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COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

JANUARY 14, 2003

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY

TUESDAY, JANUARY 14, 2003

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m. in room SR–253, Russell Senate Office Building, Hon. Ernest F. Hollings, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. ERNEST F. HOLLINGS, U.S. SENATOR FROM SOUTH CAROLINA

Chairman HOLLINGS. Good morning. The Committee will please come to order. The Committee is privileged this morning to have the full Federal Communications Commission. We welcome you. And let me make an opening statement here.

Chairman Powell testified in front of the Appropriation Subcommittee meeting last March and stated that FCC's fundamental mission was to implement the Communications Act as amended. And yet, I read in the Washington Post this month that one of those amendments, specifically the 1996 Telecommunications Act, was an experiment, according to Chairman Powell.

I think one of the biggest difficulties we have in the Congress is the lack of a sense of history. Let me remind everyone that it took 4 years, quite a struggle, to enact the 1996 Act. What we had was the deregulation of a monopoly, a monopoly that had 100 percent of the last line into the home and business. And, of course, instant deregulation would have just extended and established that monopoly in the market, and there would be no competition, or really deregulation.

At the same time, the United States of America had, and I think still has, the best communications system in the world, and we did not want to decimate the local Bell companies, the local service. And so, it was not intended as a total deregulation. We were trying to sort of deregulate it in steps—and mindful all the time that the public had built up these monopolies. Senator Wyden, Senator McCain, all of us, Chairman Powell, we all owned the seven Bells. They were built up with rate-paying charges.

So we got together with the Bell companies and the competition. The competition, of course, being long distance. And it had been deregulated by Judge Greene, and very successfully so. They were down a third in size, and making three times the profit. And yet, the Bell companies kept saying that they wanted to get into long distance. And we had, at this Committee level, over a 4-year pe-

riod, the Bell companies on—I think it was on a Friday, and the long distance on Monday—meeting intermittently with the Committee staff, and the left hand knew what the right hand was doing. There were going to be no tricks. Everybody had the power. The long distance had the power. The Bell companies had the power politically to kill the initiative, the bill itself. We realized that.

So their lawyers drew this up, sections 251 and 271. And right to the point, when they talk about low cost, that is why I mentioned the fact that we owned them. And how do you get competition going except to get the just and reasonable prices or a discount so that we can get some kind of competition started up against these mammoth Bell holdings.

And they wrote it, but they lied. They did not have any idea of trying to get into long distance. And instead, as their letters had indicated that they would be in within a year—and I have those letters in my file—that they were going to get into long distance. They immediately questioned the constitutionality of what they had written, and held us up in the courts for some three years.

Then they tried every trick in the book that you could think of. They said that they—instead of competing, were going to combine, and they merged the seven companies into four. They talked about rural America. I can see that chairman of the board of U.S. West sitting in my office. He wanted to get into rural America. And the morning paper showed that he was selling off rural American, rural properties out there in Colorado as fast as he could. It was a pure sham.

The next thing we heard was data, "Data was not contemplated. Data was not contemplated." And when we showed that it was mentioned 428 times at the hearings and in the Act and everything else, then they moved to Tauzin-Dingell and broadband. They were telling us that they could not afford to expand broadband, but deregulation would allow it. And at the same time, they were telling the market, where Chairman Powell visits regularly, that, oh, no, they were getting out of broadband—and, in fact, 70 percent of the business DSL lines that had been discovered over some 20 years ago, and that they had in their properties, and only extended when they got competition from the cable crowd. So then, they moved to parity, cable versus the Bells. And now they say that they need investment, "What we need is jobs." They will try every trick in the book.

The fact of the matter is that the 1996 Act has been a measured success. There is not any question that we have lowered greatly the barriers to entry of all segments of communication. We have fostered extensive innovation and made possible the explosive growth of the network in the Bell companies themselves. Bells have invested some $100 billion since the Act. Cable have invested some 60 billion. The CLECs, some 60 billion. In fact, one witness before the Committee says, "We are over-invested is our problem," that they have got 2 trillion in optic fiber and other cable equipment in the ground and extended, and the return on that investment is only about 300 million a year, so the tremendous over-investment problem.

And the particular company that cries and whines that they are going broke—my friend, Mr. Whitaker, out there at SBC, he is rated the tenth among the Fortune 500 in profits, 14th in size, going broke, selling below cost. I wish I could get a business and set it up that way, where I could become tenth largest in the country in profits.

So we know that they have really been going forward as fast as they can. Now, what has happened is that the largest long-distance operator—third largest in the country, I think; I had notes here—is Verizon. And the other companies are doing extremely well, but the orders that the FCC may soon implement in the Committee's consideration could destroy competition at the very time that it is beginning to take hold. In fact, just exactly that.

I noticed in the morning paper here—unless there is objection—the Bell monopolies pushed to disconnect competition in *USA Today*—we will include that, which is even a better statement than mine on this particular score.

[The information referred to follows:]

USA Today, January 14, 2003

BELL MONOPOLIES PUSH TO DISCONNECT COMPETITION

Our view: Public is asked to give up phone rate cuts for vague promises.

Seven years ago, Congress set out to break up the local Bell telephone monopolies and bring competition to consumers' homes. But just as states are finally figuring out how to make that promise a reality, and some communities are seeing phone bills drop, federal regulators may unplug the competitors at the behest of the four Bell monopolies.

The Bells want to gut rules spurring competition that were enacted in the wake of the 1996 Telecommunications Act. They require the Bells to rent their networks at reasonable prices to potential rivals that may want to offer local phone service but can't afford to set up their own phone networks.

For years, the law wasn't an issue because states let the Bells charge exorbitant fees that kept competitors out of their markets. Now that several states are ordering them to cut their network fees, competition is emerging, and phone rates are decreasing. On Monday, AT&T announced plans to compete in Washington, D.C., after the local government cut the charges for tapping into the network operated by Verizon. Nationwide, 11-percent of local phone lines were serviced by competitors through last June, nearly double their share two years earlier.

Faced with the first real threat to their grip on local service, Verizon and the other Bells are crying to the Federal Communications Commission (FCC) that they're forced to rent their networks at a loss. They want to go back to the way it was: higher fees for rivals and less choice for consumers.

Though a court-ordered decision won't come for a month, all five FCC commissioners have an opportunity to make clear which side they're on when they testify today at a hearing before the Senate Commerce Committee. If the Agency buys the Bells' argument, consumers stand to lose out on $9 billion in savings that competition could bring, according to a new report by the Competitive Telecommunications Association, which represents Bell rivals. In Michigan, for example, competition forced SBC Ameritech to cut rates 33 percent in June. In New York, where Verizon competitors provide 25 percent of dial tones, customers save $700 million a year.

The advantages of ensuring an open field are obvious. Even so, the FCC has a long history of undermining competition. Consider:

- **Cable TV.** For a decade starting in the mid-1960s, the FCC hampered development of cable TV to protect the interests of local broadcasters, who saw cable as a threat. Cable systems couldn't show movies less than 10 years old or duplicate programs on over-the-air stations. When the FCC finally lifted the roadblocks, cable service exploded.
- **Cellphones.** The FCC delayed cellphone service nearly a decade, costing the country $86 billion in economic benefits, according to a 1991 study by several economists. Then in the 1980s and early 1990s, the commission limited the number of providers to just two in most markets, thinking that best served con-

sumers. When the FCC abandoned those restrictions in 1994, competition took off, and prices plummeted.

- **FM radio.** The FCC hampered the spread of FM radio for decades. In 1945, some 55 stations broadcast in FM to 400,000 receivers; but then the FCC decided to give FM frequencies to TV. FM didn't recover from that setback to become a viable competitor to AM radio until the late 1960s.

The Bells hope to repeat history by persuading the FCC to let them charge competitors higher prices for access to switches needed to direct calls to the right phone. They claim that the states are forcing them to subsidize this piece of the network. What's needed instead, they argue, is for rivals to build their own networks to produce "sustainable" competition.

Both arguments fall flat. The states base their access fees on the Bells' own cost data. And sustainable competition won't emerge if competitors can't even get in the door. If the Bells are able to raise their fees, AT&T, MCI and others say they will abandon efforts to break into local residential markets, leaving consumers once again stuck with their monopoly provider.

What the Bells really want is as little competition as possible. Ever since the 1996 law was passed, they have tried to block rivals using an array of legal maneuvers and technical tricks. Along the way, they racked up an astonishing $2 billion in federal and state fines for undermining competition. They also broke promises to compete with other regional Bells in exchange for mergers that shrank the original seven Bells into four.

Despite that past, FCC Chairman Michael Powell appears sympathetic to the Bells' pleadings. Recently, he has called for companies to move away from renting phone networks and build their own.

Stripping away the current rules, however, would sacrifice real competition today for the promise of consumer choices sometime in the future. The Bells' track record suggests such a future is dubious.

States increasingly are appealing to the FCC to do the right thing for consumers. That's a powerful call the commissioners would do well to answer.

Chairman HOLLINGS. But residential phone service—in almost 40 states, the state public service commissions, with their local expertise, have set the terms by which the Bells must sell elements of their networks to competitors. And now the FCC wants to take away those elements. The Act permits this when the evidence shows that they are no longer necessary. But absolutely we are just getting in. The Bell companies still have at least 88 percent of that last line into the home and business.

The determination, of course, is best made by local experts on a market-to-market basis, and not by us up here in Washington. Yet, the FCC is prepared to make an across the board determination that some of the Bells' unbundled network elements are no longer necessary and disregard the opinion of the state public service commissions. This makes no sense. The PUCs are the ones the FCC listens to before approving a Bell for 271. This has happened 35 times since the current Chairman became a Commissioner. The PUCs are the ones who examine the economics and data to set the rates for the Bells' network elements. This framework was upheld by the Supreme Court. The PUCs should be the ones to determine when a Bell no longer has to provide a network element to competitors at a discount in a particular market, not the FCC.

