Remarks by Commissioner Kevin J. Martin
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"**At the Crossroads**"

Thank you, Dick, for that kind introduction. And thank you for inviting me to speak at this annual conference. The PLI and FCBA serve the communications bar so well with these informative sessions. I recall going to this one in particular as a junior associate, and I still remember how much I relied on the discussions and primers throughout much of the next year. I'm not sure that what I'll have to say today will be quite as educational as some of the speakers I heard then, but I hope at least to keep your attention. And perhaps I'll even spark a healthy debate.

I. Deliberation to Decision-Making

As most of you know, the Commission has spent almost a year collecting, reviewing, and discussing various policy proposals for local competition and broadband service. These issues are of critical importance, and certainly, a significant amount of time is needed to clearly think through the complicated legal and policy issues at stake.

At some point, however, the Commission must move to wrap up the debate and must start making the tough decisions. We must move from deliberation to decision-making.

I believe we now are at the crossroads where choices must be made. We have four critical rulemakings that have been pending since the beginning of the year: the Triennial Review of unbundled network elements, the dominant/nondominant proceeding, the wireline broadband NPRM, and the cable modem service NPRM. The records are complete, we have considered and debated the issues at length, and the proceedings are now ripe for action.

Moreover, industry conditions cry out for answers. Companies are struggling under too much debt, unable to recoup the past investments they have made. Markets are valuing companies at depressed levels, leaving

companies with little capital. Carriers are postponing the purchase of the equipment necessary to deploy competitive local and advanced services, leaving the manufacturers to suffer the consequences.

As more manufacturers founder, we risk being left with too few domestic providers of critical infrastructure for advanced services, a significant threat to our national security. Finally, investors are questioning whether communications continues to be a profitable industry in which to risk capital.

I believe the prolonged uncertainty regarding such critical issues as local competition and broadband may have aggravated existing market troubles. Prolonged uncertainty can serve as a disincentive to invest in new and upgraded facilities, as a barrier to entry for potential competitors, and as a deterrent against modifying outdated business plans. Companies need to know the rules of the road, and they need to be able to rely on them.

It is time to eliminate uncertainty and instability. We must make the difficult policy choices and conclude these four proceedings. Our decisions are vital to industry, to national security, and to the consumers who ultimately will benefit from more competitive and advanced services.

Last May, I expressed my desire that the Commission take action on these pending proceedings by the end of year. Given the potential significance of our decisions on the economic conditions, I did not think that was an unreasonable goal. Indeed, last November the Commission committed to completing the Broadband proceedings by the end of this year,[1] and the D.C. Circuit has expressed their expectation that we complete our Triennial Review this year, as well.[2] I am disappointed that we will not make it, but I am hopeful that we will act soon.

The Commission recently sought another extension of the D.C. Circuit's USTA decision mandate until February 20th, and I am beginning to become concerned with whether we will be able to make that deadline. If we are to meet that deadline, I believe we need to begin a more specific

[1] *See Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, Memorandum Opinion and Order, 16 FCC Rcd 20719 at 20754 (2001).

[2] *See United States Telecom Ass'n v. Federal Communications Commission*, 290 F.3d 415 (D.C. Cir. 2002).

dialogue with the public, and with affected industries in particular, regarding the policy direction the FCC intends to take.

If I'm going to call for FCC action by the end of this year, however, I too must be prepared to share what I am thinking on these critical issues. Therefore, I offer the following thoughts in order to spur debate, respond to my own deadline, and to help the Commission finish its deliberative process and reach finality on these issues.

II. Principles for Decision-Making

I believe it is important for the Commission to begin with certain core values and goals. Once we have articulated and prioritized these principles, we can begin to evaluate concrete actions. Following are three principles that I believe should govern our decision making.

First, the Commission should make its top priority new investment and deployment of advanced network infrastructure. We have a number of issues before us that are vital to the marketplace and need timely resolution. Nevertheless, we must begin somewhere. I believe the Commission should focus first on creating the right incentives for companies to invest in and deploy advanced services.

Until we create a stable regulatory framework for deploying and providing such services, our country's communications network and services will remain stagnant, not improving, not developing. The many people without access to advanced services now, particularly consumers in rural America, will remain without. And competition – the driver of innovation, growth, and effective pricing – will remain minimal.

Even if we correct the incentives with respect to the provision of basic telephony, and even if the market corrects its valuations of telecom carriers, companies will not invest in advanced services until we ensure that the governing regulations will not deprive companies of the ability to make a return on their investment.

