ORAL STATEMENT OF
FCC CHAIRMAN MICHAEL K. POWELL

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Good morning, Chairman Upton, Congressman Markey and distinguished members of the Telecommunications and the Internet Subcommittee. Thank you for inviting me and my colleagues to discuss the state of the communications marketplace and the Federal Communications Commission's agenda on which we have embarked to meet the challenges of the changing communications marketplace.

Two years ago, I appeared before this Subcommittee for the first time as Chairman and noted the enormous challenge of leading the Commission through a period of momentous change in the communications industry. Now, as then, the most formidable task confronting the Commission is recognizing and responding to the fundamental fact that each industry segment in our extensive portfolio is in the throes of revolution. There is new innovation, new markets, new competitors, and, equally important, new regulatory challenges.

Over the course of the last two and a half years, the telecommunications industry has faced many hardships—most of which are the result of financial and economic pressures, misaligned expectations and competitive pressures. That said, there are some bright spots that provide some hope for the sector generally and for the American public specifically. On a going-forward basis, however, great uncertainties continue to plague the entire sector, casting a wide shadow over those bright spots and hindering the recovery of the sector—and in some measure, the economy as a whole.

Clearly, the telecommunications industry, which accounts for anywhere from 14-16 percent of our Nation's GDP, is suffering. By now we are all too familiar with the fact that by some estimates 500,000 jobs have been lost and approximately $2 trillion of market value has vanished. Uncertainty looms large as announcements of layoffs have not slowed, as investors have generally shied away from the telecommunications industry and industry players have continued to dramatically scale back capital investments. As I have often stated, the Commission must work to bring some stability back to this industry. That means decisions that are faithful to the 1996 Act and that withstand judicial scrutiny; decisions that focus on producing consumer welfare; decisions that align incentives for investment in facilities; decisions that walk away from past policies of government engineered competition and regulatory arbitrage.

Last week, the Commission had the opportunity, through the Triennial Review decision to reverse the tides of industry uncertainty and unrest by providing a regulatory framework to stimulate long-lasting consumer benefits, sustainable competition, investment, innovation and economic growth. Although we made noble strides in the area of broadband infrastructure deployment, the Commission chose a course in some of

its decisions that will cause further unrest for the industry with the ultimate loser being the American public.

I have long held that the development and deployment of broadband capable infrastructure to all Americans is the central communications policy objective of our day. Last week, the Commission took a substantial step in our broadband agenda—focusing on new infrastructure investment in the traditional last mile telephone network—a vision of Congress that is shared by this Commission. By relieving incumbents from unbundling obligations for future broadband investment, the Commission aligned incentives to invest with the inherent risks and costs associated with broadband infrastructure investment. The result, over time, should be more broadband capable infrastructure to more Americans.

Despite our efforts to spur investment in next-generation broadband infrastructure, I fear that the Commission has taken two actions that will hinder the realization of that investment and the concomitant benefits it will bring to our Nation's citizens and economy. I fear that the majority's elimination of the line sharing UNE and its decision to abdicate its statutory responsibility with regard to the switching element flies in the face of the explicit Congressional goals of bringing the American public new infrastructure investment and innovation and meaningful competition. Moreover, it flaunts the admonitions of the judiciary.

The majority's decision to eliminate line sharing is of immediate concern. Line sharing has given birth to *facilities-based* competitive broadband telecommunications carriers and has provided a valuable source of inputs for broadband ISPs. The result has been lower prices for broadband users and, as a result, increased demand. I fear that the majority's elimination of line sharing strikes a blow to facilities-based competition. In addition, I fear that a result of this action will cause higher prices for broadband Internet access subscribers. Furthermore, I do not accept the argument that the elimination of line sharing provides an affirmative incentive for ILEC deployment of new broadband infrastructure. Line sharing rides on the old copper infrastructure, not the new fiber facilities that we seek to advance to deployment. For these reasons, I could not accept the majority's decision to eliminate line sharing.

In opening this proceeding, the Commission committed itself to conduct a thorough review of its unbundling regime. This review took on greater importance in light of the bursting of the telecom bubble and subsequent economic hardships facing the telecommunications industry and the D.C. Circuit's *USTA v. FCC* decision to vacate, *for a second time*, the rules that unbundled virtually every element in the incumbents' networks. In light of that decision and its predecessor from the Supreme Court, the Commission was charged with reconstructing the list of unbundled network elements from the ground up.

