SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Federal-State Joint Board on Universal Service, Recommended Decision (released July 10,2002).

I commend my colleagues on the Joint Board for their thorough consideration of the important issues raised in this proceeding and for their valuable contributions to this Recommended Decision. As Chair of the Joint Board, I am pleased that the processes we have put in place are enabling us to engage in efficient and effective decisionmaking.

I write separately to elaborate on my reasons for opposing the addition of equal access to interexchange services to the list of supported services. In short, the arguments advanced in support of adding equal access are wrong on the law, wrong on the facts, and wrong on policy. While the vote by the Joint Board Members could not have been closer, I believe this issue is actually fairly straightforward: Congress made crystal clear that CMRS carriers "shall not be required to provide equal access." 47 U.S.C. § 332(c)(8). Because adding equal access to the list of supported services would require CMRS carriers to provide that functionality as a condition of becoming eligible telecommunications carriers, *id.* § 214(e), such a requirement plainly would violate congressional intent. Moreover, equal access fails to satisfy the criteria in section 254(c). Indeed, because all consumers *already* are ensured of access to interexchange services, equal access has little, if anything, to do with universal service. Finally, while rural LECs have raised a legitimate concern about our portability rules — because CMRS carriers that do not provide equal access may be receiving universal service support that is allegedly based in part on the cost of providing equal access — the Commission, with my strong support, intends to address that issue in an upcoming rulemaking proceeding. Especially in light of that upcoming proceeding, we should not manipulate the definition of universal service as a backdoor means of responding to concerns about the manner in which competitive ETCs receive support.

1. Equal Access Is Inconsistent with Section 332(c)(8).

In 1994, the Commission issued a Notice of Proposed Rulemaking concerning the potential imposition of an equal access obligation on CMRS carriers.[1] Positing that such a requirement "would increase competition in the interexchange and mobile services marketplace, and also foster regulatory parity between wireline and wireless services," the Commission tentatively concluded that "equal access obligations should be imposed on cellular licensees."[2] Congress disagreed. In the 1996 Act, Congress enacted section 332(c)(8), which expressly bars the Commission from requiring CMRS carriers to provide equal access to toll services.[3]

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[1] *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, 9 FCC Rcd 5408 (1994) ("*CMRS Equal Access NPRM*").

[2] *Id.* at 5411 ¶ 3.

[3] Pub. L. No. 104-104, § 705 (1996), codified at 47 U.S.C. § 332(c)(8).

Proponents of an equal access argument contend that by conditioning eligibility for universal service support on compliance with an equal access requirement, rather than imposing an equal access obligation on CMRS carriers directly, the Commission could comply with the letter of section 332(c)(8). That is a questionable proposition at best, since denying or revoking a CMRS carrier's ETC designation for its failure to provide equal access seems tantamount to imposing a "requirement" on the carrier. But even if such an indirect obligation could skirt the statutory prohibition, that misses the point. In response to the Commission's previous effort to impose equal access on CMRS carriers, Congress spoke loudly and clearly in opposition to such a requirement. We should be faithful to that plain statement of legislative intent, rather than seeking ways around it.

Moreover, it is no answer to say that CMRS carriers can avoid being subject to an equal access requirement by foregoing universal service support. Presenting CMRS carriers with such a Hobson's choice would undercut the core procompetitive goals of the 1996 Act.[4] Because all wireline carriers already are obligated to provide equal access,[5] the only consequence of adding equal access to the list of supported services would be to require CMRS carriers seeking ETC status to provide equal access. The costs of complying with such a requirement undoubtedly would deter competitive entry in high-cost areas where service can be provided economically only if explicit universal service support is available. Because Congress wanted *both* to exempt CMRS carriers from equal access obligations *and* to promote competition in all telecommunications markets, the only reasonable conclusion is that making the provision of equal access a prerequisite to obtaining (or retaining) ETC status is fundamentally at odds with congressional intent.[6]

2. Equal Access Fails To Satisfy the Criteria in Section 254(c) and in Particular Would Not Serve the Public Interest.

Even if Congress had not made plain its intention to exempt CMRS carriers from equal access obligations, the factors set forth in section 254(c) would not support adding equal access to the list of supported services. Section 254(c) directs the Commission to consider whether the telecommunications services at issue

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[4] *See Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 8820 ¶ 79 (1997) ("*Universal Service First Report and Order*") (noting that imposition of an equal access requirement would "undercut local competition") (citing Joint Explanatory Statement of the Committee of the Conference, H.R. Rep. No. 104-458 at 113 (1996)). *See also* 47 U.S.C. § 214(e) (defining "eligible telecommunications carrier" without regard to technology).