But worse, in broadband, the FCC is about to create a monopoly in the small and medium business market and a duopoly in the residential market by just saying, "Well, wait a minute. Telecommunications is really information." Now, come on. I mean, I never heard of such shenanigans since I have been up here.

What does this mean? Without access to the Bell network for broadband, competitors will close up shop. Small and medium businesses throughout America will have one choice for their tele-

communications provider, and American homes will have, at best, two. This is not the Telecommunications Act as they intended. The preamble aspired about new telecommunications technologies—the word "data" or "Internet" and "advanced services," those words were mentioned in the hearings, in the bills, and on the floor over 400 times. The Act hinged on competitors having access to the Bell network on a just, reasonable, and nondiscriminatory rate whether that network carried a phone conversation or dial-up Internet service or high-speed data. This was not some hidden provision, some secret bargain reached in the dark of night.

And now, despite this measured process Congress created, five Commissioners appear ready to radically revise the rules of the game all in the name of broadband and parity. And while you are at it, you may eliminate the possibility that universal service could ever support broadband. You are going to cut off the access of disabled Americans to broadband services and thwart law enforcement access to high-speed communications in a time of terror, all protections that Congress intended to maintain in a high-speed world.

Let me stop there, and I will put the rest of my statement in the record, because you can see that we, at the committee level, are quite disturbed and concerned over the process as scheduled. For one thing, we have got—we have got—you know, Verizon is into long distance—we have got the Bell companies coming into long distance here in the District area. And we see, by the Chairman's prepared statement, that he is going to make a ruling in February so that they cannot get to it in March. I will have to find out in the morning paper. But we are having a dickens of a time here, at the congressional level, playing catch-up ball with the FCC, not administering the intent of Congress, but some wild ideas that they are supposed to promote jobs. You are supposed to promote competition—that they are supposed to promote investment—you are supposed to promote competition. And just at the time that the Act is really beginning to work, because of the delays of the Bell companies, now you are going to reward them and expand their monopoly.

[The prepared statement of Chairman Hollings follows:]

PREPARED STATEMENT OF HON. ERNEST F. HOLLINGS,
U.S. SENATOR FROM SOUTH CAROLINA

Today we hear from the five FCC commissioners who are faced with several pending proceedings that could radically revamp the future of the telecommunications industry.

Competition is finally taking root across America. Millions of Americans are signing up for cheaper local phone service offered by competitors and the Bells dropping their rates as much as 30 percent.

The Bells have received 271 approval in 35 states. They should be applauded. My BellSouth deserves particular praise, as they are the first to have achieved compliance throughout its region. Verizon is close behind and is already the 3rd biggest provider of long distance services.

As competition begins to flourish, however, the cries of the Bells grow louder. Their current strategy is to focus on two orders under consideration by the FCC that could cap competition in the telecommunications industry at the very time it is beginning to take hold.

Take residential phone service for example. In almost 40 states, the state PUCs, with their local expertise, have set the terms by which the Bells must sell elements

of their networks to competitors, who have signed up millions of local phone customers.

Now the FCC wants to take away some of those elements. While the Act permits this when evidence shows these elements are no longer necessary, that determination is best made by local experts on a market-by-market basis—not by those with offices overlooking the Southeast Freeway.

According to last week's *Wall Street Journal,* the FCC may make a national determination that some of the Bells' unbundled network elements are no longer necessary. Another Journal article urged consumers to sign up now for competitors' service before the FCC takes it away.

This makes no sense. The PUCs are who the FCC listens to before approving a Bell for 271. This has happened 35 times. The PUCs examine the economics and data to set rates for the Bells' network elements. The Supreme Court upheld this framework. Similarly, the PUCs should determine, or greatly influence when a Bell no longer has to provide an element to competitors at a discount in a particular market.

Turning to broadband, the FCC is poised to create a monopoly in the small and medium business market and a duopoly in the residential market by classifying broadband as an information service.

What does this mean? Without reasonable access under section 251 to the Bell network for broadband, you can forget about competitors. They will just close up shop.

This is not what the Telecommunications Act intended. The preamble aspired about new telecommunications technologies. The words "data" or "the Internet" or "advanced services" were mentioned in the hearings, in the bills, and on the floor over 400 times.

And the Act hinged on competitors having access to the Bell network on just, reasonable, and nondiscriminatory rates, whether that network carried a phone conversation, a dial-up internet service, or high speed data.

This wasn't some hidden provision, some secret bargain reached in the dark of night. This was section 251. That was how competition was going to develop. If a regulation was too stringent, the statute allowed forbearance to ease restrictions if that would be in the public interest.

And now, despite that measured process, the FCC is considering radically revising the rules of the game. All in the name of broadband and parity. This could also eliminate the possibility that universal service could ever support broadband, cut off access for disabled Americans to broadband services, and thwart law enforcement access to high speed communications in a time of terror—all of which Congress intended to maintain in a high speed world.

Chairman Powell testified in front of our Appropriations Subcommittee hearing last March and stated that the FCC's fundamental mission was to implement the Communications Act, as amended. He was right. And yet this month, I read in the *Washington Post* that one of those amendments, specifically the 1996 Telecommunications Act, was an "experiment" according to Chairman Powell.

This experiment is finally beginning to work for American consumers, by reducing at long last, the price of local phone service and providing meaningful choices.

We look forward to your testimony.

Chairman HOLLINGS. Senator McCain?

STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

Senator MCCAIN. Thank you, Mr. Chairman. And I want to thank the Commissioners for being here. For most of you, this is your first opportunity to appear before us since your confirmation hearing. We thank you for coming.

The telecommunications industry has been in a crisis for some time now. The effect has been disastrous for stockholders, who have seen trillions of dollars in capitalization evaporate. This crisis also threatens the future of American technological innovation as domestic suppliers lay off employees and cut back on research and development. Meanwhile, American consumers continue to face escalating rates for services.

From January 1996 to the present, the consumer price index has risen 17.4 percent. Cable rates are up 47.2 percent. Local phone rates are up 23.2 percent. Long distance rates are down 20 percent, although there are indications that long distance companies will be raising their rates in the very near future.

As stewards of U.S. communications policy, FCC Commissioners can have a tremendous impact on the telecommunications sector and the national economy. Never has this been more evident than now. Last week, an article in the *Wall Street Journal* speculating about your potential actions boosted certain stocks and deflated others. You face monumental decisions in 2003 that will shape the future of communications forever. I trust you will not make these decisions lightly.

Finally, I want to thank you again for being here, but I also would like to point out that one of the reasons why so much responsibility is borne by you is the failure of Congress to act legislatively. We continue to see competing pieces of legislation favoring one special interest or another because of massive campaign contribution, which then prevents us from coming together and agreeing on what is best for the American people. I hope that we can, as a Congress, reassert our rightful role legislatively, rather than depend upon the FCC, as well qualified and as hardworking and as dedicated as they may be.

I would urge my colleagues, since we will be asking questions of all five Commissioners, to make our opening statements as brief as possible.

Thank you, Mr. Chairman.

[The prepared statement of Senator McCain follows:]

PREPARED STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

Welcome, Commissioners. For most of you, this is the first opportunity you have had to appear before us since your confirmation hearing. We thank you for coming.

The telecommunications industry has been in a state of crisis for some time now. The effect has been disastrous for stockholders who have seen trillions of dollars in capitalization evaporate. This crisis also threatens the future of American technological innovation as domestic suppliers lay off employees and cut back on research and development. Meanwhile, American consumers continue to face escalating rates for services.

As stewards of U.S. communications policy, FCC commissioners can have a tremendous impact on the telecommunications sector and the national economy. Never has this been more evident than now. Last week, an article in *The Wall Street Journal* speculating about your potential actions boosted certain stocks and deflated others. You face monumental decisions in 2003 that will shape the future of communications forever. I trust you will not make these decisions lightly.

In particular, reports suggest that you will soon resolve a series of proceedings affecting local telephone competition and broadband services. In these proceedings, you face the difficult challenge of implementing the Telecommunications Act of 1996—which, in my view, is a flawed piece of legislation drafted by special interests. Though the Act itself states that it was designed to "reduce regulation," it has instead resulted in thousands of new regulations, massive litigation, and millions of dollars paid to lawyers and lobbyists. It took less than eight years to put a man on the moon, but as we approach the 7th anniversary of the Telecommunications Act, we have yet to see the fulfillment of the Act's stated goals—and the clock is ticking.

The same special interests responsible for drafting the Telecom Act still walk these halls. The result has been legislative paralysis. So now all eyes are on you. I ask you to look beyond these special interests, and make the decisions you believe are in the best long-term interest of the American consumer.

I look forward to your testimony.

Chairman HOLLINGS. Thank you.

The Chair has the following order—Senators Allen, Burns, Brownback, Wyden, Lott, Lautenberg, Dorgan, Breaux, Hutchison, and Boxer.

Senator Allen?

STATEMENT OF HON. GEORGE ALLEN, U.S. SENATOR FROM VIRGINIA

Senator ALLEN. Thank you, Mr. Chairman. Thank you for calling today's hearing. And I thank all our very much respected, esteemed FCC Commissioners for being here, Commissioners Abernathy, Copps, Martin, Adelstein, and all led by our very skillful and impressive Chairman, Michael Powell.

We are here to discuss the current state of the competition in the telecommunications industry.

We all know all the bad news—the job losses, the debt loads, the underutilization of capacity. And I think that one thing, though, that we all can agree on with this bad situation is that we all talk in a variety of different ways of deploying greater broadband capabilities around the country and making sure that those Internet connections will be available and utilized to help reinvigorate the growth and the technology in the telecommunications enterprises. And full deployment of broadband services clearly will substantially change and significantly impact our society in so many different ways, whether in education, healthcare, commerce, entertainment, or government services. Broadband deployment is a key aspect of improving our Nation's overall economy and competitiveness, as well.

