BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment for Interconnection Agreements of VERIZON NORTHWEST INC. with COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN WASHINGTON Pursuant to 47 U.S.C. Section 252(b), And the *Triennial Review Order*	Docket No. UT-043013 VERIZON'S PETITION FOR REVIEW OF ORDER REQUIRING VERIZON TO MAINTAIN STATUS QUO

1 Verizon Northwest Inc. ("Verizon") hereby petitions for review of Order No. 05 (rel. June 15, 2004) in the above-captioned docket to the extent that Order requires Verizon to continue providing UNEs eliminated by the *Triennial Review Order*[1] or *USTA II* pending Commission approval of amendments to existing interconnection agreements – even in cases where those agreements do not require such amendments. Verizon respectfully submits that full Commission review is necessary to prevent substantial prejudice to Verizon that would not be remediable by post-hearing review. WAC 480-07-810(2)(b).

2 The Order purports to require Verizon to "continue to provide all of the products and services under existing interconnection agreements with CLECs, at the prices set forth in the agreements, until the Commission approves amendments to these agreements in this arbitration proceeding or the FCC otherwise resolves the legal uncertainties presented by the effect of the mandate in *USTA II*." Order ¶ 55. The Order violates federal law and

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of Section 251Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

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exceeds the Commission's authority for four basic reasons, each of which alone is sufficient to warrant reversal.

3 *First*, the purpose and effect of the Order is to override the terms of interconnection agreements between Verizon and competitive carriers that are "binding" under section 252(a)(1) of the Telecommunications Act of 1996. *Second*, the Order unlawfully attempts to block the legal effect of the mandate of the United States Court of Appeals for the District of Columbia Circuit in *USTA II*. *Third*, the Commission has no authority to establish unbundling obligations binding on Verizon in the absence of a valid finding of impairment by the FCC under section 251(d)(2). *Fourth*, CLECs will suffer no immediate harm – let alone irreparable harm – because Verizon has committed to take no action for at least 90 days after the issuance of the D.C. Circuit's mandate. By contrast, Verizon and the public interest will suffer harm if the Commission perpetuates unlawful unbundling at TELRIC rates.

The Purpose and Effect of the Commission's Order Is To Override the Terms of Binding Interconnection Agreements

4 The Order purports to freeze in place Verizon's prior obligations to provide all unbundled network elements ("UNEs") at current prices *notwithstanding* the provisions of existing interconnection agreements that authorize Verizon to cease providing such UNEs in accordance with the recent determinations of the FCC and the D.C. Circuit. In thus attempting to override the terms of valid interconnection agreements, the Order violates federal law.

5 As the United States Court of Appeals for the Ninth Circuit has held, a state commission decision that purports to override the terms of valid interconnection agreements "contravenes the Act's mandate that interconnection agreements have the binding force of law." *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003). Where Verizon has a contractual right to stop providing UNEs at TELRIC prices when

no longer required to do so by federal law, the Commission cannot void that contractual right by forcing Verizon to continue to provide those services to all CLECs, without regard to the terms of their individual agreements.[2]

6 The Order cannot be distinguished from the unlawful actions in *Pacific Bell*. In *Pacific Bell*, the California Public Utility Commission adopted a generic order that required payment of reciprocal compensation on particular classes of telecommunications traffic under all existing interconnection agreements. The Court overturned the California Commission's action as contrary to federal law, ruling that a state commission that "promulgat[es] a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements" "act[s] contrary to the [1996] Act's requirement that interconnection agreements are binding on the parties." *Id.* at 1125-26. As the court explained, "[t]o suggest that [a state commission] could interpret an agreement without reference to the agreement at issue is inconsistent with [its] weighty responsibilities of contract interpretation under § 252." *Id.* at 1128.

