Separate Statement of Chairman Michael K. Powell
Dissenting in Part

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338), Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No.96-98), and Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147).

Today, the Commission concludes one of its most significant proceedings ever. The Triennial Review has been a complicated and difficult undertaking, but one that will set critical parameters for competition and broadband deployment for years to come. There are some immensely important achievements in this Order that have long been objectives of mine—namely, substantial broadband relief. Yet, regrettably, there are some fateful decisions as well, which I believe compromise some important principles to which I adhere unwaveringly. To those, I must respectfully dissent.

I begin with the momentous step we take today to create a broadband regulatory regime that will stimulate and promote deployment of next generation infrastructure, bringing a bevy of new services and applications to consumers. I have long stated that broadband deployment is the most central communications policy objective of our day. Today, we at last put some substance into that stated goal. I am proud to say that today we take some vital steps across the desert from the analog world to the digital one. Today's decision makes significant strides to promote investment in advanced architecture and fiber by removing impeding unbundling obligations. The digital migration journey is one step further along.

I do, however, dissent from the Majority's decision to immediately eliminate line sharing as an unbundled network element. Most of our policies to promote the goals of the Telecommunications Act have produced little yield to date. However, line sharing has clear and measurable benefits for consumers. It has unquestionably given birth to important competitive broadband suppliers. That additional competition has directly contributed to lower prices for new broadband services. By some estimates, 40% of DSL providers use line shared inputs. The decision to kill off this element and replace it with a transition of higher and higher wholesale prices will lead quite quickly to higher retail prices for broadband consumers.

I also believe the argument that removing line sharing is a form of positive regulatory relief to stimulate broadband is ill-conceived. Line sharing rides on the old copper infrastructure not on the new advanced fiber networks that we are attempting to push to deployment. Indeed, the continued availability of line sharing and the competition that flowed from it likely would have pressured incumbents to deploy more advanced networks in order to move from the negative regulatory pole to the positive regulatory pole, by deploying more fiber infrastructure. This decision actually diminishes the competitive pressure to do so.

Today, we also issue a very important further notice on our "pick and choose" rule and tentatively conclude that it should be eliminated. This is an important and underappreciated step. The pick and choose rule has in many ways undermined the goals of the Act by squelching any incentive to reach commercially negotiated terms and conditions, which Congress hoped would eventually overtake the heavier handed regulatory process for developing terms and conditions of commercial arrangements. I look forward to completing that proceeding. I now turn to the majority's decision on switching, which I cannot in good conscience support.

Switching

In opening this proceeding, this Commission committed itself to conduct a thorough review of its unbundling policies. This review took on greater importance in light of a slumping telecommunications sector and the D.C. Circuit's *USTA* decision vacating the rules that unbundled each element of an incumbent's network. Thus, the Commission was charged with reconstructing its list of unbundled elements from the ground up. As we have endeavored to do so, the most controversial judgment rested with the switching element. The importance of this element is not in its particular functionality, but that it represents the capstone of what has become known as the unbundled platform. If switching is available, it is very likely a carrier can resell the entire incumbent's network, at heavily subsidized rates, set by regulators, without having to provide much in the way of its own infrastructure.

A Retreat from Facilities-based Competition

The Majority apparently is a big fan of UNE-P, because it has contorted the letter and spirit of the statute and the court's interpretation of our responsibilities in an effort to ensure its indefinite preservation. What is remarkable about today's decision is that one looks in vein to find a clear or coherent federal policy in the choices made by the majority.

Consistently underlying my preferences in this area is a commitment to promote and advance facilities-based competition that is meaningful and sustainable, and that will eventually achieve Congress' stated goal of reducing regulation. The benefits of such a policy are straightforward: Facilities-based competition means a competitor can offer real differentiated service to consumers—the switch is the brains of one's network and to be without one is to be a competitor on life support fed by a hostile host. Facilities-based competitors own more of their network and can control more of their costs, thereby offering consumers real potential for lower prices. Facilities-based competitors offer greater rewards for the economy—buying more equipment from other suppliers (like Lucent, Corning and Nortel) and creating more jobs (the reason CWA supports such a course). And, facilities providers create vital redundant networks that can serve our nation if other facilities are damaged by those hostile to our way of life.

Some on this very panel have talked glowingly about facilities-based competition, but when one reviews this *Order* one will ask "where's the beef." Today's decision clearly steps back from a pro-facilities policy, by favoring extensive regulatory management of incumbent networks to supply the competitive market. More distressing than giving facilities providers the back of their hand, I see no meaningful federal policy put in its place, other than vague and solicitous pronouncements about the states playing the lead role in making these determinations and a commitment to "competition," no matter how anemic. Congress demanded the Commission not be so passive and demur when it vested it with responsibility for the unbundling regime.

Legal Peril

I also dissent from the switching section of this *Order*, because I find a Commission majority for the third time in seven years substituting its preferences for a heavily permissive unbundling regime for Congress's judgment that no element should be provided unless the Commission can affirmatively conclude that a competitor is impaired without it. The Supreme Court admonished that the FCC had to put forth a meaningful limiting principle in making its decisions. The Commission's second attempt also failed, when the D.C. Circuit vacated our rules last summer. The court emphasized that the Commission could not treat unbundling as an unqualified good and had to consider the social costs as well. It also admonished that the standard employed and applied by the FCC had to demonstrate that a typical entrant was effectively prohibited from entering the market due to barriers associated with the monopoly power of the incumbent and not just typical start up costs or costs naturally associated with entry. Today, the majority flouts the D.C. Circuit mandate.