Economists have talked about how many more jobs would be created, $500 billion annually by 2006, an increased GDP. All of this is obviously with the adoption of broadband, and promoting its deployment will help spur our Nation's economy now, and spur its growth and sustain it in the future.

Now, during the past several years, much of the debate in Congress over broadband services has focused on whether we should support competition, versus deregulation, of telecommunications as the best mechanism for encouraging broadband deployment. In my opinion, the costly, strenuous debate that we have seen has reached an unproductive stalemate, and fails to consider that other technologies are available that can jumpstart consumer-driven investment and demand in broadband services.

I believe what has been missing from this discussion is the relentless and invigorating power of innovation and promise of new technologies. And while I support competitive telecommunications environments and have been an advocate of Federal deregulation, I think it is beneficial to shift the policy discussion away from this debate and focus on something that is actually positive that Congress can do to foster innovation, stimulate technology in telecom sectors, and encourage the adoption of broadband services.

In an effort to move away from this stalemated debate and work within the carefully crafted framework of the 1996 Telecommunications Act, today I will be introducing legislation with Senator Boxer to foster a third alternative mode of broadband communication by making more unlicensed spectrum available for exciting

new wireless broadband technologies. This means that you can move around with your laptop in your house the same way that you move around with your cordless telephone. The same would apply if you are in an airport or any other Wi-Fi enabled hotspot. In my view, these innovations in advancement in the wireless area, the unlicensed wireless area, or radio-based devices, or otherwise referred to as Wi-Fi, offer an additional means of delivering data at high speed and also allow new business models for delivering broadband connectivity to emerge. By using existing advances in technologies that are spectrally efficient, like cognitive radios and dynamic frequency selection, and creating an environment that encourages further innovations in wireless broadband devices, our hope—Senator Boxer's hope and mine—with this legislation is to increase consumer demand of broadband devices and stimulate telecom and technology sectors, as well as the overall economy.

Now, I understand, Mr. Chairman that the focus of this hearing is competition in the communications—telecommunications areas. It is a very important proceeding currently before the Commission these days. But I am hopeful that the Commissioners will reserve some time to comment on emerging technologies, such as Wi-Fi, since our legislation will certainly involve the Federal Communications Commission.

Thank you very much.

Senator MCCAIN. I would, again, urge my colleagues to make their opening statements short. It is now 5 minutes, 10 minutes, of 10 o'clock and we have not yet heard a word from the witnesses.

Chairman HOLLINGS. Right. Senator Burns?

STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Senator BURNS. Thank you very much, Mr. Chairman. This is the way to start out the new year. I will submit my statement.

I did want to pick up on what Senator Allen said, and I have a great deal of interest in that, and also your comments on the history of the 1996 Act. I think four years is pretty conservative. I think it started back in 1989 when, in this room—and I was sitting way down there—we offered a little competition to the cables. That is when I think that we realized that we were going to have to do something about the telecommunications industry, we had a 1935 law trying to regulate 1990s technologies, and it just was not working.

I will be offering a broadband bill later on today—we are introducing with my colleague, Senator Baucus—and it is similar to the bill that I proudly cosponsored with Senator Rockefeller in the last session, and it has to do with a, to create a temporary tax incentive for providers in the form of expensing, allowing the immediate deduction of capital expenditure in the first year of service rather than depreciating an investment over time.

We have taken a look that, Senator Baucus is one of the primary people on the Finance Committee. We think it has a good chance of passage, and I think it offers a way that we will see build-out, especially in the rural areas, as the recovery of some of that money that is invested.

When providers build out next-generation broadband networks, which are typically more expensive, the bill would provide a 100 percent expensing. This legislation generally mirrors the broadband tax-credit legislation that, of course, Senator Rockefeller and I introduced in the last Congress. I'm looking forward to that.

I'm continuing to work on E–911. I think from the tenor of the questions today, you will find that you will just about understand what the opening statements are all about.

Again, I thank you, Mr. Chairman, for holding this hearing, and I thank the Commission for coming down today. We do not do enough of these kind of visits, and it seems like it always attracts quite a lot of crowd whenever we do.

So, thank you very much, and I will submit the rest of my statement.

[The prepared statement of Senator Burns follows:]

PREPARED STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Mr. Chairman, thank you. I am pleased that we have begun the new Congress with a hearing of such importance and with such a distinguished panel of Commissioners.

In 1996, my colleagues and I wrote a law to bring telecommunications competition—and the lower prices and innovative services that come with it—to all Americans. In doing so, we were very conscious of the tremendous benefits that resulted from bringing competition to the long distance market. Indeed, the 1996 Act did bring positive economic results and helped to fuel the economic boom of the late 1990s. There was a telecom explosion in the marketplace, even as parties pursued litigation to settle once and for all a regulatory scheme that would be used to implement the Act. It brought us incredible, cutting edge technologies and new services at affordable prices.

Back in 1995 and 1996, we realized that local phone competitors would need some help to compete against century-old incumbents, and that they would need time to gain customers before they could be expected to stand on their own. We also realized that we needed to provide incentives to the incumbents to open their networks to competition. Recognizing that simple marketplace reality, we provided competitors with three different ways to enter the market and laid out a framework that would allow the Regional Bell Operating Companies the opportunity to enter into the long distance market. We also struck a balance between federal and state authority that gave the states an important and continuing role in promoting local phone competition.

I continue to believe that the Act is fundamentally sound and that its core principles should be implemented. I look forward to the feedback of the Commissioners as they complete their work on the difficult and complex triennial review process. Like the Act itself, any decision on local competition rules should be the product of consensus on the Commission. Further, it should go without saying that any such decision should be true to the words and spirit of the Act.

One of my top priorities is making certain every household and business in Montana has access to high speed Internet service. We must make certain that everyone in rural America has access to the same digital services enjoyed by those who live in urban areas. We can't effectively grow our economy, create new jobs, guarantee access to advanced health care services and provide new educational opportunities to our children until we make sure high speed Internet access is available across this Nation.

The availability of broadband, particularly in rural areas, is an issue about which I feel very strongly, and upon which I will be very focused this year as Chairman of the Senate Communications Subcommittee. In this regard, I want to take a moment to make my colleagues aware of legislation I am introducing today to provide tax incentives to accelerate the deployment of high-speed Internet access in Montana and across the country.

The broadband bill I am introducing today with my colleague Senator Baucus and a bipartisan coalition would create a temporary tax incentive for providers in the form of "expensing"—allowing an immediate deduction of a capital expenditure in the first year of service rather than depreciating that investment over time. In the case of "current generation" broadband investments in rural and underserved areas,

the bill would allow 50 percent expensing of the investment, with the rest to be depreciated according to normal depreciation schedules. When providers build out "next generation" broadband networks, which are typically more expensive, the bill would provide for 100 percent expensing.

This legislation generally mirrors the broadband tax credit legislation introduced by my friend from West Virginia, Senator Rockefeller, in the last Congress, of which I was a proud and original cosponsor. I am going to be working on this issue very aggressively in the 108th Congress as well as a number of other important telecom initiatives including spectrum reform, eliminating the scourge of junk e-mail and continuing E–911 implementation issues. I intend to unveil the full Communications Subcommittee agenda for the 108th Congress, the "NexGenTen," tomorrow morning. This agenda will focus on bringing the benefits of the information age to all Americans.

One area which is benefitting from healthy competition is in the area of video programming. A decade ago if you had problems with your cable service, you really didn't have a good alternative. But that's not the case today. EchoStar and DirecTV offer 500 channels of digital video and CD quality music. In fact, close to 35 percent of Montana households subscribe to a direct broadcast satellite service, the highest penetration rate in the Nation. Additionally, even though cable doesn't reach every household in Montana, where cable is deployed, they compete head to head with satellite providers. That competition makes certain my constituents have a choice. The market discipline imposed by competition is far more effective in protecting consumers than any government regulation. That is one of the reasons I have been such a strong proponent of Multichannel Video Distribution and Data Services (MVDDS) and co-sponsored legislation in the 107th Congress that would have allowed this new entrant to compete in the marketplace.

There are other wonderful side effects of competition . . . one is that it forces companies to innovate in order to keep their customers and attract new ones. That's just what the cable industry and DBS providers are doing; investing billions to upgrade their systems in order to offer new services like high speed Internet access to thousands of Montanans that would otherwise go without.

Finally, I should add a note of good news, as it is always gratifying when we pass a piece of legislation and it accomplishes our original aim. As we discuss rural broadband deployment, I want to mention that because of the Orbit Act we now have a new strong broadband provider for rural areas. After reaching an agreement with Intelsat, Liberty Satellite Technology—a subsidiary of Liberty Media and the National Rural Telecommunications Cooperative—will offer service to millions of rural residents and small offices which have no access to high quality affordable broadband service that is comparable to that offered in urban areas. If we had not taken action to open up the satellite market, Intelsat and its vast satellite system would not be able to be used to serve rural America.

I look forward to the testimony of the distinguished panel today on these items of such importance to the economic health of our Nation. Thank you, Mr. Chairman.

Chairman HOLLINGS. Thank you.

Senator Brownback?

STATEMENT OF HON. SAM BROWNBACK, U.S. SENATOR FROM KANSAS

Senator BROWNBACK. Thank you, Mr. Chairmans. I appreciate you holding this hearing. I thank the Commission for being here. I think you are going to hear a lot of statements, because we do not do this often enough, as Senator Burns said, and so we have got some things to put forward.