Second, the Commission must minimize further questions and avoid creating greater uncertainty or prolonging ambiguity in this area. After having already taken a year to review a set of issues and debate various policy outcomes, we should resolve all of the issues, not just

definitions, but also the implications on wholesale obligations. To put off the decisions that have the greatest impact on the marketplace to another day will only aggravate current market conditions and prolong the angst and uncertainty that surround the deployment of advanced services.

Third, the Commission must be responsive to the courts by outlining a clear standard on the necessary and impair test while remembering Congress's goal of ensuring that the local markets are truly open to competition. In so doing, we must address the court's criticism regarding our existing unbundling framework, while also ensuring access to essential facilities.

Priority I: A Regulatory Environment that Encourages New Investment

As you know, telecommunications has been responsible for much of this nation's economic growth during the past decade. The availability of advanced telecommunications is essential to the economy in the 21st century, dramatically reducing the costs of exchanging information, improving efficiency and productivity, and allowing previously local businesses to serve the world.

I am confident that spurring investment in the deployment of new facilities and advanced network infrastructure will lead to a new period of growth.

I believe that at the outset, there are three immediate steps the Commission can take to speed that growth and ensure that all Americans have greater access to advanced services.

1. Adjust TELRIC Pricing

First, we need to adjust the TELRIC pricing formula for all new investment on a going forward basis.

In my view, the TELRIC pricing formula provides incumbent service providers with an insufficient return on investment capital for new infrastructure.

In a nutshell, the existing TELRIC formula fails to accurately measure the true risk of capital investment under current economic conditions, and creates an unnecessary barrier for the deployment of broadband facilities.

We also need to adjust the depreciation schedules within the TELRIC formula to more adequately account for new investment. I believe that greater flexibility in depreciation time frames will provide a greater economic incentive for service providers to invest in and deploy new network infrastructure.

We therefore should conclude in the Triennial Review proceeding that we must adjust the TELRIC formula on a going forward basis to spur deployment in new facilities and services.

2. Deregulate New "Fiber to the Home"

Secondly, I believe we also need to adopt the principles set forth in recent proposals regarding the regulatory framework for new fiber investment deployed to a customer premises.

Under these proposals, "fiber to the home" facilities would be relieved from unbundling requirements and incumbents would be relieved of any obligation to deploy copper facilities in new build situations where fiber to the home is deployed. Incumbents also would have several options and obligations with respect to the existing copper plant in new build situations.

In the recent DC Circuit decision overturning our unbundled network element regime, the Court criticized the Commission for not fully taking into account the ability of new entrants to invest in and deploy new network infrastructure. I believe that it is not "necessary" for a competitor to have access to a new fiber loop.

I believe that if incumbent service providers decide to build new fiber local loops to a customer premise, they should be free of "old-style" legacy rules. Legacy rules are ill-suited for new facilities and new services in the supercharged IP and fiber broadband worlds of tomorrow.

3. Provide Regulatory Relief for Hybrid Facilities but Ensure Continued Access

In my view, new entrants should only use incumbent facilities that are truly necessary for new entrants to provide service. That does not mean that we should allow incumbents to stop providing any elements overnight, and we need to acknowledge the distinctions among what different competitors may need to compete for small and medium-sized business or residential customers.

We also ought to reexamine how our unbundling and/or pricing rules apply to incumbent deployment of new facilities. For example, once we have determined that a particular state's market "is fully and irreversibly open to competition," how is access to yet-unbuilt new facilities at super efficient prices necessary to enable a new entrant to compete, especially if existing facilities or their equivalent capacity are maintained at current prices?

I must give Tom Tauke of Verizon credit for this policy construct. About a year and a half ago, shortly after I joined the Commission, I heard Tom give a speech where he laid out the concept of "new rules for new wires."

I believe that the Commission should freeze the service capacity level that must be made available on new or upgraded facilities to the service capacity level provided by the ILEC prior to the new investment in a hybrid facility. For example, under this approach competitors receiving access capacity at 1.54 mbs per second using pre-existing ILEC facilities would be able to continue to receive such access capacity at the same bit rate under newly deployed hybrid facilities.

I believe that incumbents should be given the proper incentives to push fiber deeper into their networks and closer to the American consumer. And such an approach actually facilitates the deployment of electronic loop provisioning which would solve many provisioning problems.

At the end of the day, ILECs should receive the benefits of making investments in new infrastructure deployment, but competitors should maintain the ability to receive access to end user customers at the service capacity levels that they currently receive.