7 The Order does precisely that. Although the Order recites that "[i]n granting this motion, the Commission does not modify the change in law provisions" of interconnection agreements, Order ¶ 57, the Order does not consider the actual terms of any of the interconnection agreements at issue. In opposing the Joint CLEC Motion that gave rise to the Order, Verizon set forth provisions in interconnection agreements of the Joint CLECs and of the four CLECs (of the more than 70 CLECs that are parties to this proceeding) that filed in support of their motion. Those provisions expressly permit Verizon, at a minimum, to cease providing, as UNEs, mass market circuit switching,

[2] Moreover, because the FCC's attempts to expand unbundling beyond the reach of the statute have now been struck down by the federal courts three times, there have never been lawful section 251 unbundling rules binding the ILECs and obligating them to provide local mass market switching, high-capacity loops and transport, and dark fiber as UNEs. Accordingly, the issuance of the D.C. Circuit's mandate was not a "change of law" to eliminate previously lawful rules requiring provision of UNEs, but merely an affirmation that there have never been lawful UNEs rules to change. Verizon does not waive this argument when it seeks to follow the administrative processes set forth in its interconnection agreements that apply to actual changes in law.

high-capacity loops and transport, and dark fiber, either immediately upon the issuance of the D.C. Circuit's mandate or shortly thereafter. In relevant part, these provisions state:

a. XO: "if Verizon provides a UNE or Combination to [XO], and . . . a court . . . determines . . . that Verizon is not required by Applicable Law to provide such UNE or Combination, *Verizon may terminate its provision of such UNE or Combination.*"[3]

b. Integra: "[Verizon] and [Integra] agree that the terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time the Agreement was produced. Any modifications to those requirements will be deemed to *automatically supersede* any terms and conditions of this Agreement. . . . In the event [Verizon] is *permitted . . . to discontinue any Unbundled Network Element . . .*, [Verizon] shall provide [Integra] *30 days advance written notice of such discontinuance.*"[4]

c. Eschelon: "The terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time this Agreement was produced, and shall be subject to any and all . . . judicial decisions . . . that subsequently may be prescribed by any federal . . . authority having appropriate jurisdiction. Except as otherwise expressly provided herein, such subsequently prescribed . . . judicial decisions . . . will be deemed to *automatically supersede* any conflicting terms and conditions of this Agreement."[5]

d. Time Warner and Pac-West: "[T]he terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time the Agreement was produced. Any modifications to those requirements that subsequently may be prescribed by final and effective action of any federal . . . governmental authority will be deemed to *automatically supersede* any terms and conditions of this Agreement."[6]

e. ATG: "[I]f Verizon provides a UNE or Combination to ATG, and the Commission, the FCC, a court or other governmental body of appropriate jurisdiction determines or has determined that Verizon

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[3] XO Agreement, Network Elements Attach. § 1.5 (emphasis added).

[4] Integra Agreement §§ 32.1, 32.2 (emphases added).

[5] Eschelon Agreement Art. II, § 1.2 (emphasis added).

[6] Time Warner Agreement § 32 (emphasis added); Pac-West Agreement § 32 (emphasis added).

is not required by Applicable Law to provide such UNEs or Combination, Verizon *may terminate* its provision of such UNE or Combination to ATG."[7]

f. Comcast: "In the event . . . a final order [of a court] allows but does not require discontinuance [of a UNE], [Verizon] shall make a proposal for [Comcast's] approval . . . . [Verizon] will not discontinue any Local Service or Combination of Local Services without providing 45 days advance written notice to [Comcast]."[8]

g. Covad: "[Verizon] and Covad agree that the terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time the Agreement was produced. Any modifications to those requirements will be deemed to *automatically supersede* any terms and conditions of this Agreement . . . . In the event [Verizon] is *permitted . . . to discontinue any Unbundled Network Element* . . . , [Verizon] shall provide Covad *30 days advance written notice of such discontinuance*."[9]

h. Sprint: "The terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time this Agreement was produced, and shall be subject to any and all . . . judicial decisions . . . that subsequently may be prescribed by any federal . . . governmental authority having appropriate jurisdiction. Except as otherwise expressly provided herein, such subsequently prescribed . . . judicial decisions . . . will be deemed to *automatically supersede* any conflicting terms and conditions of this Agreement."[10]