The Commission, in my estimation—I have got a couple of items I want to specifically hit with you—really needs to be bold and decisive at this point in time. You have got several big issues in front of you. You are going to hear a lot of us talk about broadband facilities. I clearly think we need to move forward in this area. I have put forth legislation in the past. I'm going to continue to work on that so that we can put inter-platform competition into overdrive in an economically sound manner providing consumers with un-

precedented and lasting competition and the benefits that will revitalize telecom and the technology economy.

I recently signed a bipartisan letter to the Commission with 12 of my colleagues requesting the Commission take special interest in its treatment of fiber to the home to help make this happen. That is one area I wanted to mention to you.

Another is on the UNE–P regulatory construct. It is my understanding that the Commission may be considering phasing out UNE–P by removing switching from the list of available network elements for competitive use. I would welcome such a reform. It is clear to me that if Congress intended for UNE–P to exist, we would not have included a separate resale provision in the Act. Such action will help encourage facilities-based competition in the telephone market, which reflects the viable economic and regulatory foundation that Chairman Powell has mentioned.

I think this is something that needs to be moved forward aggressively and not phased in on a multi-year basis, if at all possible.

TELRIC reform, either going forward or in general, must be included in efforts by the Commission to revive this sector, in my estimation. TELRIC can be revised and implemented faster than any unbundling deregulation and make a positive impact on the market sooner. Such reform must include the elimination of the hypothetical cost model and reliance on actual cost. TELRIC reform will enable incumbents to invest in new technologies and services in competition with other platforms, yet still permit competitors to use those facilities that continue to qualify for unbundling to gain a foothold in the marketplace.

Now, if the Commission's efforts to revive the telecom sector do not include the elimination of the current TELRIC pricing methodology, I fear this Commission will not or cannot live up to its important responsibilities at this juncture. I really think this is a key place to focus on.

And finally—and this is something I have visited with a number of you about at different times—for more than 50 years, regulations regarding indecency have existed on the books at the FCC. And yet in recent years, it appears that this portion of the Commission's job description has been forgotten.

As medical studies continue to mount, more than 3,500 already—and we just saw a front-page story in *USA Today* yesterday talking about violence in our children at a younger age—3,500 studies showing a correlation between viewing violence and violent behavior—3,500 studies—which is stronger—and that correlation is stronger than that of tobacco smoke and lung cancer. So clearly we must do something about the amount of indecency that plagues the airwaves.

Now, this is not about censorship or government meddling, but about remembering that freedom of expression is not immunity from criticism, and particularly here when it involves the public airwaves.

I would really encourage the Commission to look at this area, given the huge amount of medical data now available of what is happening when we entertain our children with violence.

Thank you, Mr. Chairman.

Chairman HOLLINGS. Thank you very much.

Senator Inouye had a conflict, and I want to, unless there is an objection, include his statement in the record.

[The prepared statement of Senator Inouye follows:]

PREPARED STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Mr. Chairman, I want to thank you for holding this hearing. I cannot recall when we have held a single communications policy hearing with as much import. I remember when we passed the Telecommunications Act of 1996. It passed a Republican Senate and a Republican House nearly unanimously. I also remember when the FCC began to implement the Act. It did so nearly unanimously. Yet today, I am disturbed to read in virtually every press account that the FCC appears ready to radically reshape the industry through several pending proceedings, absent the harmony and agreement among the five Commissioners that should accompany decisions of such magnitude.

If this Commission embarks on the course it has set for itself, and it does so in partisan fashion, then those at today's witness table who do so will know where to look when (not if) their actions extinguish competition in the telecommunications industry—the mirror.

As a Senior Member of both the Authorizing and Appropriating Committees that oversee the FCC, I am appalled. I am appalled that the FCC stands ready to ignore the existence of millions of new local phone customers who have seen their bills slashed by as much as 30 percent. Instead, I understand that the FCC may cap such competition customers by eliminating the manner in which competitors access the Bell network to compete for customers—so called UNE–P. Apparently the FCC believes that if we deregulate significantly now, we will reap the benefits of some imagined competition later. A majority of FCC Commissioners may believe that. But the Telecom Act did not direct such a course. It instructs the FCC to deregulate the Bells incrementally, and only upon a finding that sufficient competition has developed to withstand a Bell strengthened by such deregulation.

Moreover, such a finding is best made on a state by state and market by market basis. The state PUCs are the best judge of whether the Bells should receive regulatory relief in a particular market just as they are best positioned to provide the first determination as to whether a Bell has opened its market. And yet, I'm told the FCC may ignore the expertise of the state PUCs and simply make a national, uniform decision to deregulate the Bell network. It stands beyond reason to assume without any evidence or market analysis that deregulation that may be justified in New York is similarly justified in a small town in middle America.

As if that were not enough, the FCC stands ready to flagrantly contravene the Communications Act by characterizing broadband as an information service—an action that bears no justification and will slam the coffin shut for the competitive small and medium business telecommunications carriers that compete with the Bells in market after market. The cornerstone of the Telecommunications Act was and is access to the Bell network—broadband or no broadband.

Let me be perfectly clear to each of the Commissioners testifying today. Your job is to implement the statutes we in Congress pass, regardless of your individual views as to their merit. And from what I understand about your pending proceedings, you appear to be ignoring the jobs you were appointed to do. I look forward to the testimony of today's Commissioners. They have a lot of explaining to do.

Chairman HOLLINGS. Senator Wyden?

STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM OREGON

Senator WYDEN. Thank you, Mr. Chairman. I will be brief, because I have really only one point right now.

The Senators have noted that there are a host of telecommunications issues coming down the track at the Federal Communications Commission. And my concern is that the big and powerful seem to be driving the train, and that the consumer is being left in the caboose. And, specifically, if you look at the key issues, the big media companies want the freedom to get even bigger. The big phone companies want changes to the telecommunications rules.

Big Wall Street interests are weighing in, hoping to boost lagging share prices.

And what I hope the Federal Communications Commission will address this morning is how these changes are going to benefit the consumer, because that is what the 1996 Act was all about. I certainly do not support needless regulations. There are areas that are ripe for innovation. But it just looks to me like the consumer is being left in the caboose on the telecommunications track, and I would like to see how their interests are being protected in the course of these debates.

Thank you, Mr. Chairman.

Chairman HOLLINGS. Thank you.

Senator Lott?

STATEMENT OF HON. TRENT LOTT, U.S. SENATOR FROM MISSISSIPPI

Senator LOTT. Thank you, Mr. Chairman and Senator McCain, for going forward with these hearings even under these unusual circumstances, because I think it is very important that we have early hearings and do everything we can to understand what the Federal Communications Commission is doing, and how they view the present condition of the very important sector of our economy, telecommunications.

I understand that it has been probably at least three or four years since we have had all the Commissioners from the FCC before this Committee, so this is almost historic, and I'm looking forward to hearing from all five of the Commissioners.

You know, we are very interested in the current state of competition in the telecom industry. It is one area that I have obviously been keenly interested in, and I am taking every opportunity to discuss this issue with all sectors of the economy.

I was one of the Senators that worked on the Telecom Act of 1996, worked with Senator Hollings on trying to get the compromise put together that led to the passage of legislation. And so, I'm now focused on how that competition is progressing and also wanting to understand and diagnose the problems in the industry so that we can pursue the best possible policies or laws in the government to encourage competition and expansion and good services for the consumers. That is our ultimate goal.

So, I feel like progress is being made, in that now we see that section 271 approvals are being granted to the Bells, and I believe that they are offering long distance services perhaps—or have been approved to do that in 35 states. Also, the traditional long distance companies are now beginning to compete aggressively for a slice of the local market in a number of states.

Despite that, there are still, obviously, a number of problems. This is such a dynamic field. So much is changing, so much is happening. I must confess, when we were working on the Telecom Act, we were still thinking in terms of just basic telephone service and did not anticipate the explosion of innovation and options that are available.

So this is a very important hearing, and I look forward to hearing from the witnesses, and I do have some questions that I will propose at that time.

Chairman HOLLINGS. The Committee is informed that Senators Lautenberg and Senator Sununu will be assigned to our Committee. We welcome them, and we will recognize them just for a word so they can welcome the Commissioners.

Senator Lautenberg?

STATEMENT OF HON. FRANK LAUTENBERG, U.S. SENATOR FROM NEW JERSEY

Senator LAUTENBERG. Thank you, Mr. Chairman. I know——

Chairman HOLLINGS. Turn your mike on.

Senator LAUTENBERG. I will tell you, you learn—I just learned something about telecommunications, Mr. Chairman.

[Laughter.]

Senator LAUTENBERG. And I thank you very much, and Senator McCain, for permitting me to join you today, when officially I'm still not here. But the fact of the matter is that this is where my Senate career started, and it took me 20 years, Mr. Chairman, to get back here again. And I am pleased to be here and to walk into this very complex and very difficult area of consideration.

The fact is that I—in keeping with Senator McCain's admonition, because we do not know who the next Chairman might be, I want to—I will put my statement into the record.

[The prepared statement of Senator Lautenberg follows:]

PREPARED STATEMENT OF HON. FRANK LAUTENBERG, U.S. SENATOR FROM NEW JERSEY

Mr. Chairman, I want to thank you and all the Members of the Commerce Committee for letting me share the dais with you today.

I was a Member of this Committee early in my Senate career and I am pleased to be rejoining it. The Committee has jurisdiction over many issues and agencies I care a great deal about and are so important to my state, such as rail, aviation, ports, the Coast Guard, fisheries, transportation of hazardous materials, consumer rights, science, and the subject of today's hearing: telecommunications.

The Telecommunications Act of 1996—which I supported—promised that the former "Baby Bell" companies would be allowed to offer long-distance telephone service in return for leasing their local lines and switches to competitors at reasonable prices. Congress wanted to promote competition in local, cellular, and long-distance markets.

It appears that we succeeded with regard to cellular and long-distance service. According to the Federal Communications Commission (FCC), rates for cellular phone service dropped by 32.8 percent—nearly one-third—between 1997 and 2001. Long-distance rates dropped 12.1 percent. These reductions are saving consumers money in New Jersey and across the Nation.