[5] The equal access obligations grew out of the Bell System divestiture decree (the Modification of Final Judgment, or MFJ), and later were extended to all wireline carriers by the Commission. *See CMRS Equal Access NPRM*, 9 FCC Rcd at 5412-13 ¶¶ 6-9.

[6] As the Commission explained in the *Universal Service First Report and Order*, 12 FCC Rcd at 8819-20 ¶ 79, declining to add equal access to the list of supported services does not run afoul of the Commission's principle of competitive neutrality. Indeed, the Commission noted that the competitive neutrality principle is intended to ensure that universal service policy is not "biased toward any particular technologies," *id.*, and, in this context, *adding* equal access to the list of supported services, rather than refraining from doing so, would bias universal service policy against a particular class of carriers — CMRS carriers.

> (A) are essential to education, public health, or public safety;
> (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential consumers;
> (C) are being deployed in public telecommunications networks by telecommunications carriers; and
> (D) are consistent with the public interest, convenience, and necessity.[7]

First, the fact that access to interexchange service already is a supported service — and therefore one that all ETCs must provide — undermines any argument that equal access is "essential" to education, public health, or public safety. In other words, since access to interexchange service already is universal, adding equal access to the list of supported services is not necessary to ensure such access.

Proponents of requiring equal access focus on the procompetitive benefits it supposedly would entail. But enhancing competition in the already-competitive interexchange market — assuming for the moment that forcing CMRS carriers to provide equal access in fact would have such an effect — is entirely distinct from our task here, the preservation and advancement of universal service. The history of our existing equal access requirements for wireline carriers is instructive. When the MFJ court ordered the breakup of AT&T, it was concerned that, absent judicial intervention, AT&T would squelch competition from other IXCs.[8] The court accordingly ordered the BOCs to offer to all IXCs access to the local exchange network that is "equal in type, quality, and price" to that offered to AT&T and its affiliates.[9] The Commission extended the equal access obligation to all wireline carriers in 1985 as a further means of ensuring unfettered competition in the developing interexchange market.[10] Thus, equal access was established as an antitrust remedy — not as a universal service policy. And today, the focal point of the debate over equal access remains competition, rather than universal service. When proponents of imposing an equal access requirement speak of "advanc[ing] customer choice," Recommended Decision at ¶ 77, they are essentially expressing a desire to promote greater interexchange competition, not to support universal access to a critical residential service; again, such access *already* is universal.

Moreover, I do not agree with the premise that imposing an equal access requirement on CMRS carriers would be beneficial for competition or consumers. As

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[7] 47 U.S.C. § 254(c).

[8] *CMRS Equal Access NPRM*, 9 FCC Rcd at 5412 ¶ 6.

[9] *United States v. AT&T*, 552 F. Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom Maryland v. United States*, 460 U.S. 1001 (1983).

[10] *CMRS Equal Access NPRM*, 9 FCC Rcd at 5413-14 ¶ 9.

noted above, we should not even be having this debate, because Congress settled this policy call in the text of section 332(c)(8) of the Act. But if I were to make a decision based on policy considerations, I would agree with Congress that allowing wireless carriers to offer consumers innovative service packages including bundles of any-distance minutes promotes, rather than harms, consumer welfare. There can be little question that both the interexchange and mobile wireless markets are highly competitive, and that wireless carriers' innovative offerings have led to extensive intermodal competition. And if a wireless subscriber seeks to use the services of a particular IXC, she can presubscribe to that IXC over her landline phone and also can reach the IXC on a wireless phone on a dial-around basis.