8 The Order does not address any of these provisions. Instead, the Order simply requires Verizon to continue to provide access to de-listed UNEs irrespective of the actual terms of its interconnection agreements. This is the very type of "generic" order that the Ninth Circuit held unlawful in *Pacific Bell.*

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[7] ATG Supplemental Agreement No. 3 Regarding Unbundled Network Elements § 1.5 (emphasis added).

[8] Comcast Agreement § 3.3. The notice that Verizon will send upon issuance of the D.C. Circuit's mandate, which will provide at least 90 days' notice, will constitute compliance with this condition, as did Verizon's TRO Amendment. But again, Verizon notes that its choice to act in compliance with section 3.3, Verizon does not waive any argument that compliance is not required for the reasons stated in footnote 2, above.

[9] Covad Agreement §§ 32.1, 32.2 (emphases added).

[10] Sprint Agreement, Art. II, § 1.2 (emphasis added).

9 Verizon has no quarrel with this Commission's authority to "interpret[] change in law provisions." Order ¶ 57. But this Commission has no authority to modify the terms of these agreements by requiring Verizon to continue to provide access to unbundled network elements despite the absence of any obligation under those agreements to do so.

10 In this regard, it is important to note that the relevant provisions in Verizon's interconnection agreements differ from the change-of-law provisions in Qwest's interconnection agreements. Qwest stated in a recent filing that the change of law provisions in its interconnection agreements "typically" require the parties "to negotiate for a minimum period of time in order to arrive at mutually acceptable amendment language reflecting the particular change in law. . . . If the parties are not able to reach agreement on an appropriate amendment during this period, they must then follow the interconnection agreement's dispute resolution provisions." Qwest's Response to Joint CLEC Motion for an Order Requiring Qwest To Continue To Honor Existing Interconnection Agreements, Docket No. UT-033044, ¶ 10 (WUTC filed May 25, 2004). The ALJ concluded that "[b]y entering this status quo order, the Commission . . . requires Qwest and all parties to follow the processes set forth in their agreements." Order No. 15, Docket No. UT-033044, ¶ 25 (rel. June 15, 2004). That cannot be said here, because many of Verizon's Commission-approved agreements expressly permit Verizon to cease providing UNEs that it is no longer required to provide under law. Notably, in its opposition to the Joint CLECs' Motion in Docket No. UT-033044, the Commission staff noted that the legality of an order requiring an incumbent LEC "to do something more than comply with its interconnection agreements . . . is questionable, at best." Commission Staff's Response to Joint CLECs' Motion To Maintain Status Quo, Docket No. UT-033044, ¶ 5 (filed May 25, 2004) ("Staff Comments").

11 Moreover, as a practical matter, by ordering Verizon to continue providing UNEs at TELRIC rates until amendments are negotiated and arbitrations completed – despite the

terms of its interconnection agreements, and despite the fact that they are no longer required as a matter of federal law – the Order gives CLECs a powerful financial incentive to obstruct the implementation of D.C. Circuit's mandate, and to delay any negotiation or arbitration process that might apply under a particular agreement. The Order eliminates CLECs' incentive to negotiate commercial agreements with Verizon. Instead, because they stand to gain financially from every day of delay, CLECs have every incentive to drag out any amendment negotiation and arbitration process for as long as possible. For this reason, the Order is not merely unlawful; it is also bad public policy.

The Commission Cannot Stay the *USTA II* Court's Mandate

12 The Order is also contrary to federal law because it purports to block the D.C. Circuit's mandate in *USTA II*. In the last two weeks, both the D.C. Circuit and the United States Supreme Court refused to stay the *USTA II* mandate. This Commission lacks authority to override those judgments and issue the stay that those courts found unwarranted.