We haven't succeeded when it comes to local phone service, the cost of which rose 14.9 percent between 1997 and 2001, again according to the FCC. This is a big problem, especially in New Jersey. Consumers in my state pay some of the highest charges nationwide for local phone service—often $70 per month or more. This is a huge burden for people on a fixed income, especially the elderly.

It seems to me that consumers would benefit tremendously from having a variety of companies competing with each other to offer the best quality local phone service at the lowest prices.

I'm curious to hear from the Commissioners whether they disagree with my assessment.

In some places, that is beginning to happen. AT&T, MCI, and some other companies (large and small)—aided by state utility commissioners—have gained access to local phone service markets in some states, including New Jersey this past summer. It appears that the increased competition—where it has taken hold—is driving prices down—in some instances, by as much as 30 percent.

I understand that officials for the Bells argue that forcing them to lease their local lines to competitors at lower prices will make it difficult for them to make the capital investments necessary to offer broadband (high-speed Internet access), and that

they are/will be facing enough competition from wireless companies and satellite-based service providers. I'm not convinced of the veracity of that argument and am anxious to hear what the Commissioners have to say about the subject. Suffice it to say that I think consumers need a break from high-priced telephone and Internet access bills and the best way to do that is to foster competition.

Thank you again, Mr. Chairman—both for holding this immensely important hearing and for allowing me to participate as a "Member-in-Waiting."

Senator LAUTENBERG. But just a question, Mr. Chairman, because there are so many issues in front of this Committee that I am interested in, but, in particular, the one I hear so much about at home is telephone rates. Why does it cost so much in the State of New Jersey, the ninth largest state in population of the country, for our telephone service? And frankly, there is one place that I think we can look to and say, "Well, here is a reason. It is not competitively inviting." And why is it not?

Mr. Chairman, it is nice to see all of you, and I hope this will not be our last meeting. I doubt that that would occur so quickly. But the fact is that, as I look, Mr. Chairman, Chairman Powell, at the principles that you have detailed as to where you want to be with the prospective rule change, and I see "expand the diversity, variety, and dynamism of communication, information, entertainment, and empower consumers, promote universal deployment of new services to all Americans," I think that is in substantial contradiction, Mr. Chairman, to the proposal that we have tentatively in front of us.

The distinguished Chairman of this Committee, who worked long and hard to get the 1996 bill into place, had something quite different in mind, as we heard him say today. And frankly, I do not understand why we are taking a rules course to make changes that ought to be changed, if at all, within the Committee—make the recommendations here. Let us see whether or not there are amendments to the bill that ought to be considered.

So I hope to hear, Mr. Chairman, that you will present your ideas as something that you would like considered by the Committee, and not impose a de facto change in the rules when they were so arduously defined in the first place.

And, Mr. Chairman, I thank you very much.

Chairman HOLLINGS. Senator Sununu?

STATEMENT OF HON. JOHN E. SUNUNU, U.S. SENATOR FROM NEW HAMPSHIRE

Senator SUNUNU. Thank you, Mr. Chairman. It is a pleasure to be here. And I would only note to begin with that this is the third hearing that I have been invited to participate in as a non-member of the Committee, and you are very generous in doing so. I look forward to participating as a Committee Member.

I would want to underscore what Senator Wyden said to the Commissioners, and that is that as we go through this hearing and the Commission goes through the rulemaking, the consumer remains forefront in our minds. We are here because of the rule changes that are being contemplated and that will be in front of the Commission in the months ahead. When we change the rules, we change the nature of competition. When we change the nature of competition, we affect the consumers. And we absolutely need to think about how the consumer is being effected with these changes.

I would highlight two particular areas, where, as we go through the hearing and the rulemaking, you bear in mind. First is preemption and the role of the local regulators. Preemption is something that would concern me as a legislator. I hope it concerns you as a Commissioner, in that if we preempt, we do it for, I think, very sound and solid reasons, not because we do not trust local regulators to make a good decision about whether or not true competition exists in New Jersey or New Hampshire or Texas or any other state. I think we always have to defer to those local regulators, who are public servants, and have our public sentiments at heart.

Second is the nature of competition. I have seen discussions and am aware of discussions about whether or not we favor inter-modal over intra-modal competition, and I just want to underscore that the simple act of choosing one versus the other biases the entire competitive playing field. It preempts new entrants, it can preempt new technologies that we might seek to have investments made. And before we start, before we head too far down the road, we need to think about how that simple act of choosing what we might think would be the best environment for competition, by definition, prohibits certain competitive practices from taking place.

Thank you very much, Mr. Chairman.

Chairman HOLLINGS. Thank you.

Senator Dorgan?

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. Thank you very much.

This is a great opportunity for us to have some time with the Commissioners. And I want to say that the 1996 Telecom Act, which I was a part of writing, was designed to foster competition and make a number of changes that were very important, both for consumers and also for those involved in the industry itself.

I worry that there are three areas in which, if observers who watch the Commission closely are accurate, three areas that are going to set us up for a train wreck. One is the area of competition.

I think the UNE–P process, if the wrong decisions are made there, I think you undermine and pull the rug out from under the potential for competition in local exchanges. And if the incumbent companies are losing money, and it is a pricing issue, let us deal with pricing, but let us not decide to pull the rug out from under this in a way that will destroy competition. We have not yet achieved the fruits and benefits to the consumer of real competition of local exchanges. That has not happened. And the Commission has the responsibility, in my judgement, to take actions to help us foster that competition, not thwart it.

Second, in the area of universal service, time and time again over the years, in my judgment, the Federal Communications Commission has narrowed the base of opportunity to provide the funding that is necessary for universal service. Describing the wireline broadband as an information service and, therefore, out of the reach of universal service contribution, in my judgment, is a predictor for failure of the universal service down the road. That cannot happen if we care about much of this country and access to communications in much of the country.

And finally, the area of concentration. If the Commission is headed towards eliminating some of the barriers to additional concentration, that is a huge mistake. And I read what is being said by some Commissioners and where experts think the Commission is headed. Prior to the 1996 Telecommunications Act, the top radio station group owned 39 radio stations. Now the top group owns 1,100 radio stations.

In my small State of North Dakota, the four largest stations have 31 commercial radio stations. One company owns 13 of them, including all six commercial stations in one city.

Now, I can talk about the national statistics as well. They are much more ominous. But the fact is, we are headed in exactly the wrong direction. In these areas, you need to have your foot on the brake, not your hand on the throttle. And I worry very much in all three of these areas, unless changes are made, we are headed for a train wreck, and I want to talk about that during the question period, Mr. Chairman.

But this is very important. This can only work if the FCC helps make it work. And Senator Sununu and Senator Wyden and others are right about this. There is a great deal at stake here for the consumers in this country. We will never get competition unless we have the right decisions made by the Federal Communications Commission.

Chairman HOLLINGS. Very good.

Senator Breaux?

STATEMENT OF HON. JOHN B. BREAUX, U.S. SENATOR FROM LOUISIANA

Senator BREAUX. Thank you, Mr. Chairman and Senator McCain, for bringing us together. And, Mr. Chairman of the Commission and members of the Commission, welcome. We are glad you are here. Good luck. You have one heck of a challenge over the next six months. You are going to have a million different ideas about what you should be doing coming from a million different areas. I think your role is incredibly important, and the time on the clock is ticking very rapidly.

You know, some may say you should not be involved in this at all. And I would make the point that, under the D.C. Circuit Court ruling, if you do not get involved, particularly in the unbundling areas for the local telephone exchange, there will be no rules at all, because the District Court has made it very, very clear that the previous rules are not constitutional. So it is absolutely imperative that you do start moving in this direction or there will be no rules at all in some of the most important areas.

I think Congress has proved over the last several years that we cannot legislate again on this issue. I mean, we saw the trillions of dollars being spent by all of the outside groups in advertising about what Congress should be doing on a most incredibly complex set of rules and legislative dictates, and we were not able to do anything. Therefore, you, as an independent regulatory agency, are going to have to, I think, become involved under the existing laws to try and create what I would call a level playing field.

Now, everybody can look at a level playing field and see it differently, but it seems to me that when one side—for instance, the

cable companies—has almost no rules concerning their broadband coverage and their telephone coverage, and another group of providers are under all types of rules, including providing access to their equipment at below cost, that is not a level playing field.

How do you fix it? I do not know. If I knew, I would offer some great legislative proposal. What we basically tried to do last year is to say, "Look, FCC, go out and try and create a level playing field." It is not going to be easy. It is a hell of a challenge. But it should not be a political challenge. It should be a challenge based not on who can run the most ads, but who can do the best job. And I hope that you all will be able to use the short time frame you have to come up with some recommendations that accomplish that.

Thank you.

Chairman HOLLINGS. Senator Hutchison?

STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM TEXAS

Senator HUTCHISON. Thank you, Mr. Chairman.

I will not repeat what many of you have said, except to say I certainly support legislation that gives broadband regulatory parity regardless of how you get your Internet service. Broadband is the future of the industry, and I hope that you will move ahead with further broadband deregulation.

The 1996 Act, which all of us participated in, was meant to give you a stairstep and a game plan so that everyone would know what the rules were and no one would be able to get an advantage and it would be a level playing field. I think the time has come to fulfill the intent of the Act.

I want to make a further comment on a different issue because we have the Commission here, and that is that we understand you are currently evaluating your media ownership rules. And as you review these rules, including the 35 percent ownership cap and the newspaper/broadcaster cross-ownership rules, I hope that you will carefully weigh the adverse effect of relaxing these very important rules. When it comes to the primary source of news in any community, I think it is most important that we preserve local and diverse voices. Encouraging local competition and preventing one company from having too much control of the content in a single media market is essential for the best interest of consumers and well informed consumers in our country.

