SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

April 19, 2001

Re: Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket Nos. 01-__, 99-68, 96-98

This NPRM seeks comment on a variety of pricing mechanisms for commercial relationships between and among carriers, placing particular emphasis on bill-and-keep arrangements. Such mechanisms are worthy of praise when they are employed voluntarily and by mutual assent in contracts. This NPRM thus may do some good in informing the public of various contractual options, expanding and illuminating the range of pricing mechanisms that carriers can agree to adopt.

If, however, the goal of the NPRM is ultimately to limit the range of permissible contractual arrangements private parties may undertake, this is a sad and shameful day for the Commission. We would be telling private parties that Washington knows how to improve their lot better than they do themselves. We would be mandating an invasive form of nationwide price regulation, a great irony at a time when politicians of all stripes embraces the ideals of economic deregulation.

The Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act"), does not require the Commission to regulate the prices charged between and among carriers. Indeed, the entire elaborate framework of Sections 251 and 252 of the 1996 Act is predicated on the primacy of contracts between private parties, not rate regulation from Washington, D.C. *See* 47 U.S.C. §§ 251-252.

Moreover, the 1996 Act explicitly aims to remove impediments to contract. For example, section 252 limits the grounds on which State commissions may reject privately negotiated intercarrier agreements. *See* 47 U.S.C. § 252(e)(2)(A). In addition, section 253(a) prohibits barriers to entry – which necessarily include foreclosing options to contract between private parties: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). These provisions make unlawful many forms of price regulation that limit the scope of contracts between and among carriers. While the focus of these provisions is primarily upon State and local governments, the federal government should be slow to adopt regulation that State or local governments cannot legally impose.

Allowing and encouraging freedom of contract is profoundly important. As Milton and Rose Friedman explain in *Free To Choose*:

> One set of ideas was embodied in *The Wealth of Nations*, the masterpiece that established the Scotsman Adam Smith as the father of modern economics. It analyzed the way in which a market system could combine the freedom of individuals to pursue their own objectives with the extensive cooperation and collaboration needed in the economic field to produce our food, our clothing, our housing. Adam Smith's key insight was that both parties to an exchange can benefit and that, *so long as cooperation is strictly voluntary*, no exchange will take place unless both parties do benefit. No external force, no coercion, no violation of freedom is necessary to produce cooperation among individuals all of whom can benefit. That is why, as Adam Smith put it, an individual who "intends only his own gain" is "led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good."

Milton & Rose Friedman, *Freedom To Choose* 1-2 (1980) (quoting Adam Smith, *The Wealth of Nations* (1776)).

Two lessons relevant to this proceeding can be drawn from the Friedmans' essay. First, limiting the scope of potential contracts among carriers, or coercing the terms of such contracts, cannot advantage all carriers; indeed, it will certainly harm some carriers relative to no limitations on contracts. Second, the unfettered pursuit of private interest, including through contracts, will lead to greater social welfare gains than the intentional, including governmental, efforts to promote welfare. Stated simply, contracts, rather than government regulation, are the surest way to promote the public interest.

Requiring intercarrier compensation of specific forms, such as bill-and-keep, is nothing more than price regulation – harmful to contracts, carriers, consumers, and the public at large. No amount of studies or documents can paper over that simple fact. Indeed, the burden should be on proponents of new forms of price regulation and new forms of contract foreclosure to demonstrate that such regulation promotes public welfare more than contractual flexibility. I await such demonstrations.

For its entire history, the Commission has regulated telecommunications rates with a heavy, clumsy, at times sadistic, and all too visible hand. Limiting voluntary contracts among private parties, or coercing the terms of such contracts, cannot promote the public interest. I hope that this proceeding will afford the public an opportunity to provide comments to the Commission on the legacy of Commission rate regulation and its substantial unintended harms. Perhaps it is time for the Commission to promote both the reality as well as the rhetoric of deregulation.