13 In reversing several aspects of the FCC's *Triennial Review Order*, the D.C. Circuit made a deliberate decision to *vacate* – rather than simply to remand without vacating – several of the FCC's unbundling rules, including the FCC's rules requiring incumbent LECs to unbundle mass market switching, high capacity facilities, and dark fiber. *See USTA II*, 359 F.3d at 594. Furthermore, the D.C. Circuit took the unusual step of making clear, in advance, that it would delay the issuance of its mandate (and thus stay the order of vacatur) *only* for 60 days or until any petition for rehearing was denied. Although the D.C. Circuit subsequently granted one unopposed motion for extension of that stay, it subsequently refused CLECs' request to extend the stay further, and the Court's mandate issued on June 16, 2004. *See* Order ¶¶ 3, 7, 9, 13, 17. As of that date, the FCC's rules ceased to exist. And because they do not exist, they cannot provide the basis for imposition of any further unbundling obligation.

14 Thus, to the extent that existing interconnection agreements limit Verizon's unbundling obligations to the requirements imposed under Applicable Law, the issuance of the mandate in *USTA II* unquestionably *eliminates* Verizon's unbundling obligations. In granting the Joint CLECs' request for injunctive relief, therefore, the Order purports to *stay* the effectiveness of the *USTA II* decision in the State of Washington. By effectively seeking to overturn the relief granted by the Federal Court of Appeals, the Order exceeds the Commission's rightful authority.

15 The Order is especially inconsistent with *USTA II* because the D.C. Circuit's decision was explicitly intended to ensure that the FCC would have appropriate incentives "to develop lawful unbundling rules" in light of its "apparent unwillingness to adhere to prior judicial rulings." 359 F.3d at 595. When a state commission perpetuates the FCC's unlawful unbundling regime, it therefore undermines the D.C. Circuit's order in a direct and significant way. That is precisely what the Order here purports to do.

16 Nor is there any basis for the suggestion that the mandate in *USTA II* creates any "legal uncertainties." Order ¶ 55. The D.C. Circuit could not have been clearer that it was vacating the FCC's prior unbundling rules with respect to mass market switching, high capacity facilities, and dark fiber. With the issuance of the mandate, those rules no longer exist, and Verizon has no legal obligation to provide access to those elements (except to the extent that interconnection agreements have provisions that require some delay in effecting the change). Indeed, that is *why* the D.C. Circuit vacated the rules. This Commission cannot override the federal court's judgment.

The Commission Has No Authority To Adopt Unbundling Rules

17 Although the Order recites several provisions of state and federal law that purportedly give it authority to "address the Joint CLECs' motion as well as the issues raised by the motion," Order ¶ 53, the only basis offered for the relief granted in the Order is the

Commission's "authority over the arbitration of interconnection agreements, including the interpretation of change in law provisions," *id.* ¶ 57. As explained above, however, the Order is not justified by reference to any "change in law provision[]"; to the contrary, the relief granted contradicts and overrides the terms of binding, Commission-approved interconnection agreements. Indeed, the *only* effect of the Order is to override those interconnection agreements that, by their terms, permit Verizon to stop providing UNEs that are no longer required as a matter of federal law.

18 Without a basis in existing interconnection agreements to require continued unbundling at TELRIC rates, the Order lacks any legal foundation. The Commission cannot claim any authority under federal law to require continued unbundling. *USTA II* makes clear that the unbundling required under the FCC's prior regulations is inconsistent with federal law, and that no unbundling can be ordered in the absence of a valid finding *by the FCC* of impairment under section 251(d)(2) of the 1996 Act.

