SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Inquiry Concerning High-Speed Access on the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities.

I. Introduction

One might ask what is in a name? In the law, a great deal. When Congress crafts legislation it defines the rights, responsibilities and obligations by reference to particular definitions or classifications. In the multifaceted world of communications it has defined the rights and obligations differently, depending on the nature of the service offered without regard to the means in which it is offered.

Thus, the Commission has an inescapable duty to determine the will of Congress by faithfully applying these definitions to new services. This is not an easy task, given all communication services have some similar and overlapping features.

II. There Are Three Statutory Classifications

For our purposes, there are three essential regulatory definitions under the statute, each having different regulatory consequences: "Telecommunications service" is defined in 47 U.S.C. § 153(46). "Cable service" is defined in Section 602(6). And "information service" is defined in the United States Code in Section 153(20).

If one looks throughout the statute, one will see clearly that Congress ascribed different regulatory treatment to these classifications – sometimes more regulatory oversight, sometimes less. For example, a cable service provider cannot be regulated as a common carrier pursuant to the statute.[1] Yet, as a consequence of the statute, a telecommunications service provider is regulated as a common carrier. Most importantly, "information service" is a conscious regulatory classification under the statute. Not only is it defined, there are specific references to it throughout the statute.

For example, the Commission under its discretion can extend universal service obligations to providers that *use* telecommunications who are *not* telecommunications carriers (who must contribute to universal service). This indicates Congress recognized classes of services, other than telecommunications service that may have to be reached by Commission discretion, rather than mandatory application under the statute. Similarly, the schools and libraries provisions make specific reference to information services as being covered by the provision, entitling schools and libraries to discounted service. Or, one can look at the network sharing provision of Section 259 and see specific reference to information service as well as telecommunication services.

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[1] *See* Communications Act § 621 (c), 47 U.S.C. § 541 (c)

III. The Classification Is Not An Exercise In Regulatory Free Will

The Commission does not have unconstrained discretion to pick its preferred definition or classification, as some imply. The Commission must attempt to faithfully apply the statutory definition to a service, based on the nature of the service, including the technology used and its capabilities, and the nature of the interactive experience for the consumer. This "is complex and subject to considerable debate and . . . appropriately left to the expertise of the FCC." [2]

The Commission is not permitted to look at the consequences of different definitions and then choose the label that comports with its preferred regulatory treatment. That would be contrary to law. The Commission must apply the definition and then accept the regulatory regime that adheres to that classification and that which Congress chose when it adopted the statute.

IV. Commission Is Not Neutered By This Classification

The Commission is not left powerless to protect the public interest by classifying cable modem service as an information service. Congress invested the Commission with ample authority under Title I. That provision has been invoked consistently by the Commission to guard against public interest harms and anti-competitive results.

It was this Commission that promulgated *Computer I, Computer II and, Computer III,* (all under Title I) in an effort to protect against public interest harms, all with the blessing of judicial review and court sanction of its ancillary authority. Additionally, Title VI is a direct progeny of the Commission's assertion of jurisdiction over cable services under its Title I authority and has regulated cable extensively for a number of years under that authority. This exercise, too, was approved by the Supreme Court as within the congressional scheme.[3]

There is no basis to conclude that Title I is inadequate to strike the right regulatory balance. The Commission's willingness to ask searching questions about competitive access, universal service and other important policy issues demonstrates its commitment to explore, evaluate and make responsible judgments about the regulatory framework.

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[2] *MeidaOne Group, Inc. v. County of Henrico*, 257 F. 3d 356 (4th Cir. 2001).
[3] *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).