The legal errors of today's decision are many to my mind, but I emphasize a few of the most egregious. First, the majority places switching on the list without making an affirmative finding of impairment based on a thorough analysis of sufficiently granular criteria. Cleverly, they state only a presumption that there is impairment that can subsequently be addressed by state commission proceedings to either defeat the presumption and take switching off the list, or affirm it and leave switching on the list. Remarkably, however, the national rule requires the switching element on little more than a presumptive intuition and even fails to really apply the Commission's own articulated impairment standard. I believe this to be reversible error.

Moreover, the majority delegates its own responsibilities under the statute to the states, but fails to invoke any meaningful limiting principles in doing so. States are free to add or subtract elements at will. The majority does provide a laundry list of micro-economic criteria that a state may consider, but the list is not exhaustive and states are free at bottom to do what they choose. State decisions are unreviewable by the Commission.

This *Order* is legally suspect if for no other reason than it is nearly identical at its core to the ill-fated *UNE Remand Order of 1999*. In substance and in spirit it endeavors again to reverse the presumptions of the statute by treating unbundled switching as an

unqualified good that should be provided by an incumbent to an entrant, unless the incumbent proves that the "presumption" of impairment is unwarranted. I think this basic paradigm turns the statute on its head and flies in the face of the Court's ruling.

Bad for the Market and bad for the economy

I believe this decision will prove too chaotic for an already fragile telecom market. In choosing to abdicate its responsibility to craft clear and sustainable rules on unbundling to the State Public Utility Commissions the Majority has brought forth a molten morass of regulatory activity that may very well wilt any lingering investment interest in the sector. And, I fear as much or more for CLECs as I do ILECs, for the prolonged uncertainty of rights and responsibilities may prove stifling.

The nation will now embark on 51 major state proceedings to evaluate what elements will be unbundled and made available to CLECs. These decisions will be litigated through 51 different federal district courts. These 51 cases will likely be decided in multiple ways—some upholding the state, some overturning the state and little chance of regulatory and legal harmony among them at the end of the day. These 51 district court cases are likely to be heard by 12 Federal Courts of Appeals—do we expect they will all rule similarly? If not, we will eventually be back in the Supreme Court of the United States to resolve any conflicts—the same Court that vacated our excessively permissive unbundling regime in 1999. This process will take many years and will hardly be the quieting and stabilizing regime that was so craved by a rocky market.

I also believe that under this decision there will be other negative consequences for the economy. I fear we will see more job loss as carriers cut their capital expenditures and refuse to move forward with new investment and growth against this Picasso-esque regulatory backdrop. I can only imagine how a business plan gets written by a CLEC hoping to enter the local market, not knowing now and not likely to know for years what they will ultimately be entitled to and for how long.

Harmful to Consumer in the Long-run

This decision also could prove harmful to consumers in the long-run, and I cringe to see their welfare raised on the staff of the majority's decision. Make no mistake, UNE-P may have very limited merits as a transitional strategy, but 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 that only works if hundreds of stars align perfectly and stay that way. Every state needs to continue to make every last element available. Every decision to do so must be sustained by every court that examines it. The FCC must never tamper with it and Congress better not ever alter the rights. The regulatory arbitrage bubble expands ever more perilously with each regulatory variable and is sure to eventually pop, like dot coms of old, if government policy does not diligently steer the balloon to stable ground.

"States Rights"

To explain their decision, the majority has cloaked itself in the drape of "State's Rights." (a classic conservative mantra not generally associated with a majority of democrats). This is a trivial misuse of a cherished constitutional precept. Congress has established a federal statute and federal policy to promote competition. Even the majority concedes that it is delegating federal authority to state offices and not intruding on the traditional general police powers of a state that normally comprise its constitutional "rights." Justice Antonin Scalia, whose credentials are unchallenged as a leading voice for states' rights himself eloquently quashed this peccadillo in *Iowa Utilities*. It is worth repeating:

> [T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any 'presumption' applicable to this question it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange. . . This is, at bottom, a debate not about whether the states will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.. . .To be sure, the FCC's lines can be even more restrictive than those drawn by the courts—but it is hard to spark a passionate 'states rights' debate over that detail.

I could not agree more.

I emphasize, however, that I do see the implementation of this statute as a state/federal partnership. States are given control over the rates set for unbundled elements, but it is principally the obligation of the FCC to determine what those elements will be, faithfully implementing the impairment clause. States can assist in that effort, but our responsibilities should not be released to them.

I must also note that the impulse to leave much more telecom policy to state commissions may run against the winds of technological change. Communications is converging, distance is fading as a meaningful construct in an internet, cyber-space world, mobility is ascending. These are the circumstances that necessitate, at a minimum, a coherent national framework of rules. States can play important roles in such a regime, but I am of the view that primacy must rest with the national government.

Conclusion

There are great strides being made today in the march of Digital Migration, which realize some of my most important objectives. I am disappointed, however, by today's decision on UNE-P. Nonetheless, it is the fair result of a democratic institution in which majority rules. I also recognized that State PUCs will now have an enormous task before them and I sincerely wish them the very best as they struggle through what the FCC

could not. I pledge to work with them in partnership to yield the best result for the nation. And, I sincerely hope that those carriers who fought so fiercely for this result will now prove their value in the marketplace and actually deliver the local competition, lower prices and more innovative services that they insisted they would if they prevailed. I, for one, will be watching. This has been a tough proceeding, but I look forward to getting it behind us and moving to other matters pressing for the Commission's attention.