19 Furthermore, the 1996 Act preempts state commission attempts to impose unbundling obligations outside of the section 252 process that Congress established. *See, e.g.*, *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 443 (7th Cir. 2003); *Pac West*, 325 F.3d at 1126-27; *Verizon North Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002). The D.C. Circuit's vacatur of specific FCC unbundling rules therefore did not leave a vacuum that this Commission is free to fill. As both the Supreme Court and the D.C. Circuit made clear in vacating the FCC's first two attempts to issue UNE rules, Congress did not permit "blanket access to incumbents' networks" or determine that "more unbundling is better" when it passed the 1996 Act. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999); *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) ("*USTA I*"). Instead, as the Supreme Court's decision in AT&T and the D.C. Circuit's decision in *USTA I* make clear, "'impairment' [is] the touchstone" to any requirement of unbundling. *USTA I*, 290 F.3d at 429. Therefore, under federal law, there must be a valid finding of

impairment under section 251(d)(2) of the 1996 Act *before* an incumbent may be ordered to provide access to a network element as a UNE at TELRIC rates. And in *USTA II*, the D.C. Circuit unequivocally held that *only the FCC* has the authority to make that impairment finding. *See* 359 F.3d at 565-68. Accordingly, because there is no lawful finding of impairment *by the FCC* under section 251(d)(2) of the 1996 Act, any state commission order requiring unbundling at TELRIC rates would be fundamentally *inconsistent* with federal law by requiring unbundling where the 1996 Act, by its terms, does not *permit* it. *See also* Staff Comments ¶ 7 (noting that a "an order under state law requiring, at least temporarily, exactly what the *USTA II* court held the FCC could not require under the Section 251 impair standard . . . is very likely preempted as inconsistent with Section 251 of the Act").

20 Moreover, beyond the preemptive force of federal law, state law does not authorize the imposition of the unbundling requirements imposed by the Order. Indeed, the only provisions that the Order cites address: (1) the Commission's authority to exercise the authority delegated under the federal Act (RCW 80.36.610(1)); (2) the Commission's authority to resolve complaints between public service companies and to determine whether a practice is reasonable (RCW 80.04.110, RCW 80.36.170); (3) the Commission's general authority to regulate telecommunications companies (RCW 80.01.040(3)); and (4) Commission rules governing the enforcement of interconnection agreements (WAC 480-07-650). The Order does not and could not claim that any of these provisions gives the Commission authority to require Verizon to provide unbundled access to network elements.[11]

[11] Order No. 5 does not cite or attempt to rely on RCW 80.36.140, which provided the basis for the Commission's pre-1996 Act Interconnection Order. *See* Fourth Supplemental Order, *WUTC v. US West Communications, Inc.*, Docket Nos. UT-941464 *et al.*, at 52 (Wash. UTC Oct. 31, 1995). In any event, RCW 80.36.140 does not supply any authority for Order No. 5. Even aside from the fact that any pre-existing state law authority to require unbundling has been preempted, even under RCW 80.36.140 (1) the Commission could not impose unbundling requirements without a hearing, and (2) even *after a hearing*, the Commission could not lawfully impose unbundling requirements without an extensive evidentiary record,

The Public Interest Did Not Justify the Order

21 The Order states that an "overriding public interest in maintaining stability in the local telecommunications marketplace in Washington State" justified the relief granted. That conclusion was unsupported, because giving effect to the terms of existing interconnection agreements would cause no significant disruption to the market.

22 As this Commission is aware, Verizon has expressly committed that, for at least 90 days from June 16, 2004 – and for at least five months in the case of mass-market UNE-P arrangements – it will continue to provide the UNEs at issue in *USTA II* at TELRIC rates and will accept new orders for those UNEs. *See* Letter from Ivan G. Seidenberg to Michael K. Powell (June 11, 2004) (attached hereto as exhibit A). Moreover, there is no question that CLECs will continue to be able to obtain access to Verizon's network more than 90 days from now, because Verizon has expressly stated that it has "no intention of disconnecting any CLEC's services." Verizon Response ¶ 21; *see also id.* ¶¶ 20-22.[12] Instead, the only question is the price CLECs will pay for that access. By freezing TELRIC rates for unbundled elements in place beyond the period provided for under the parties' interconnection agreements, the Order simply grants some market participants an unlawful windfall.

