**SEPARATE STATEMENT OF**
**CHAIRMAN MICHAEL K. POWELL**

*RE: Unbundled Access to Network Elements (WC Docket No. 04-313); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338)*

Today's decision crafts a clear, workable set of rules that preserves access to the incumbent's network where there is, or likely will be no other viable way to compete. The rules have also been carefully designed to pass judicial muster, for I hope we have learned that illegal rules, no matter their other merits, are no rules at all. For eight years, the effort to establish viable local unbundling rules has been a litigation roller coaster. Regrettably, years of fierce battles to bend the rules entirely toward one sector or another without proper respect for the legal constraints have contributed to a prolonged period of uncertainty and market stagnation.

This item decidedly does not attempt to make all sides happy. Consequently, one will undoubtedly hear the tortured hand-wringing by incumbents that they are wrongly being forced to subsidize their competitors. They have a legal duty to provide access under limited conditions and they do protest too much in arguing for the end of vast portions of their unbundling requirements. Conversely, one can expect to hear dire predictions of competition's demise from those who wanted more from this item. Time will show this will not be so. Business models may change, but competition and choice for consumers in the information age will continue to grow and thrive.

After repeated defeats in court, the Commission has heeded the call to apply a meaningful impairment analysis to switching. Therefore, while commercial agreements can be established to offer UNE-P services, such services are no longer legally compelled. We recognize, however, that during the years of wrangling over the lawfulness of UNE-P, companies have sold phone service to significant numbers of consumers using this now thoroughly legally discredited business approach. While we cannot justify the continuation of this approach, we see the need and obligation to minimize the impact on consumers by providing a smooth transition of these customers to other alternatives. To accomplish this, we have adopted a significantly longer transition than first proposed. In addition to the six months already provided by our Interim Order, we will extend the transition into early 2006. We are confident this will mean less disruption for customers and provide time for quickly emerging alternatives—not the least of which include cable telephony, wireless and VoIP—to root in the market.

Facilities competitors are favored under the Act and Commission policy and we have attempted to permit wide unbundling for the key elements of loops and transport, where there is clear and demonstrable impairment. Recall that two years ago all five Commissioners stood together in requiring substantial unbundling of virtually all loops and transport. The Court rejected that effort. So today we have tried again to satisfy the court, while preserving access to incumbent's networks outside the most competitive and

densest business districts. Incumbents made forceful attempts to remove the majority of these elements, but the record and our analysis demonstrated that competitors still depended significantly on them in the overwhelming majority of markets and, thus, we have required unbundling in those circumstances. We did not just check off the CLEC holiday list, however, and were careful to draw the lines tightly, understanding the rigors of the statutory impairment test and the inevitable need to withstand judicial challenge. Where loops or transport are removed, we also provide substantial transition periods to avoid disruption.

Over the course of the past few months, the five commissioners have worked very hard together to craft a solution that all of the offices could support. Ultimately, although my colleagues' insights and proposals improved the final result, we could not bridge the gap to reach a unanimous result that I felt could pass judicial muster. Finally I would be remiss if I did not praise the extraordinary efforts and leadership of the Wireline Competition Bureau and our Office of General Counsel, particularly Jeff Carlisle, Austin Sclick, Michelle Carey, Tom Navin, Russ Hanser and Jeremy Miller. They have been tireless advocates for a rigorous decision that advances the public interest. We all owe them a debt of gratitude.

In 1996, no one could have guessed that nearly a decade later the FCC would be on its fourth attempt to develop local competition rules that are lawful. We hope to end that here and now, for the market cannot possibly continue another day plagued by an ever-shifting regulatory foundation. We can only hope that the fourth time is the charm.