Tellingly, none of the IXCs that participated in this proceeding — the would-be beneficiaries of an equal access requirement — supported imposition of such a requirement. For example, AT&T argued that subjecting CMRS carriers to an equal access requirement "would thwart competition from alternative providers in rural areas."[11] "Rather than adopt requirements that exceed the Communications Act and have nothing to do with a particular carrier's or class of carrier's ability to offer universal service," AT&T contends, "the Commission's eligibility criteria should promote competition from as many sources and technologies as possible."[12] Similarly, WorldCom argues that an overly expansive definition of universal service would thwart competition.[13]

Equal access also lacks support under the remaining factors in section 254(c). The second criterion is whether the service at issue has been subscribed to by a substantial majority of residential consumers through the operation of market choices by customers, and the third is whether it is being deployed in public telecommunications networks by telecommunications carriers. 47 U.S.C. § 254(c)(1)(B), (C). It is difficult to gauge whether equal access satisfies these criteria, because the existence of a regulatory mandate has both precluded the exercise of market choice and necessitated deployment by all wireline carriers. But to the extent that the deployment of equal access has been left to voluntary market choices — that is, in the wireless arena — it has neither been subscribed to by a substantial majority of consumers nor deployed by carriers. Moreover, applying the second criterion literally, the fact that consumers do not "subscribe" to equal access suggests that it is not the kind of service that Congress envisioned as part of the definition of universal service; indeed, equal access is not a "service" at all. Overall, these factors are probably not dispositive, but they certainly cannot be said to support adding equal access to the list of supported services.

The final factor — the public interest, convenience, and necessity — weighs heavily against requiring equal access for the reasons discussed above and because of the

[11] Reply Comments of AT&T Corp. at 14.

[12] *Id.*

[13] Reply Comments of WorldCom at 4 (citing Comments of Bell South at 5). *See also* SBC Reply Comments at 2; Verizon Reply Comments at 6.

competitive state of the interexchange marketplace. As noted above, requiring CMRS carriers to provide equal access as a condition of becoming ETCs (or retaining existing ETC status) would frustrate local competition by deterring entry. I also believe that the imposition of substantial costs on wireless carriers that choose to implement equal access would be pointless, because it is unlikely that consumers would choose a different interexchange carrier than their wireless provider. Most wireless carriers now offer bundles of minutes that include long distance at no extra charge. In light of the widespread availability of such beneficial packages, it seems doubtful that a consumer would choose to pay an additional charge to obtain service from a different long distance provider. IXCs presumably have made the same judgment, as evidenced by their conspicuous lack of support for a new equal access requirement.

Looking at the telecommunications marketplace as a whole — which is more competitive than ever before, and which is moving away from artificial service-category distinctions based on geographic boundaries — I am frankly puzzled by the argument that we need to adopt an intrusive and backward-looking regulatory requirement for CMRS carriers. Indeed, as the Commission is considering whether equal access obligations continue to be necessary even for *LECs*,[14] I would think that the case against extending equal access obligations to CMRS carriers would be far less controversial.

3. The Commission Will Address Concerns About the Provision of Support to Competitive ETCs in an Upcoming Rulemaking.

In light of the overwhelming arguments against adding equal access to the list of supported services, I believe that proponents of such a requirement are allowing their concerns about the manner in which CMRS carriers receive universal service support — *i.e.*, our portability rules — to complicate what otherwise would be a straightforward matter.[15] I agree that the question whether CMRS carriers should receive support based on incumbent LECs' costs — including the cost of providing equal access — is a legitimate one.[16] Indeed, I have repeatedly urged the Commission to initiate a rulemaking proceeding focused on that question, something the Commission is now planning.[17] That is the forum we should use to address potential inequities in our

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[14] *See Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, CC Docket No. 02-39, Notice of Inquiry, FCC 02-57 (rel. Feb. 28, 2002).

[15] *See, e.g.*, Recommended Decision at ¶¶ 82-86.

[16] Notably, however, there is considerable debate over whether wireline carriers in fact receive support associated with providing equal access. *Compare* Ex Parte Presentation of GVNW Consulting, June 19, 2002 (contending that rural ILECs receive universal service support for providing equal access) *with* Ex Parte Presentation of Competitive Universal Service Coalition, June 12, 2002 (contending that rural ILECs do *not* receive any support for providing equal access).

[17] *See, e.g.*, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, FCC 02-171, CC Docket Nos. 96-45, 00-256, ¶ 15 (rel. June 13, 2002).

portability rules. While it may be several months before the Commission is able to launch that proceeding, and there is no assurance that the Commission ultimately will modify its rules, that uncertainty does not justify using this definitional proceeding to saddle wireless carriers and consumers with new costs under the guise of regulatory parity.