service, CLECs using UNE-P to provide service to business customers will also
23
24 have to make an evaluation of whether there is an economically and operationally viable
25
26 alternative method to serve those lines. To the extent those lines are not migrated to an
27
28 alternative provisioning method, the result will be to reduce the level of competition that
29
30 SBC faces.
31

32
33 **Q. Does NuVox have any UNE-P lines in Missouri serving business customers?**
34

35 A. NuVox has a very small number of UNE-P lines in service in Missouri. NuVox uses
36
37 UNE-P only in limited, ancillary situations, e.g., when a multi-location customer has a
38
39 primary office served by a DS1, but also has one or more satellite locations that do not
40
41 have sufficient demand to justify deploying separate DS1 loops to those premises and
42
43 where the satellite locations are in end offices where NuVox does not have a collocation.
44

45
46 **Q. Has NuVox determined a course of action regarding its UNE-P lines in light of this**

1
2 **most recent FCC decision?**

3
4 A. No, not at this time.

5
6
7 **Q. Turning your attention to high capacity loops and transport facilities, at the time this**
8 **testimony is being filed has NuVox had a chance to assess the impact of the FCC's**
9 **TRO-Remand decision on its business?**
10

11
12 A. We have only been able to make a limited, tentative assessment. This is due in part to the
13 fact that the FCC decision was issued two days prior to the filing of this testimony, and
14 because there is no list that is immediately available to NuVox's business planners that
15 clearly identifies the specific ILEC wire centers nationwide that meet the various access
16 line and fiber-based collocation criteria that are the triggers for the elimination of DS1
17 loops and DS1 EELs. I would anticipate that prior to the hearing in this case NuVox and
18 other CLECs will have a better picture of which wire centers and which transport routes
19 are affected, but a complete and definitive list may not be available until some time after
20 the FCC issues its written decision. One reason for that potential delay is the possibility
21 that the FCC's order might not provide explanation regarding what constitutes a "fiber-
22 based collocater" for purposes of these triggers. How that term is defined could affect how
23 many and which central offices qualify for UNE delisting.
24
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38 **PART FOUR - RECOMMENDATIONS**

39 **Q. Based on the foregoing, do you have a recommendation regarding what the**
40 **Commission should do in this case?**

1 A. My recommendation would be that the Commission suspend the proceedings for at least 12
2 months and then allow additional evidence and hearings. The information supplied by
3 SBC regarding competition as of June 2004 or any time up to the date of hearing does not
4 accurately reflect what is going to happen in the market in the immediate future. Changes
5 in FCC regulations, and the possibility of additional court challenges regarding such
6 changes, create new barriers to entry and uncertainty. What is certain is that there will be
7 significant, near-term changes in the market due to the new FCC UNE decision.
8 Preferably, because of this regulatory tumult, the Commission would simply deny SBC's
9 requests to be released from price cap regulation and instruct SBC not to refile such
10 requests for at least 12 months. But if the Commission nonetheless chooses to address the
11 merits of SBC's requests based on current information, then I would recommend that the
12 Commission reject SBC's request for additional competitive classification of services
13 based on the considerations I have described in this testimony.

14
15 **Q. Does this conclude your testimony at this time?**

16 A. Yes.

EDWARD J. CADIEUX

QUALIFICATIONS

PROFESSIONAL EXPERIENCE

NUVOX COMMUNICATIONS (and Predecessor Companies) 1999-Present
Senior Regulatory Counsel (2004); Vice President, Regulatory & Public Affairs –
Midwest Region (1999-2003)

In-house regulatory counsel advising and representing facilities-based CLEC from start-up phase through first five years of operations. Duties have included obtaining state public service commission certification and initial interconnection agreements with incumbent local exchange carriers, and providing NuVox management with legal/regulatory enforcement support for those agreements. Current responsibilities focus on re-negotiation/arbitration of interconnection agreements, and in-house management of NuVox's participation in state public utility commission proceedings related to implementation of FCC unbundling rules. Duties also include representing NuVox in regional and state CLEC trade associations and ad hoc CLEC advocacy groups.

