SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services et al., CC Docket No. 01-337 et al.

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al., CC Docket Nos. 01-339 et al.

In this combined statement, I write separately to underscore my support for these two *Notices of Proposed Rulemaking*, which comprise the second and third in a series of notices the Commission recently announced that will begin Phase II of our local competition implementation and enforcement efforts under the 1996 Act.[1]

Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services

I vigorously support the *Notice* we hereby adopt that initiates a review of the regulatory requirements applicable to incumbent LEC provision of high-speed telecommunications services. In this proceeding, the Commission will ask whether potentially robust competition among multiple types of broadband service providers suggests that we should avoid subjecting incumbents to the same regulatory burdens that we impose on these carriers with respect to their provision of local telephone service. That is, we ask whether incumbent LECs, which are so clearly dominant in the provision of local phone service, must also be treated as dominant as they use DSL and other technologies to provide high-speed telecommunications services in competition with cable modem service providers and other types of platforms. I would point out that this item focuses on traditional Title II common carrier regulation, historically arising out of the section 201 and 202 of the Communications Act of 1934, as applied to incumbent LEC provision of high-speed *telecommunications services.* In contrast, the aforementioned proceeding regarding regulation of incumbent LEC broadband information services will address the question whether Title I should apply when incumbent LECs provide a bundled high-speed *information service* offering.

I would emphasize that our initiation of this proceeding should not suggest a grand departure from our ongoing efforts to implement unbundling, collocation and other market-opening requirements with respect to incumbent LECs pursuant to section 251(c)(3) of the Act. These other requirements are intended to allow competing carriers, particularly facilities-based carriers, to provide new and innovative telecommunications

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[1] The first of these items was the *Notice of Proposed Rulemaking* regarding performance requirements for UNE provisioning that we adopted at the November agenda meeting. [cite] In addition to that *Notice* and the two items captioned above, we will in the coming weeks seek comment on the appropriate regulatory framework for incumbent LEC provision of broadband information services.

services. By the express terms of the statute, the Commission is duty-bound to continue our implementation and enforcement of these provisions, and we will.

Rather, this *Notice of Proposed Rulemaking* is intended to develop further one more avenue of thinking about how regulation can serve to help (or hinder) broadband deployment. It is, in that sense, not a signpost heralding a new direction but an attempt to add yet another arrow to the regulatory quiver we will use to attack and, in conjunction with other forces outside our purview, eventually subdue the broadband beast.

Notwithstanding my enthusiasm for our decision to initiate this inquiry, I for one have an open mind as to how these questions should be answered. For example, it may prove too unwieldy for both carriers and the Commission to treat incumbents as dominant for their provision of traditional local service but non-dominant for their provision of high-speed telecommunications services. I also acknowledge that declaring incumbent LEC provision of broadband telecommunications services non-dominant could have consequences in other areas of regulation that the Commission has not yet fully anticipated. Yet the importance of broadband deployment to the public interest and welfare is too great to disregard any potential method of facilitating that deployment. In sum, we must ensure that we leave no stone unturned in our pursuit of this important goal.

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

I similarly and wholeheartedly support the *Notice* we adopt here that initiates our scheduled triennial review of UNE obligations imposed on incumbent LECs pursuant to sections 251(c)(3) and 251(d)(2). Taking our cues from the Supreme Court in its opinion remanding to the Commission the task of giving meaningful effect to these provisions, my former colleagues and I determined that the agency would, in three years, revisit its decisions regarding the availability of UNEs.[2] The purpose of this triennial review would be to keep those decisions current with ongoing market and regulatory developments. That was in 1999, and now the year 2002 fast approaches.

Not surprisingly, however, I support this item for reasons other than the fact that it will put the Commission in a position to deliver on the commitment it made in 1999. First, it underscores the Commission's ongoing commitment to the promotion of facilities-based competition, which was pronounced most clearly by my former colleagues and I in the 1999 *UNE Remand Order*.[3] I believe this commitment should focus, in particular, on both so-called "full facilities-based" competition and competition from newer entrants who supplement their own facilities with network elements leased from the incumbent. As I have demonstrated in my decisions and public statements over

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[2] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*"UNE Remand Order"),* ¶ 151.

[3] *UNE Remand Order,* ¶ 14.

my four years at the Commission, I fully support the use of facilities and individual UNEs as means to promote local competition while simultaneously furthering the related goals of encouraging deregulation and innovation. The 1996 Act and our experience since its passage demand no less.

Second, I support this item because it emphasizes further an area of inquiry begun in the *UNE Remand Order*. Specifically, in that *Order*, we considered how the Act's goals of encouraging broadband deployment and investment in competing facilities should shape unbundling policy.[4] I support our decision here to continue and to expand this area of inquiry.

Third, I support the Commission's decision, in seeking comment here on whether to unbundle aspects of the incumbent's network, to ask whether and the extent to which we should take note of the availability of technologies other than circuit-switched telephony provided by traditional common carriers. In particular, this *Notice* expressly focuses on the roles that cable and wireless companies have begun and will continue to play in the market for telephony and broadband telecommunications services. This emphasis may also be viewed as expansion of an avenue of inquiry begun by the previous Commission. Specifically, in the *UNE Remand Order*, my former colleagues and I appropriately followed the Supreme Court's demand that we not blind ourselves to the availability of self-provisioned or other alternative facilities in determining whether to unbundle elements of the incumbent LEC's network.[5]

To my mind, it seems premature to suggest that the availability of such technologies should be fully dispositive of the question whether to require the availability of specific UNEs. Yet it does stand to reason that such availability may give us some indication of the alternative tools newer entrants could use to serve customers if the Commission were to decline to unbundle any particular element of the network. I encourage parties to provide detailed and well-supported comments in order to help us determine whether this line of reasoning is, in fact, sound.

As this *Notice* itself reminds us, the Commission now has the benefit of two years of experience with the current unbundling rules and almost six years of experience with promoting competition since the 1996 Act was passed. These are no doubt merely the opening chapters of a regulatory epic that will take many years to rewrite a near century-long history of legally sanctioned monopoly in the telephone market. But I believe it is critical that we take stock of the lessons we have learned so far and make any changes that may be necessary to ensure that our rules remain faithful to the statute and its goals of promoting competition, deregulation and innovation in telecommunications markets.

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I thank the Common Carrier Bureau staff and my colleagues for their enormous work on these *Notices* and look forward to working with them, as well as my state commission colleagues, in carrying out both of these important "Phase II" proceedings.

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4 *UNE Remand Order*, ¶¶ 107-113.

5 *UNE Remand Order*, ¶ 8.