It is with this backdrop that the Commission considered whether or not and in which markets to unbundle the switching element. Unfortunately, a majority of the Commission, in essence, decided not to decide at all—instead, handing over its clear

statutory authority to 51 state PUCs. In so doing, one looks in vein to find a clear, coherent or consistent federal policy driving its decision. Indeed, the truth is that in the course of our deliberations we never addressed the merits of whether a competitor was actually impaired without access to the switching element and therefore should be unbundled. Instead, the focus of the majority was merely on giving the states a subjective and unrestricted role in determining the fate of the switching element, and therefore UNE-P.

The result, what nearly every industry observer calls a "full employment act for telecommunications lawyers," violates each and every principle I have outlined in addressing regulatory reform in this space, as it: (1) is legally suspect, in my opinion and does little to "reduce regulation," as required by Congress; (2) is a gross step back from facilities-based competition, the most proven form of consumer welfare producing competition in the telecommunications sector; (3) is harmful to the recovery of the telecommunications economy and our Nation's economy; and, most importantly, (4) is harmful to consumers in the long run.

The approach adopted by the majority, to my mind, suffers from several fundamental legal flaws. Indeed, as I mentioned above, there seems to be no logical federal policy driving the Commission's decision. In a regime that allows for unfettered and unreviewable state discretion, one can only assume that the Commission has an affinity for UNE-P, which, in turn, can only suggest that the Commission for the third time has adhered to "more unbundling is better" approach—an approach that twice as been rejected by the courts and that flies in the face of the D.C. Circuit's mandate. In failing to adopt any meaningful limiting principle, the majority seems to ignore the admonitions of both the Supreme Court and D.C. Circuit.

In stepping back, the Triennial Review is at bottom about the nature of the competition that Congress and the Commission are trying to incent. It has long been my view that facilities-based (both full and partial) has produced the most welfare for consumers (through lower prices and differential product offerings), provides for positive investment for our economy, creates jobs and provides us with valuable infrastructure alternatives in the face of threats to our homeland. Here, again, however, the Commission turns its back on facilities-based competition. By setting up a state review regime where an apparent acceptable outcome is unbundled switching (and therefore UNE-P) in perpetuity, the Commission retreats from its previously stated policy of promoting facilities-based competition.

Equally as troubling is the impact the Commission's decision, or more accurately indecision, will have on the telecommunications industry and our economy. One can expect continued regulatory uncertainty to accompany 51 state proceedings that may be litigated in 51 different federal district courts where the perceived aggrieved party will surely take its gripes. This could lead to court cases heard by each of the 12 Federal Courts of Appeal where disparate opinions very well could lead the Supreme Court, the same court that vacated the Commission's first attempt at an excessive unbundling regime in 1999. The impact of the uncertainty today? Investment fleeing the sector.

On the Wall Street and venture capital side of the equation, one can already see what the continued uncertainty is doing to the sector. To be sure, CLECs seeking to devise and implement business plans in the face of uncertain and varying regulatory regimes from state to state will face a monumental task in finding new funding to support their ventures. On Thursday afternoon alone the industry lost over $16 billion in market cap, one CLEC lost 43%, and the major equipment suppliers lost anywhere from 4% to 14% of their value. Reactions from investment analysts spoke loudly in the wake of our decisions—the entire sector was downgraded by several firms, others suggested that the resulting "enormous uncertainty about the telecom industry" as a result of the Commission's decision "represents a very high level of risk to investors, risk they can avoid by moving their funds to other industries."

Finally, and most importantly, the Commission's decision to give the states the unfettered ability to continue in perpetuity the house of cards that is UNE-P is likely to prove harmful to consumers in the long run, for it is fatally flawed as sustainable local competition. This is not the low lying plateau on which the high aspirations of the 1996 Act should be planted. It is a model based on assumptions that hundreds of stars will align forever. Every state must keep every element available to competitors and every court must uphold that view—an unlikely scenario considering we are 0-for 2 in the courts thus far. With each passing day, month and year the regulatory arbitrage bubble continues to expand ever more perilously and it is sure to eventually pop, like dot-coms of old. In the meantime, facilities-based investment and competition will take a back seat to regulatory arbitrage to the detriment of every local telecommunications consumer. Let us hope that technology can do what the Commission failed to do—drive the development of meaningful economic competition to the benefit of all of the American public.

I thank you for the opportunity to speak before you today.