Priority II: Minimize Further Questions and Uncertainty

These are turbulent economic times for the telecom industry and the economy as a whole. In such times, the Commission should be particularly cognizant of the impact of its decisions and that it can contribute to market stability by establishing a more stable and reliable regulatory environment. Broad proceedings that remain pending for extended periods can contribute to uncertainty. Protracted uncertainty can prolong financial difficulties. Regulatory uncertainty and delay can function as entry barriers in and of themselves, limiting investment and impeding deployment of new services.

Particularly given the current financial conditions, we should act quickly on our major pending rulemakings, particularly as they relate to new investment. Prompt decision making will provide greater certainty and stability to the marketplace.

We should work to be faster and be more reliable in our decision making. Prolonged proceedings with shifting rules ultimately serve no one's interest, regardless of the substantive outcome. It is time for the Commission to take action not only on the UNE Triennial, but also on performance measures and the broadband proceedings.

Much of the buzz that I hear from others on the potential outcome for the Broadband proceeding is centered on deregulation of the retail offering of broadband service. My sense, however, is that the question that most parties want answered is how we will ultimately decide the wholesale or input question. In other words, I think most people already assume that we are going to treat Internet access as an information service. The question that matters is the regulatory treatment of DSL and cable modem transmission.

I recognize that the Commission itself may have contributed to the continuing confusion on this issue as a result of our ambiguous and somewhat contradictory statements in the Wireline Broadband Proceeding and the Cable Modem Proceeding. In both of these items we attempted to address the appropriate regulatory framework for broadband services.

In the Cable Modem Proceeding,

(1) we determined that cable modem high speed Internet access is an information service;

(2) we decided that the Commission's Computer II unbundling obligations did not automatically apply to cable modem service; and

(3) we sought comment on whether some form of access obligations should ultimately be imposed on Cable Modem service.

In other words, in the Cable Modem Proceeding we addressed the definitional issue **and** left open the issue of whether we would impose discretionary unbundling obligations.

In the Wireline Broadband Proceeding, the Commission tentatively concluded that DSL high speed Internet access is an information service, and we asked about the implications of the Computer Inquiry II obligations and other unbundling obligations.

Some in and around the Commission have suggested that the Commission should use the same process we set forth in the Cable Modem proceeding in the Wireline Broadband proceeding.

In other words, they advocate that the Commission should address only the definitional issues and leave undecided – until some time later next year – whether and to what extent the unbundling obligations apply in the Wireline context.

I'm very concerned about – and at this stage I would not support – such an approach. We should be cognizant and clear on what the implications of that suggested approach would be.

In the Cable Modem proceeding, inaction resulted in no regulation being applied.

In the case of DSL, however, the impact of the current presumption under the Commission's decision is that unbundling obligations do apply.

Inaction by the Commission therefore leaves all of the unbundling regulations firmly in place – and only applies them to one of the two competitors.

Therefore, I see three potential courses of action:

We could treat DSL services similar to cable modem service.

In doing so, we would need to change our Computer II rules so that incumbent providers would no longer be required to provide underlying transmission services as retail service offerings. Providers nevertheless would have the incentive to provide broadband transport to unaffiliated ISPs on reasonable terms, because only by doing so could they maximize the value of their investments. Such offerings would be made available on a private carriage basis and not as unbundled tariffed offerings.

The Commission could, on an interim basis, guarantee ISPs access to broadband transmission services in a nondiscriminatory manner. Specifically, ILECs would be required to offer unaffiliated ISPs the same transmission services that the ILEC offers to its own affiliates through private carriage agreements. This nondiscrimination requirement could be put in place for two or three years, but then sunset unless the FCC extends it to all broadband providers.

Second, we could treat cable modem services similar to DSL services. Under this alternative, the Commission could leave the Computer Inquiry rules in place and apply them to all broadband providers with common carrier status. In effect, the FCC would impose the same regulatory framework on cable modem service that currently applies to wireline DSL service.

As for the third option, I believe the only other logical alternative is to classify wireline broadband as a telecommunications service, with the accompanying nondiscrimination requirements, and to acknowledge that the Commission was wrong when it declared cable modem service to be an information service. Instead, the Commission could determine that cable modem service is a cable service subject to the panoply of Title VI regulations currently applicable to cable service providers, such as local franchise obligations and service regulations.

At this stage, of the three options I have just outlined, I believe the first option – treating DSL service similar to cable modem service – is the better choice. I recognize, however, that there are merits to all three – I fail to see any merits, however, in refusing to answer the underlying question.

Priority III: Responding to the Courts

As you know, the U.S. Court of Appeals for the DC Circuit has remanded the Commission's *UNE Remand Order* – the Commission's most recent effort to set out a list of network elements that incumbent local exchange carriers must make available on an unbundled basis to competing carriers.

The Court criticized the FCC's unbundling requirement as being overly broad. The Court found the FCC had failed to take into account the competitive nature of particular geographic and customer markets. At the end of the day, we need to develop an unbundling framework that can be implemented at a more granular level and takes into account the unique issues found in rural and underserved areas.

Provisioning Issues

First, as I have stated previously, in responding to the court, the Commission cannot ignore and must address provisioning and "Hot Cut" problems that new entrants have highlighted in the record in order to ensure that impairment does not exist and to allow for access to the residential market.

Switching

I believe the Commission can adopt a relatively simple and straightforward test with regard to whether "unbundled local switching" is necessary for the provision of competitive services to consumers.

If other alternative facilities based providers exist in a market and the impairment associated with provisioning problems is addressed then switching would not need to be provided.

In other words, (1) alternative facilities providers would be required to use their own facilities, and (2) if a sufficient number of alternative providers are present, the Commission would assume that a wholesale market for switching is viable.

The unbundling obligations that reside in the Act, however, still remain viable and serve a pro-competitive purpose. In my view, the unbundling obligations are necessary and need to stay in place in those rural and underserved areas that lack alternative facilities based service providers.

At the end of the day, however, we need to recognize that if we fix existing provisioning problems that will allow competitors to easily migrate customers from the ILEC to their own facilities, then we cannot continue to require unbundling in markets where such competitive facilities exists.

Any shifts in regulatory direction, however, should be cushioned by transitional measures and safeguards.

Several states have requested that they become more involved in our impairment analysis.

In my view, much of the current talk about state preemption is premature. I believe that the States are best positioned to make those highly fact intensive and local determinations.

During my stay at the Commission, I have witnessed first hand the role that the States have played in being helpful partners in our mutual goal to implement the Act.

I believe that the States should be implementing our standard by making the factual determination regarding the existence of alternative facilities based providers and whether, and to what extent, impairment exists with respect to the ability of new entrants to access the market.

Line Sharing

Besides addressing our unbundling framework, the DC Circuit's USTA decision also vacated the Commission's Line Sharing Rules.

The Court stated that we failed to adequately take into account alternative facility providers, specifically cable and satellite. No one denies` that Cable is the dominant provider of residential high speed Internet access services.

In my view, the Commission has no choice but to recognize this fact as it decides whether incumbent DSL providers should be treated as dominant carriers when they provide high speed Internet access services.

Therefore, I'm in favor of declaring the incumbents non-dominant in the residential high-speed Internet Access market and not re-imposing our Line Sharing obligations where a cable competitor exists for residential high speed services.

III. Conclusion

In sharing with you this afternoon my vision of how the Commission should proceed and what the future landscape should look like, I have covered a lot of ground. I'd like to leave you with some parting thoughts.

In today's marketplace, many residential consumers do have competitive, facilities-based choices for broadband services. Where a competing provider, such as cable, offers broadband service, our regulations need to recognize this reality.

In the residential narrowband, or voice-centric world, however, less facilities-based competition exists. And our regulations also need to reflect that reality. That is why it is critical that we establish a framework, working with the States, that evaluates the true extent of facilities-based competition in markets throughout the country. We must not leave behind American consumers that live in rural and underserved areas.

I am optimistic that if the Commission follows the steps I have just outlined, we could develop a framework to encourage investment in new infrastructure and that would ensure the availability of next generation network technology for all consumers through out the nation.

By taking these steps, the Commission can establish a framework that would result in an effective tiered capacity approach agnostic to the nature

of the service provider or the technology it is using, while still ensuring access to competitive providers for consumers. This framework puts cable operators and telephony providers on similar footing.

Both types of providers would have basic service obligations that remain regulated. Cable operators would be required to continue to offer basic cable; they would be subject to must carry obligations and basic tier pricing. Incumbent local exchange carriers would continue to be subject to unbundling and state supervision.

Access to capacity above that level, however, would be constrained primarily by market forces. Both types of service providers would be similarly situated with regard to how they provide broadband service. Both would be free to innovate, deploy additional capacity, and offer service in a completely unregulated tier.

As I have said, the Commission at some point must move from deliberation to decision-making. I believe we are now at the crossroads where the tough choices must be made. I recognize that I envision a very different world that exists today. The proposal I have set forth is provocative, and one with which everyone will not agree. Indeed, I will not be surprised if there are aspects with which you agree, but you do so silently, and points with which you disagree, and you do so loudly. But in the end, if the Commission is to move forward, we must engage more directly and specifically. I therefore welcome your reaction, criticism, and suggestions. Your move.

Thank you for your time.