BROOKS FIBER PROPERTIES 1996-1998
Director, Regulatory Affairs – Central Region

In-house regulatory counsel advising and representing facilities-based CLEC from start-up phase through first three years of operation. Duties included obtaining state public service commission certification and initial interconnection agreements with incumbent local exchange carriers, and providing NuVox management with legal/regulatory enforcement support for those agreements. Responsibilities also included analysis of FCC decisions relating to interconnection, unbundled network elements and related matters.

MCI 1988-1995
State Regulatory Counsel – Southwest Region

In-house state regulatory counsel for nationwide long-distance company, representing and advising MCI regarding state public service commission proceedings affecting the company's long-distance business.

MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL 1997
Assistant Attorney General – Public Utility Division

Attorney for the Commonwealth of Massachusetts representing consumer interests in utility cases filed at the Massachusetts Department of Public Utilities.

MISSOURI PUBLIC SERVICE COMMISSION 1980-1986
Hearing Examiner, Deputy Chief Hearing Examiner, Assistant General Counsel
and Deputy General Counsel

Administrative Hearing Officer and, later, Staff Counsel for state public utility commission, with primary emphasis in telecommunications cases.

EDUCATION

Saint Louis University School of Law – Juris Doctor (1978)

Saint Louis University – BA, Political Science (1975)

PROFESSIONAL LICENSES

Member in good standing, Missouri State Bar Association (since 1979)

FOR IMMEDIATE RELEASE:

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FCC ADOPTS NEW RULES FOR NETWORK UNBUNDLING OBLIGATIONS OF INCUMBENT LOCAL PHONE CARRIERS

New Network Unbundling Rules Preserve Access to
Incumbents' Networks by Facilities-Based Competitors
Seeking to Enter the Local Telecommunications Market

Washington, D.C. ? The Federal Communications Commission today adopted rules concerning incumbent local exchange carriers' (incumbent LECs') obligations to make elements of their network available to other carriers seeking to enter the local telecommunications market. The new framework builds on actions by the Commission to limit unbundling to provide incentives for both incumbent carriers and new entrants to invest in the telecommunications market in a way that best allows for innovation and sustainable competition.

The rules directly respond to the March 2004 decision by the U.S. Court of Appeals for the D.C. Circuit which overturned portions of the Commission's Unbundled Network Element (UNE) rules in its Triennial Review Order. We provide a brief summary of the key issues resolved in today's decision below.

Unbundling Framework. We clarify the impairment standard adopted in the Triennial Review Order in one respect and modify its application in three respects. First, we clarify that we evaluate impairment with regard to the capabilities of a reasonably efficient competitor. Second, we set aside the Triennial Review Order's "qualifying service" interpretation of section

251(d)(2), but prohibit the use of UNEs for the provision of telecommunications services in the mobile wireless and long-distance markets, which we previously have found to be competitive. Third, in applying our impairment test, we draw reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets. Fourth, we consider the appropriate role of tariffed incumbent LEC services in our unbundling framework, and determine that in the context of the local exchange markets, a general rule prohibiting access to UNEs whenever a requesting carrier is able to compete using an incumbent Less tariffed offering would be inappropriate.

. Dedicated Interoffice

Transport. Competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines. Competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. Finally, competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's network in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity dedicated transport where they are not impaired, and an 18-month plan to govern transitions away from dark fiber transport. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled dedicated transport at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if

any, between June 16, 2004 and the effective date of this Order.

High-Capacity Loops.

Competitive LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are not impaired without access to dark fiber loops in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity loops where they are not impaired, and an 18-month plan to govern transitions away from dark fiber loops. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled facilities at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

Mass Market Local Circuit

Switching. Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundled mass market local circuit switching. This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs. During the transition period, competitive carriers will retain access to the UNE platform (i.e., the combination of an unbundled loop, unbundled local

circuit switching, and shared transport) at a rate equal to the higher of

(1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004, plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for this combination of elements, plus one dollar.

Action by the Commission, December 15, 2004 (FCC 04-xxx).