23 Furthermore, the Order gives no consideration to the fact that Verizon is certain to suffer harm from any order that purports to prolong CLECs' ability to compete by reselling Verizon's network under unlawful unbundling obligations. Verizon should not be forced to suffer financial loss from having to provide UNEs at TELRIC rates where it has no

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which is absent here. *See* Verizon Response to Joint CLEC Motion ¶¶ 23-24 (filed June 2, 2004) ("Verizon Response"); Staff Comments ¶ 7 ("It would not be legally sustainable for this Commission to adopt the FCC's provisional national impairment findings for mass market switching and dedicated transport because those were discredited by the court as inconsistent with Section 251.").

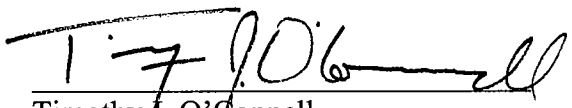
[12] A CLEC, of course, may request that Verizon discontinue those services. Verizon also retains its existing rights to discontinue service to a CLEC that fails to pay undisputed charges for the services it uses or that otherwise materially breaches the terms of its interconnection agreement.

such obligation under the binding terms of its Commission-approved interconnection agreements. Moreover, consumers are *harmed*, not helped, by any order that purports to extend "synthetic competition" using UNEs and, thereby, forestalls the development of the genuine, facilities-based competition that Congress envisioned and that brings real benefits to consumers.

Conclusion

24 For the foregoing reasons, the Commission should grant the petition for review and eliminate the requirement that Verizon continue to provide access to unbundled network elements where no such obligation exists under the terms of its interconnection agreements.

Respectfully submitted,



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June 18, 2004

EXHIBIT A

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June 11, 2004

Honorable Michael K. Powell
Chairman
Federal Communications Commission
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Dear Chairman Powell:

The decisions of the Solicitor General and the FCC not to appeal the *USTA II* decision pave the way for a new telecommunications policy that reflects the market facts of today -- facts that have changed dramatically even since the last order. A new market-oriented policy will promote investment in new technologies and services, and provide enormous benefits to consumers.

Some carriers nevertheless claim that these decisions will produce immediate and drastic price increases for consumers. Their claims are misplaced.

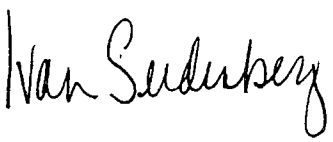
First, their claims are out of touch with the business realities we have to contend with every day. The simple fact is that retail pricing strategies are determined by competition among wireline carriers, wireless carriers, cable providers and VOIP. This competition is here to stay.

Second, for our part, we will continue to provide wholesale access to our narrowband network after the rules are vacated, and will continue to make every effort to negotiate commercial agreements with wholesale customers. As we have consistently emphasized, negotiated commercial arrangements, rather than continued litigation and regulation, will provide certainty for all concerned, promote investment and help bring an end to the regulatory food fights that have plagued the industry.

Third, we also are committed to not unilaterally increase the wholesale price we charge for UNE-P arrangements that are used to serve mass market consumers (those with fewer than 4 lines) for 5 months, and we plan to give our wholesale customers at least 90 days notice of any future change. We will, of course, continue to pursue efforts to correct the wholesale prices that have been set by the states.

Fourth, we will continue to invest in new broadband technologies such as fiber optics and packet switching that will allow us to provide exciting new services to our customers. We have announced the initial sites where we are deploying these new technologies, and more will follow. The Commission's decision that these new technologies are not subject to unbundling helped pave the way for these investments, but more remains to be done to clarify the scope of that ruling and to adopt a clear and comprehensive national broadband policy. I urge you to promptly address these matters to facilitate the widespread broadband investment that you and the administration have wisely encouraged.

Sincerely,



Ivan G. Seidenberg

Cc: Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein