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August 8, 2001

STATEMENT OF COMMISSIONER KEVIN J . MARTIN, APPROVING IN PART AND CONCURRING IN PART

Re: *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Fourth Report and Order, CC Docket No. 98-147*

The Commission's Order on collocation responds to a decision of the United States Court of Appeals for the D.C. Circuit, which vacated and remanded the Commission's last attempt to establish collocation rules. See GTE Service Corp. v. FCC, 205 F.3d 416 (D.C. Cir. 2000). There is much that is good in this Order, and providing further guidance to both ILECs and CLECs on collocation is essential to the development of facilities-based competition.

In at least one important aspect, however, the Order is critically flawed. Generally, the Commission should be concerned with providing much needed regulatory stability in an area that has been plagued by court reversals and shifting rules. Such stability is essential to promote meaningful competition. The Commission should be even more sensitive to providing such stability when it is addressing a court's concerns after one of its orders has been vacated and remanded. Yet, in part IV.C of the Order, which addresses the ILECs' duty to install and maintain cross-connects between collocating CLECs, the Commission continues to exaggerate the requirements of the statute in order to effect what it believes to be good policy. In that part of the Order, the Commission justifies its decision to order CLEC-to-CLEC cross-connects on two alternative statutory grounds, section 201 and section 251(c)(6), 47 U.S.C. §§ 201 & 251(c)(6). While I do not quarrel with the Commission's decision to impose this cross-connects obligation under section 201, its effort to tie cross-connects to section 251(c)(6) stretches the meaning of that provision too far. In doing so, the Commission ignores the D.C. Circuit, which has already rejected a virtually identical interpretation as "unbridled agency action." GTE, 205 F.3d at 424.

Section 251(c)(6) requires ILECs to "provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). In the Commission's last order on collocation, the Commission relied on this provision to require ILECs to allow CLECs to provision their own CLEC-to-CLEC cross-connects within ILEC premises. On review, the D.C. Circuit flatly reversed the Commission. As the court made clear, "Section 251(c)(6) is focused solely on connecting new competitors to [incumbent] LECs' networks." GTE, 205 F.3d at 423. The Court thus found no room for the Commission's view that it could order CLEC-to-CLEC connections under that provision: "The obvious problem with this rule is

that the cross-connects requirement imposes an obligation on LECs that has no apparent basis in the statute." GTE, 205 F.3d at 423 (emphasis added). "Chevron deference does not bow to such unbridled agency action." Id. at 424.

In the face of this clear admonition from the D.C. Circuit, the Commission adopts a new CLEC-to-CLEC cross-connects rule and again seeks to use section 251(c)(6) as justification. To be sure, today's rule requires ILECs to install and maintain the cross-connects, rather than allowing CLECs to do so, as the old rule did. But that distinction is irrelevant under the D.C. Circuit's analysis of section 251(c)(6). The court has made clear that the statute "is focused solely on connecting new competitors to [incumbent] LECs' networks" and cannot be used to justify CLEC-to-CLEC connections. GTE, 205 F.3d at 423.

The Commission today musters only a single new argument to support its interpretation of section 251(c)(6) – the claim that CLEC-to-CLEC cross-connects are reasonable "terms and conditions of the requesting carrier's collocation in much the same way as the incumbent LEC provisions cables that provide electrical power to collocators" (79). This argument fails on its face. CLEC-to-CLEC cross-connects are easily distinguished from power cables, which, as the Commission acknowledges, "enable the collocator to operate the collocated equipment." Id. Because power cables facilitate a CLEC's ability to connect with the ILEC, it seems quite reasonable to consider the cables "terms and conditions" of collocation. CLEC-to-CLEC cross-connects, on the other hand, do nothing whatsoever to facilitate connection with the ILEC. Indeed, to require collocation but not allow a CLEC to obtain power would render the CLEC's equipment useless. In contrast, no one has argued that cross-connects are necessary to enable the collocated equipment to function.

In fact, the only nexus found in the Order between CLEC-to-CLEC cross-connects and the ILEC-to-CLEC collocation addressed by section 251(c)(6) is that, once CLECs are collocated at the ILEC's premises pursuant to section 251(c)(6), cross-connects enable CLECs to "interconnect efficiently with other carriers" (84). But such efficiency cannot justify characterizing cross-connects as "terms and conditions" of collocation, and the D.C. Circuit expressly rejected efficiency as a rationale for the Commission's previous cross-connects rule: "the Commission is almost cavalier in suggesting that cross-connects are efficient and therefore justified under § 251(c)(6). This will not do." GTE, 205 F.3d at 423. Indeed, under the Commission's logic, it could require ILECs to allow collocated CLECs to maintain, at the ILECs' premises, other equipment or services wholly unrelated to interconnection or access to unbundled network elements – such as "payroll processing" or "data collection" equipment (38) – so long as it was more efficient to do so. In both cases, however, such an interpretation strays too far from a statute aimed at connecting CLECs to ILECs. As the D.C. Circuit made clear, "the FCC cannot reasonably blind itself to statutory terms in the name of efficiency." GTE, 205 F.3d at 424.

One might wonder why the Commission goes out of its way to read section 251(c)(6) in this manner when it has asserted an independent basis of statutory authority in section 201. One reason might be that placing CLEC-to-CLEC cross-connects within the purview of section 251 could enable States to force ILECs to provide for such cross-connects in their interconnection agreements. Whether or not a good idea, the Commission should be reluctant to interpret – or, as here, misinterpret – statutes solely to justify a particular policy outcome. The Commission has a

responsibility to execute Congress' policy choices by fairly and neutrally reading the statutes it administers.

In the end, such results-oriented decisionmaking is rarely an effective means of promoting the desired policy or of achieving regulatory stability. Rather, I fear that this Order's faulty reasoning will lead to further uncertainty with regard to the cross-connects issue. Although the flawed reasoning is merely an alternative basis for the cross-connects rule adopted, a court might be more skeptical of the Commission's section 201 justification in light of the Commission's failure to observe the D.C. Circuit's admonitions concerning section 251(c)(6). Such a result would be quite disappointing for an Order that offered the promise of some regulatory stability.

Accordingly, for the reasons discussed, I approve the Order except for part IV.C, with respect to which I concur only in the result.