Wireline Competition Bureau Staff Contact: Jeremy Miller, 418-1507; Email: jeremy.miller@fcc.gov

-FCC-

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on the Commission's web site www.fcc.gov
<<http://www.fcc.gov>> .

SEPARATE STATEMENT OF

CHAIRMAN MICHAEL K. POWELL

RE: Unbundled Access to Network Elements (WC Docket No. 04-313); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338)

Today's decision crafts a clear, workable set of rules that preserves access to the incumbent's network where there is, or likely will

be no other viable way to compete. The rules have also been carefully designed to pass judicial muster, for I hope we have learned that illegal rules, no matter their other merits, are no rules at all. For eight years, the effort to establish viable local unbundling rules has been a litigation roller coaster. Regrettably, years of fierce battles to bend the rules entirely toward one sector or another without proper respect for the legal constraints have contributed to a prolonged period of uncertainty and market stagnation.

This item decidedly does not attempt to make all sides happy. Consequently, one will undoubtedly hear the tortured hand-wringing by incumbents that they are wrongly being forced to subsidize their competitors. They have a legal duty to provide access under limited conditions and they do protest too much in arguing for the end of vast portions of their unbundling requirements. Conversely, one can expect to hear dire predictions of competition's demise from those who wanted more from this item. Time will show this will not be so. Business models may change, but competition and choice for consumers in the information age will continue to grow and thrive.

After repeated defeats in court, the Commission has heeded the call to apply a meaningful impairment analysis to switching. Therefore, while commercial agreements can be established to offer UNE-P services, such services are no longer legally compelled. We recognize, however, that during the years of wrangling over the lawfulness of UNE-P, companies have sold phone service to significant numbers of consumers using this now thoroughly legally discredited business approach. While we cannot justify the continuation of this approach, we see the need and obligation to minimize the impact on consumers by providing a smooth transition of these customers to other alternatives. To accomplish this, we have adopted a significantly longer transition than first proposed. In addition to the six months already provided by our Interim Order, we will extend the transition into early 2006. We are

confident this will mean less disruption for customers and provide time for quickly emerging alternatives?not the least of which include cable telephony, wireless and VoIP?to root in the market.

Facilities competitors are favored under the Act and Commission policy and we have attempted to permit wide unbundling for the key elements of loops and transport, where there is clear and demonstrable impairment. Recall that two years ago all five Commissioners stood together in requiring substantial unbundling of virtually all loops and transport. The Court rejected that effort. So today we have tried again to satisfy the court, while preserving access to incumbent's networks outside the most competitive and densest business districts. Incumbents made forceful attempts to remove the majority of these elements, but the record and our analysis demonstrated that competitors still depended significantly on them in the overwhelming majority of markets and, thus, we have required unbundling in those circumstances. We did not just check off the CLEC holiday list, however, and were careful to draw the lines tightly, understanding the rigors of the statutory impairment test and the inevitable need to withstand judicial challenge. Where loops or transport are removed, we also provide substantial transition periods to avoid disruption.

Over the course of the past few months, the five commissioners have worked very hard together to craft a solution that all of the offices could support. Ultimately, although my colleagues' insights and proposals improved the final result, we could not bridge the gap to reach a unanimous result that I felt could pass judicial muster. Finally I would be remiss if I did not praise the extraordinary efforts and leadership of the Wireline Competition Bureau and our Office of General Counsel, particularly Jeff Carlisle, Austin Sclick, Michelle Carey, Tom Navin, Russ Hanser and Jeremy Miller. They have been tireless advocates for a rigorous decision that

advances the public interest. We all owe them a debt of gratitude.

In 1996, no one could have guessed that nearly a decade later the FCC would be on its fourth attempt to develop local competition rules that are lawful. We hope to end that here and now, for the market cannot possibly continue another day plagued by an ever-shifting regulatory foundation. We can only hope that the fourth time is the charm.

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.