Thank you, Mr. Chairman.

Chairman HOLLINGS. Thank you.

Senator Boxer?

STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM CALIFORNIA

Senator BOXER. Thank you, Mr. Chairman. I ask unanimous consent to place my statement in the record.

Chairman HOLLINGS. Included.

[The prepared statement of Senator Boxer follows:]

PREPARED STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM CALIFORNIA

Thank you, Mr. Chairman, for calling this hearing. It provides us with a rare opportunity to hear from and question all five FCC Commissioners.

I look forward to a lively discussion on the state of competition in the turbulent telecommunications industry and how we can best help consumers. Next month, the Commission may vote to eliminate the rules that are now creating local phone competition and competition in telephone Internet broadband service. I have three specific areas of concern about how such a decision would affect consumers:

- First, it is my understanding that competing companies led the way in delivering innovative DSL broadband services to consumers. I am concerned that this kind of competition could be lost and then innovation will be lost.
- Second, I understand that some Commissioners believe that competition among telephone companies is unnecessary on the theory that there is competition among telephone, cable, and wireless companies. But the incumbents still control the vast majority of phone lines to the home and nearly half of California lacks access to cable Internet broadband service. I am concerned that the Commission may be relying on theoretical competition rather than what is actually available in the market.
- Third, I am concerned that the Commission does not adequately appreciate the role of state regulators in protecting consumers from poor service quality and abusive business practices in communications services. I hope the Commissioners will allow state regulators to continue protecting consumers.

I raise these issues because it is our responsibility to ensure that the Commissioners frame their decisions with a focus on consumers.

On another matter Mr. Chairman, I am also interested in hearing the Commissioners's views on the "Jumpstart Broadband Act" that Senator Allen and I will introduce today. Our bill would make more spectrum available for technologies like wireless fidelity in order to help jumpstart the broadband market. It would also direct the FCC to create rules to ensure that devices operating in this spectrum cooperate with each other and not interfere with Department of Defense systems.

If our bill succeeds, then we believe that the broadband monthly fee will be far more attractive to consumers as they will be able to wirelessly connect an array of devices by a simple attachment to their broadband connection and card in their digital device (hold up card). Also, cities like Long Beach are using this technology as an economic development tool to wirelessly connect people downtown. In November, my staff made a discussion draft of the bill available to the Commissioners and we made an updated draft available last week. I would appreciate hearing their feedback during the question and answer period.

I also hope that we can hear the Commissioners' views on the effects of changing the rules that protect citizens from excessive concentration of major media ownership in fewer and fewer hands. When the rules were changed in the 1990s on radio ownership, the resulting mergers led to 30 percent fewer radio station owners than there was in 1996. I wouldn't want to see that kind of decline in the ownership over news outlets where, for example, one company could own ABC news, a major newspaper, CBS news, and CNN. I am deeply concerned about what such concentration would mean for citizen access to diverse viewpoints and the possibility that it would increase the likelihood of the press driving rather than delivering the news.

Last, I have to ask the Commissioners for their perspectives on how we can work together to minimize digital piracy. It seems to me that Digital Television will be welcomed warmly by consumers for two reasons. The first is that the technology means consumers will enjoy superior sound and pictures. The second, is that consumers will have a much wider array of programing choices. But if that content—with its superior sound and pictures—is vulnerable to piracy, producers, directors, writers and actors may make a lot less of it. Unless we can agree on a way to prevent piracy, we could see the range of new productions sharply diminished just as the ability of consumers to enjoy them is greatly increased.

Mr. Chairman, thank you again for holding this hearing. I look forward to working with you to protect consumers and help jumpstart this vital industry.

Senator BOXER. I will speak for about two minutes here.

First of all, I think we have heard some words of wisdom from colleagues on both sides of the aisle, and it always makes me feel good about this Committee that we can do that, and it makes me proud.

I think the issue of the day for me is consumers. That is it. That is why I'm here. And that is crucial. And also, competition is crucial.

I want to say to all five of you, welcome. And I want to say how important your work is to my state, the largest state in the union—35 million people really watch everything that you do.

I want to make a point here about competition. I understand that some Commissioners believe, or may believe, that competition among telephone companies is unnecessary on the theory that there is competition among telephone, cable, and wireless companies. What is important to note is that, in my state and in many states, the incumbent companies still control the vast majority of phone lines. And in my state, nearly half of California lacks access to cable Internet broadband service. So there is theoretical competition, and there is real world competition, and I hope you will think about this.

I also agree with Senator Sununu's comments about looking carefully at what our states are doing to protect consumers. You know, all the wisdom does not reside here. We have good people at home, and I want to make sure that the consumers have that layer of protection.

I want to thank Senator Allen. We have joined together on our Jumpstart Broadband Act, and we really believe strongly, we hope you will look at this—that if our bill succeeds, we will, in fact, jumpstart broadband service. This is just a little card right now. Eventually, it will be built into the computers. But you will slide this into your computer, and you can access the Internet that way if we give some more spectrum for these Wi-Fi devices. So we are excited about this, and we hope that we can get that bill through this Committee, and onto the floor. We hope you will help us with it.

Last two points. I agree with Senator Hutchison's comments about more and more mergers. We could have a situation where just a couple of companies control all the news outlets. That is not healthy for the greatest democracy in the world. So I hope you will look at that, as well as digital piracy. Too many issues for too little time, but thank you very much.

Chairman HOLLINGS. Thank you.

Senator Smith?

STATEMENT OF HON. GORDON SMITH,
U.S. SENATOR FROM OREGON

Senator SMITH. Thank you, Mr. Chairman.

I would like to join my colleagues in welcoming the Commission. We appreciate the important work that you do, and it's probably never been a more important time for your Commission. I think if I have learned anything in six years in the Senate, it is that there are many good ideas, and many things well intentioned, but passing them into law is very difficult. And there are few issues I have ever tried to grapple with more difficult a resolution than the whole broadband issue. And so the work that you are doing now and the proposals that you are making, frankly, are where the action is, because our ability to come to a consensus here is certainly

unlikely, in my experience on this Committee, because there are some very well intentioned, ideas, but certainly at cross-purposes.

I would like to introduce, Mr. Chairman, into the record, if I may, a letter I received from the High Tech Broadband Coalition that is an association——

Chairman HOLLINGS. It will be included.

[The information referred to follows:]

Hon. GORDON SMITH,
Senate Committee on Commerce, Science, and Transportation,
Washington, DC.

Dear Senator Smith:

As the Committee on Commerce, Science, and Transportation prepares for next week's important hearing on the state of the telecommunications industry, and as you prepare your opening statement and questions for the witnesses, we would like to advise you of the policy changes that the High Tech Broadband Coalition (HTBC) strongly believes the Federal Communications Commission needs to make in order to foster broadband competition and deployment, a key to national economic recovery and growth.

HTBC represents the leading trade associations of the computer, telecommunications equipment, semiconductor, consumer electronic, software and manufacturing sectors—a coalition of trade associations representing over 15,000 companies that participate in the non-carrier broadband "value chain." HTBC believes that the best way to achieve widespread adoption of broadband is to embrace the sustainable inter-modal competition that has developed in the broadband market—a market that is distinct from the legacy voice market. Moreover, we believe that strengthening such inter-modal competition will result in lower prices and increased quality for cable television, high-speed Internet access, and basic telephony.

HTBC is very concerned about the impact current regulations are having on new investment in broadband facilities. For example, in part because of regulatory disincentives and continued uncertainty about the future regulatory structure, incumbent local exchange carriers (ILECs) reduced their capital expenditure (capex) budgets in both 2001 and 2002, and are doing so again in 2003. Some carriers may reduce capex budgets this year by up to 30 percent. Without regulatory changes, industry capital expenditures will plummet further, declines in manufacturers' research and development (R&D) spending will persist, job losses will continue to mount (already well over 500,000 in the vendor/supplier community alone), and consumers will lose out on new services. In short, we believe that regulatory reform is absolutely necessary to stimulate broadband deployment and breath new life into the industry.

As a result of the telecom collapse, communications equipment manufacturers have had to focus on reducing operating costs and in doing so have cut R&D spending. This decline raises a red flag. Our innovations have kept this country's communications infrastructure at the cutting edge and made the United States a worldwide leader in technology. The impact of reduced R&D investment may not be felt next week, but it poses a long-term serious threat to the rollout of new products and services and to our Nation's ability to compete in the global marketplace.

Since its inception early in 2002, HTBC's principal focus has been on the importance of reform of the Federal Communications Commission's network unbundling rules to the future of broadband deployment and facilities-based competition in the United States. HTBC last year submitted Comments and Reply Comments in the Commission's *Notice of Proposed Rulemaking* concerning its unbundling rules (the *Triennial Review* proceeding),[1] and the coalition has continued to meet with all levels of the FCC staff to further press this matter. HTBC has been urging the Commission to act with a sense of urgency to resolve the broadband issues in the *Triennial Review*. We believe that it is critical that the Agency adopt a report and order at its open meeting scheduled for February 13.

The specifics of the HTBC policy recommendations are that the Commission must refrain from imposing section 251 (of the Telecommunications Act of 1996) unbundling obligations on new, last-mile broadband facilities, including all fiber, remote terminals, and digital subscriber line (DSL) (and successor) electronics de-

[1] Review of the section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advanced Telecommunications Capability, Notice of Proposed Rulemaking, CC Docket Nos. 01–338, 96–98, 98–147, FCC 01–361 (rel. Dec. 20, 2001).

ployed on the customer side of the central office used to provide broadband services. HTBC also believes that the Commission must clarify that sections 251 and 261 prohibit states from imposing unbundling obligations on such facilities.[2] At the same time, HTBC recommends that the Commission continue to require ILECs to provide competitive local exchange carriers ("CLECs") with collocation space and unbundled access to ILECs' legacy copper facilities.

