SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Notice of Proposed Rulemaking, Performance Measures and Standards for Unbundled Network Elements and Interconnection et al., CC Docket Nos. 01-318 et al.

With the adoption of this important *Notice,* the Commission begins a second phase in its implementation of the local competition provisions of the Telecommunications of 1996. In so doing, we also continue to carry out the agenda I recently outlined, in which the Commission will debate and resolve key questions in the five areas of: (1) Broadband Deployment; (2) Competition Policy; (3) Spectrum Allocation Policy; (4) Re-examination of the Foundations of Media Regulation; and (5) Homeland Security.

Since the Act was passed, we all have been engaged – before the Commission, in the states and in the courts – in an initial effort to effectuate the intent of Congress as embodied in the Act's local competition requirements. Girded primarily (sometimes solely) by the wisdom of forward-thinking state commissions, the Commission embarked in earnest on its journey to deliver on the Act's promise of competition, deregulation and innovation in the local market. But even as the Commission has shown progress in completing that journey, we have found little light along our path. In the absence of real experience about the difficulties of substituting market forces for regulation, we sometimes stumbled. At times, we even fell.

We now begin to reassess and improve upon our hard-earned knowledge with the clarity of hindsight and practical understanding of how complex and intractable is the task of promoting local competition. This "Local Competition Phase II" will begin with this proceeding regarding national performance requirements, and continue on with examinations of our unbundling regime and an inquiry regarding whether and how we can, consistent with the Act, use deregulation to pursue the statute's goal of facilitating broadband deployment to all Americans.

As the leading edge of Phase II, our decision to seek comment on whether to adopt national performance requirements evidences what I hope will be some of the hallmarks of this more mature stage in our regulatory efforts. First, it demonstrates that the Commission remains committed to considering adoption of new federal requirements if they can be legitimately derived from the 1996 Act and are targeted to address the most essential competitive concerns.

Second, at the same time, this *Notice* recognizes that more is not necessarily better with respect to the number and scope of our requirements. If we have learned anything from the Commission's regulatory, enforcement and legal battles over the last five years, it is that we can expect carriers to defend themselves in countless formal and informal ways against what they perceive to be overly aggressive statutory

interpretations. The public loses in several ways under such interpretations, as they sacrifice long-term, meaningful competition in favor of easy market entry, while also ensuring that the "pro-competitive" interpretation ties the Commission and parties up in litigation for years at a time. Just as importantly, such interpretations may drain critical resources away from carriers' efforts to bring consumers new products and services and to invest in existing and newer technologies and infrastructures. Rather than piling on a panoply of duplicative regulations on all potential performance issues, this *Notice* seeks comment on a few key requirements with the hope that these will become a model by which performance requirements used at the state and federal levels may be streamlined. In light of the attendant regulatory burdens, I firmly believe that the requirements we propose here are those that will generate real competitive choices in the long run.

Third, this *Notice* recognizes that, where we are justified in imposing the burdens associated with new regulation, setting out clear expectations should enhance enforcement efforts. Such expectations tell carriers what behavior satisfies the broad statutory requirements, and what behavior falls short. This approach, coupled with due restraint regarding the scope of new rules, ensures that carriers will know ahead of time how to conduct themselves on matters most crucial to meaningful competition, without also subjecting carriers to burdens in less leveraged areas. In these other areas, regulators can continue to police the statutory requirements, as we have over the last several years, using less intrusive methods such as adjudication.

Fourth, this *Notice* acknowledges what has been apparent for some time: that facilities-based competition is the mode of market entry most likely to foster simultaneously and sustainably the Act's mandates of competition, deregulation and innovation. Certainly, the Act and the Commission's rules continue to require incumbent LECs to permit non-facilities-based entry; these are statutory requirements that we are duty-bound to implement at this time. Yet the Act has never required the imposition of performance requirements regarding its core interconnection and unbundling obligations. Thus, the decision whether and where the Commission will impose such requirements is squarely a matter for our discretion, informed as I believe it must be by the detriment to carriers and the public generally of the regulatory burdens associated with such requirements.

It is for these reasons, and to express my pleasure with the Commission's initiation of this "Phase II" of our ongoing mission to facilitate competition, that I wholeheartedly support this *Notice*. I look forward, in particular, to hearing from and working with my state colleagues on these substantial issues.