STATEMENT OF

COMMISSIONER MICHAEL J. COPPS,

DISSENTING

Re: Unbundled Access to Network Elements, Review of
the Section 251

Unbundling

Obligations of Incumbent Local Exchange
Carriers, Order on Remand (WC Docket No. 04-313, CC
Docket No. 01-338)

We are living in a new world when it comes to wireline competition. It is not a world of my making or my choosing, and I am deeply troubled by the conviction that this new world will be characterized by dramatic changes that will negatively impact American consumers. In decision after decision over the past three years, this Commission has taken actions curbing competition and limiting consumer choices, in the process straying far from the paradigms of competition laid out in the Telecommunications Act of 1996.

Our challenge today is to craft rules that will be acceptable to the courts and true to our statutory directives. I entered this remand proceeding hopeful that we could reach a compromise that would ensure some future for competition among wireline service providers and to provide a decent future for facilities-based carriers. We have had a long and serious dialogue over this item, extending through most of the night and

right into today. I appreciate my colleagues' willingness to engage in this discussion and to make the effort to achieve consensus. Unfortunately, in the final analysis, consensus eluded us. I thought we were getting close, but we couldn't cross the finish line. I cannot support the decision that resulted.

What we have in front of us effectively dismantles wireline competition. Brick-by-brick, this process has been underway for some time. But today's Order accomplishes the same feat with all the grace and finality of a wrecking ball. No amount of rhetoric about judicially sustainable rules and economically efficient competitors can hide the bang-up job this Commission has done on competition. During its tenure, the largest long distance carriers have abandoned the residential market. And as a result of today's decision, other carriers will follow suit. In their wake we will face bankruptcies, job losses and customer outages. Billions of dollars of investment capital will be stranded. And down the road consumers will face less competition, higher rates and fewer service choices.

After having abandoned residential competition earlier, today the majority also hangs up on small business consumers. Small business likes competition. It has voted with its feet for competition. In fact, the Small Business Administration tells us that in metropolitan areas competitive carriers serve 29 percent of small businesses. The inroads competitive carriers have made in this community are important, because small business is the engine of our economy. Small businesses generate between two-thirds and three-quarters of all new jobs in this country. They represent over 90 percent of employers and they produce over half of the nation's private sector output. The savings they enjoy from competitive telecommunications services go straight to the bottom line. But the majority's action today pulls the bottom out from under small business competition. It places restrictions on access to high-capacity loop and transport facilities that are vital for carriers serving small businesses.

It imposes economically unsound tests. In short, it burns the bridges competitive carriers have made in serving the small business community.

For a Commission that has laced its decisions with praise for facilities-based competition, today's action is a funny way of showing its continued support. As a result of this decision there will be less competition, less choice and higher rates. The people who pay America's phone bills deserve better. I dissent.

Some would have us believe that this is the road we have to travel in the wake of court decisions. Yet it is this Commission that refused to seek review of the very court decisions they now claim constrain us.

Though I do not join this decision today, I wish to thank the Commission staff for their hard work on this item. This proceeding and its predecessor have not been easy. But throughout the Bureau has been helpful, candid and generous with their time. I am grateful for their devotion to the task at hand and hope that there is some well-deserved time for rest and relaxation in the weeks ahead.

STATEMENT OF

COMMISSIONER JONATHAN S. ADELSTEIN,

DISSENTING

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

With this Order, the Commission officially cuts the cord on the local competition provisions of the

Telecommunications Act of 1996, the companies and investors which sought to deliver on the promise of the Act, and the American consumers ? to whom that promise was made. By fundamentally undermining facilities-based competition, the Commission relegates consumers to an inevitable future of higher rates and fewer choices. Regrettably, and unnecessarily, the Commission's action will ratchet up rates for both residential consumers and small businesses, which are so central to our nation's economic growth.

By not defending the Commission's prior decision before the Supreme Court, the majority placed itself in a box, in effect a coffin for telecom competition. Now, the majority buries telecom competition six feet under. The only choice I was given was where to pound in the nails. I cannot support this decision, because it will force consumers and businesses to pay higher prices and have fewer choices.

Throughout this proceeding, I have sought to take a careful and balanced view of the benefits and burdens of our unbundling rules. The record here, however, overwhelming demonstrates that competitors need access to critical bottleneck elements from the incumbents' legacy networks in order to connect their networks to their customers. Yet, today the Commission denies access to those elements with an overbroad decision that is divorced from the requirements of the statute, the direction of the courts, and the realities of providing telephone service.