In support of its proposal, HTBC asserted that the section 251 impair standard set forth in section 251(d)(2) of the Communications Act of 1934, as amended, is not met with respect to ILECs' new, last-mile broadband facilities because ILECs have no unfair advantage over CLECs in deploying new broadband facilities, and CLECs can provide broadband services to consumers over alternative broadband platforms. In addition, excluding ILECs' new, last-mile broadband facilities from section 251 unbundling would promote broadband deployment in compliance with section 706.[3] These conclusions were buttressed by an economic study that Corning submitted with its comments to the Commission[4] and by an economic study performed by Drs. Haring and Rohlfs (attached as Appendix A to the HTBC comments).[5]

Recently, HTBC filed detailed proposed rule language with the Commission that would implement the above unbundling policies (see attachment). These draft rules would require an ILEC to unbundle a local loop, but would not require an ILEC to unbundle either a "broadband loop" or dark fiber deployed in the local loop. A broadband loop is defined as any fiber-based facility deployed on the customer side of the central office that is used in whole or in part to transmit packetized information and the associated equipment attached thereto. It also includes any packet-based equipment attached to a copper loop. However, the draft rules also maintain various ILEC obligations and propose other safeguards to assure that a CLEC can continue to get access to the unbundled network elements that it is able to get today.

HTBC continues to advocate public policies that promote strong facilities-based broadband competition among cable modem, DSL, fiber, satellite and wireless alternatives. Unfortunately, widespread broadband deployment by multiple platforms is not happening quickly enough under the current regulatory rules. Continuing to apply outdated rules to the capital-intensive broadband marketplace will send the industry into further depression. On the other hand, removing the shackles on the heavily regulated "telephone" side of the broadband market will promote sorely needed competition for delivering to consumers an endless array of bandwidth intensive applications, including video, made possible by robust, high capacity networks. We hope that you will support and encourage the five FCC Commissioners to act quickly and decisively in order to achieve this result.

Sincerely,

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[2] 47 U.S.C. §§ 251(d)(2), 251(d)(3) & 261(c).

[3] Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 56 (1996).

[4] Cambridge Strategic Management Group, *Assessing the Impact of Regulation on Deployment of Fiber to the Home: A Comparative Business Case Analysis* Apr. 5, 2002) ("*Corning Study*"), attached as exhibit I to Comments of Corning, Inc., Review of the section 251 Unbundling Obligations of the Incumbent Local Exchange Carriers, CC Docket No. 01–338, (filed Apr. 5, 2002).

[5] John Haring and Jeffrey H. Rohlfs, The Disincentives for ILEC Broadband Investment Afforded by Unbundling Requirements (July 16, 2002).

ROBERT HOLLEYMAN,
Business Software Alliance, President and CEO.
GARY SHAPIRO,
Consumer Electronics Association, President and CEO.
RHETT DAWSON,
Information Technology Industry Council, President.
JERRY J. JASINOWSKI,
National Association of Manufacturers, President.
GEORGE SCALISE,
Semiconductor Industry Association, President.
MATTHEW J. FLANIGAN,
Telecommunications Industry Association, President.

ATTACHMENT

HTBC's First Rule Modification:

47 C.F.R. § 51.319 (a):

§51.319 Specific unbundling requirements.

(a) *Local loop and subloop*. An incumbent LEC shall provide nondiscriminatory access, in accordance with §51.311 and Section 251(c)(3) of the Act, to the local loop and subloop, including inside wiring owned by the incumbent LEC, on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service, except that the incumbent LEC shall not be required to provide unbundled access to a broadband loop as defined below and dark fiber deployed in any part of the local loop. Where an incumbent LEC upgrades an existing DLC system, the incumbent LEC shall provide unbundled access to a non-packetized voice-grade equivalent channel for basic telephone service where such technical capability already existed. Where an incumbent LEC upgrades existing plant to a broadband loop, it shall not deprive a CLEC of access to an existing copper UNE loop without first obtaining Commission approval.

(1) *Local loop*. The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC. The local loop network element includes all features, functions, and capabilities of such transmission facility. Those features, functions, and capabilities include, but are not limited to~~, dark fiber~~ attached electronics ~~(except those electronics for equipment used for the provision of advanced services), such as Digital Subscriber Line Access Multiplexers),~~ and line conditioning. The local loop includes, but is not limited to, DS1, DS3, ~~fiber,~~ and other high capacity loops. ~~The requirements in this section relating to dark fiber are not effective until May 17, 2000.~~

(2) *Broadband loop*. The broadband loop is defined as any fiber-based facility deployed on the customer side of the central office that is used in whole or in part to transmit packetized information and the associated equipment attached thereto. Also included is any electronics attached to a copper loop that is used in conjunction with or facilitates packetized transmission over such loop.

Note: With the addition of (a)(2) "Broadband loops" "Subloop" must be renumbered to 51.319(a)(3) and "Network interface device" must be renumbered to 51.319(a)(4)

....

47 C.F.R. § 51.319 (c)(5)

(c) *Switching capability* …

(5) An incumbent LEC shall not be required to provide nondiscriminatory access to unbundled packet switching capability. ~~only where each of the following conditions are satisfied.~~

~~The requirements in this section relating to packet switching are not effective until May 17, 2000.~~

~~(i) The incumbent LEC has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (e.g., end office to remote terminal, pedestal or environmentally controlled vault);~~

~~(ii) There are no spare copper loops capable of supporting xDSL services the requesting carrier seeks to offer;~~

~~(iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access multiplexer in the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by paragraph (b) of this section; and~~

~~(iv) The incumbent LEC has deployed packet switching capability for its own use.~~

HTBC's Second Rule Modification:

47 C.F.R. §51.319 (a)(2) [which must be renumbered to (a)(3), as indicated above]

(3) *Subloop.* The subloop network element is defined as any portion of the copper loop that is technically feasible to access at terminals in the incumbent LEC's outside plant, including inside wire. An accessible terminal is any point on the loop where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within. Such points may include, but are not limited to, the pole or pedestal, the Serving Area Interface ("SAI"), the network interface device, the minimum point of entry, the single point of interconnection, the main distribution frame, the remote terminal, and the feeder/distribution interface. Further, upon a site-specific request, an incumbent LEC shall provide access to the copper subloop at a splice near the remote terminal. The incumbent LEC shall be compensated for the actual cost (without regard to § 51.505) of providing this access. ~~The requirements in this section relating to subloops and inside wire are not effective until May 17, 2000.~~

Senator SMITH. Thank you, sir. It is an association of six high-tech trade associations, and it represents 15,000 companies, including Intel, Lucent, Alcatel, and Microsoft. These are not phone companies. They are consumer electronics and software producers. They point out that this whole area is in turmoil, it needs resolution. They have some wonderful ideas. There are some good ideas in here for your Triennial Review, so I recommend them to you.

I believe we need to continue to promote facility-based broadband competition among all telecommunications modes, including cable modem, DSL, fiber, satellite, and wireless, and we need to ensure competition. The companies who take the risk of deploying broadband facilities should get the benefit if they succeed.

And finally, I would like to express my interest in the Commission's status report regarding the broadcast flag issue. As we continue to deploy more broadband, we need to address the problem of online piracy. As the Commissioners are well aware, American copyright industries are responsible for over 5 percent of the Nation's GDP, and we need to direct our energies towards protecting the output of the country's copyright industry.

And so, Mr. Chairman, thank you.

Chairman HOLLINGS. Thank you.

Senator Nelson?

STATEMENT OF HON. BILL NELSON,
U.S. SENATOR FROM FLORIDA

Senator NELSON. Thank you, Mr. Chairman.

Competition and the input of state regulators, that is what I would underscore.

Thank you, Mr. Chairman.

Chairman HOLLINGS. Thank you.

Senator Snowe?

STATEMENT OF HON. OLYMPIA J. SNOWE,
U.S. SENATOR FROM MAINE

Senator SNOWE. Thank you, Mr. Chairman, and thank you for holding this hearing today, because I do think it is extremely appropriate to have the entire FCC Commission here to explore many of the issues concerning competition in the telecommunications industry.

Clearly over the past 2 years, the industry has experienced difficulties with a $2 trillion loss in marketplace value as well as 500,000 jobs. Now, we know some of the problems in the industry are due to corporate malfeasance, others as a result of an economic downturn.

When we considered the Telecommunications Act in 1996, and I was a Member of this Committee, obviously we were trying to design the best public policy that would provide the entrance of viable and robust competition in the telecommunications marketplace. This new framework, along with the rapid progression of available technologies, has fostered the growth of the market with increased choices for consumers. However, the recent economic climate has taken its toll on the industry, and it is in that light that we address many of the important issues today.

While the topic of today's hearing encompasses many important issues, I would hope that the Commissioners today would focus on the Triennial Review, proceeding on the potential actions on the issues of unbundled network elements and those parts of the incumbent network that the incumbent companies must offer to competitive entrants.

The FCC Commission is charged with the critical role of assessing how to best balance regulatory policy in a manner that encourages growth, innovation, and investment in the market while continually assessing the best policy to ensure competitive choices for consumers.

And I hope in that light, Mr. Chairman, that the FCC Commissioners would help to explore some of these issues. What is the data? What are the criteria to determine what is going to be part of that network or what is not, or making that final determination.

I think, obviously, a lot has changed in the telecommunications industry, and we have to have a better understanding of what are the viable factors, the reliable data that would make a decision that would change the essence of the Telecommunications Act of 1996. And obviously, you are in a position to evaluate that, and to provide recommendations to this Committee.