Most stark is the Commission's treatment of local loops, which carry telephone traffic from customers' locations to a service provider's network. These local loops act as the on and off ramps to reach the alternative facilities-based networks that competitors have constructed at considerable expense. In this Order, the Commission adopts unbundling rules for these elements that are strangely disconnected from the operational and economic barriers a competitor would face if it had to duplicate the incumbent's legacy network. This blow to competition and choice comes

with a certain slight of hand, couched by the majority as ?inference tests? compelled by the courts. But ?inferences? aside, there should be little doubt about the real-world implications of this Order. By cutting facilities-based competitors off from access to essential network elements, the Commission undermines choice for small and medium size business customers across the country, let alone all consumers. In my view, these small business customers have yet to realize the wave of rate increases to come.

Nowhere, though, will this disconnection be as pronounced as in the largest metropolitan markets. These are areas where competitors have been able to gain a tenuous but growing foothold, building out their own networks closer to consumers, just as this Commission repeatedly encouraged them to do. Investors, who have committed billions of dollars of private investment in facilities-based wireline competition, have argued persuasively that the type and locations of their facilities were selected precisely to mesh with loop and transport elements leased from incumbent carriers as unbundled network elements pursuant to the Act. These investors have emphasized that their investments are ?essentially worthless? and that ?further investments will not be forthcoming,? without access to those elements leased from the incumbents. No ?inferences? are required to understand the true effect of today?s decision on investment.

The message from the facilities-based competitive industry has been clear: this Order will be devastating. It will create dislocation not only for telecommunications companies and their employees, but it will disrupt service for thousands of businesses that rely on them. Given the importance of the cutting-edge services these upstarts provide, this decision is bound to be a drag on the growth of our overall economy. While some argue it will spur investment, it is more likely to diminish it, as competitors who would otherwise invest are forced out of business and incumbents face less pressure to respond to their offerings.

Today's decision also marks the demise of UNE-based competition for residential consumers. For millions of residential consumers, that translates into fewer choices and higher prices. The majority concludes here that this residential competition, predicated on the availability of unbundled local switching, is unsustainable under existing legal precedent. Despite these protestations, the majority all but ensured this result.

I note with appreciation that the majority at least took some of our suggestions. Applying strict eligibility criteria to stand-alone UNE loops would have drastically limited competitors' ability to provide data services, which this Commission has touted as the future of the telecommunications market. Also, I appreciate the majority's willingness to extend slightly the transitions available to competitors who have invested so much in the effort to fulfill the goals of the 1996 Act. I would have supported relief more in line with the Commission's transition approaches used in other proceedings, where the Commission has been granted great deference to fashion transitional remedies.

Moreover, I have serious concerns that consumers may experience unnecessary service disruptions as their providers of choice are forced to exit the marketplace or as carriers rush to convert to new systems. To safeguard against this upheaval, it will be imperative that our State commission colleagues monitor the re-absorption, like the proverbial rat in a python, of millions of consumers who have chosen competitive alternatives. Our failure to address this possibility more comprehensively shows unnecessary disregard for consumers who have signed up with competitors -- for such disruptions would come through no fault of their own.

While I strongly dissent from this Order, I want to thank my colleagues for their candor in approaching these issues. I am deeply disappointed that we cannot

find common ground on this result, but I respect their opinions and our dialogue. Some may argue the dissenters drove too hard a bargain and let the perfect be the enemy of the good. I weighed heavily this concern but cannot agree. The disconnect between the Commission's pro-competitive statements and the anti-competitive policies adopted here is too wide to sanction. The Commission's lofty promises and assurances directed this summer at facilities-based competitors ring hollow in this Order. Beyond rhetoric, the harm to competition and consumers is too great a price for the constrained and ineffectual approach outlined in this Order. Finally, I find this Order dismissive of Congress's vision that the 1996 Act would allow facilities-based competitors to grow and to get a foothold in the market by relying on elements like loops and transport that they need to do business. For all these reasons, I respectfully dissent.