In addition, I am concerned about the declining revenues in the Universal Service Fund, and I know the Commission has taken the action to use the unused E-rate funds to stabilize it. Again, I think

we have to look at the methodology for the future in how to provide the necessary revenues to continue the support of those programs that it does provide for as a result of statutory requirements. So I will be monitoring that process closely, and I hope that you will continue to commit to the principles of the Universal Service Fund, because I do think those goals are primary and essential to the future of so many of the programs that are vital.

So, again, Mr. Chairman, I thank you.

Chairman HOLLINGS. Thank you.

The Committee is privileged to have full statements from each of the five Commissioners, and they will be filed. You can, as you are recognized, highlight them or deliver them in full.

We will start first with Chairman Powell. We welcome you.

STATEMENT OF HON. MICHAEL K. POWELL, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Chairman POWELL. Thank you, Chairman Hollings, and it is good to be here again, and also to soon-to-be-Chairman McCain and the other distinguished Members of the Committee, particularly a welcome to the new Members, who I have not had the privilege of testifying before. Congratulations, and it is good to be here.

Soon after I began my tenure as Chairman of the FCC, I laid out an agenda under my leadership. The theme that binds it, simply, is digital migration. That is, we are at a critical crossroads in communications in which technology is driving us to cross over from a predominantly analog realm, with its matured infrastructure, classic services, and long practiced regulatory regime, to the digital world of the modern era, one that demands more advanced architecture, dynamic and innovative applications, and a more enlightened and flexible regulatory environment.

In the next six months, as you have noted, the Commission will complete many of the specific proceedings intended to advance the digital migration. Specifically, we will tackle a bevy of proceedings dedicated to telephone competition, broadband deployment, and media ownership, and 21st Century spectrum policy. In so doing, I can assure you we will be guided exclusively by the public interest and resist the pressure to view our exercise, as so often urged, as awarding benefits and burdens to corporate interests.

The preamble of the 1996 Act states succinctly its purpose, "an Act to promote competition, reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers, and encourage the rapid deployment of new communication technologies." Clearly, as evidenced from this preamble, promoting competition is a central objective of the Act.

Seven years into the act, there is notable success, but perhaps significantly less in some markets than originally expected, and perhaps in different form than was first envisioned. In the local telephone market as of June 2002, CLECs reported 21.6 million of the approximately 189 million nationwide switched access lines in service. New entrants have pursued a variety of strategies for entering the local market to serve consumers. For instance, CLECs providing full facilities-based competition account for 6.24 million of those CLEC access lines. Of that number, cable telephony providers using coaxial cable, 2.6 million of the access lines, while

other full-facilities-based CLECs, like fiber carriers, serve over 3.6 million lines. In addition, nearly 6.5 million consumers report that their wireless phone is their only phone. Partial facilities-based CLECs, using a combination of cell phone facilities and unbundled network elements leased from the ILEC, serve over 4 million access lines. In total, nearly 6.7 million consumers are served by facilities-based competitors, and another 11.9 million are served by CLECs using no facilities, through resale or UNE–P.

I think deserving special notice is that much of the most significant competition in voice, both local and long distance, has come from wireless phone service. As of June 2002, 129 million consumers subscribe to wireless services. In the wireless space, there are currently six national carriers, two that are BOC-owned, one that is IXC-owned, and three that are independent, and a host of smaller regional local carriers. Price competition and innovation has been significant in this space.

In addition, we are beginning to see the introduction of a reliable Internet telephony. Services provided by companies such as Vonage are providing an alternative to analog wire telephony over broadband connections.

The Commission has before it a number of major proceedings that will attempt to improve and advance the goals of the 1996 Act. With the benefit of hindsight, we will be able to assess the last seven years and consider how we might improve the regulatory environment to more aggressively promote facilities-based competition, to promote major investment in advanced architecture, and to reduce regulation, all clearly hallmarks of the Act.

First, in the Triennial Review of unbundled network elements rules, the Commission will address what it has been trying—what has been a trying time in its effort to establish the unbundled network element rules. The Commission, on its previous two attempts to establish such a regime, has failed to do so and pass judicial scrutiny, first, in the United States Supreme Court that struck down the Commission's original unbundled network rules, and more recently in the D.C. Circuit for failure to give fair weight to Congress' directive that the Commission unbundle only those elements that would impair the viability of entry. Therefore, it is important to understand the legal exercise that is before the Commission. For under the D.C. Circuit mandate, as Senator Breaux noted, by February 20th, there will be no unbundling rules whatsoever if the Commission does not act quickly, consistent with the Court's ruling. The Commission must establish, from the ground up, the clear impairment of each and every element that it orders unbundled.

I think it is very important to remember in this discussion that UNE–P is not a network element. It is a consequence of previous decisions that required each and every network element to be unbundled. That is, it is an aggregation of all the individual elements. If even one of those elements cannot be sustained under the rigorous impairment analysis, which we have failed twice, UNE–P will not be government-mandated as an alternative. The Wireline Bureau will provide an item for consideration to the Commission quite imminently.

Second, after bringing the Triennial Review to the floor, the Commission will consider whether it should establish and enforce national performance measures and standards for incumbent LEC provision of UNEs, which many states, consumer groups, and competitive carriers have urged. We initiated this proceeding as a recognition that effective and efficient enforcement of our regulations is just as, if not more, important than the underlying regulations.

Broadband, as I have often articulated, I think is the central communication policy objective in America today. If the United States is to empower consumers to enjoy the full panoply of benefits of the information age, provide a source for long-term sustainable economic growth, continue to be a global leader in information and network technologies, then, as Congress did recognize in the Act, the development and deployment of broadband infrastructure will play a vital role. To my mind, the primary challenge in front of policymakers today in promoting broadband is to determine how we can help drive the enormous investment required to turn the promises into reality.

Now, at the Commission, we have initiated a number of proceedings to address this challenge, guided by a few simple principles. First, get it built, and get it built everywhere. Encourage investment in new advanced architecture. Second, promote the vibrancy of this new Internet medium through a minimally regulated environment. Third, promote multiple platforms for the delivery of the broadband Internet.

The biggest obstacle in telecommunication policy to many of the goals that we pursue is the unending and thorny problem of last-mile monopoly control of the telephone infrastructure. Our goal should be to encourage multiple pipes in the future of the broadband world to minimize, on a going forward basis, that obstacle. And fourth, to unleash the innovation that has been characteristic of the computer and software industries.

The Commission will address broadband deployment in four interrelated proceedings. Our Triennial Review will consider many of the questions. It will address the unbundling obligations under the Act, where the ILEC deploys next generation fiber facilities in its network. In addition, the Commission will address obligations for the high-frequency portion of the loop, often referred to as "line sharing."

Once completed with that proceeding, the Commission will turn its efforts to other proceedings, including the broadband wireline proceedings and cable proceedings, specific details of which are provided in my full testimony.

Finally, in December 2001, the Commission initiated a review of the current regulatory environment for ILECs providing telecom services commonly referred to as the "Dom/Non-Dom proceeding." We, too, will try to complete that in the next several months.

So as you can see, these next six months will be incredibly busy and a significant time for the Commission in the areas of local competition and broadband deployment. These decisions will be vital to our efforts to advance the digital migration in this country, faithfully implementing the will of Congress so that consumers, as we have all so carefully emphasized, continue to reap the Act's intended benefits.

Thank you, Mr. Chairman.
[The prepared statement of Chairman Powell follows:]

PREPARED STATEMENT OF HON. MICHAEL K. POWELL, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Good morning, Mr. Chairman and distinguished Members of the Committee. It is my pleasure to come before you today to discuss the state of competition in the telecommunications industry and, to the extent permissible, the various competition and broadband proceedings that are nearing completion at the Commission.

Introduction

Soon after I began my tenure as Chairman, I laid out the Commission's agenda under my leadership. The theme that binds the agenda is "Digital Migration." That is, we are at a critical crossroad in communications in which technology is driving us to cross over from the predominately analog realm—with its matured infrastructure, traditional services, and long-practiced regulatory regime—to the digital world of the modern era, one that demands more advanced architecture, dynamic and innovative applications, and a more enlightened and flexible regulatory environment. In short, our challenge is to move from the old to the new, while remaining faithful to our governing statutes and the venerable principles of communications policy—universal service, competition, and diversity, just to name a few.

In the next six months, the Commission will complete many of the specific proceedings intended to advance the digital migration. Specifically, we will tackle a bevy of proceedings dedicated to telephone competition, broadband deployment, media ownership reform and 21st Century spectrum policy. These proceedings will shape the communications landscape for years to come. My colleagues and I understand the enormity of our responsibility, as much as the absolute necessity of going through with it. In doing so, we will be guided exclusively by the public interest, and resist the pressure to view our exercise as awarding benefits and burdens to corporate interest.

Guided by consumer interest, our course will endeavor mightily to:

- Bring consumers the benefits of investment and innovation in new communications technologies and services.
- Expand the diversity, variety and dynamism of communication, information, and entertainment.
- Empower consumers, by moving toward greater personalization of communications—when, where, what and how they want it.
- Promote universal deployment of new services to all Americans.
- Contribute to economic growth, by encouraging investment that will create jobs, increase productivity and allow the United States to compete in tomorrow's global market.

The Status of Telecommunications Competition

The preamble of the Telecommunications Act of 1996 (1996 Act or Act) states succinctly its purpose: "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Clearly, as evidenced from the preamble, promoting competition is a central objective of the Act. In its detail, the statute provides a regulatory blueprint that conveys extensive authority to the Commission to advance that objective.

Seven years into the Act, there is notable success—though perhaps significantly less in some markets than originally expected, and perhaps in different forms than were first envisioned. A brief review of the reported results offers a snapshot of our progress. In the local telephone market, wireline-based competition, as of June 2002 (the most recent data reported by the Commission), competitive local exchange carriers (CLECs) reported 21.6 million (or 11.4 percent) of the approximately 189 million nationwide switched access lines in service. Slightly more than one-half of these reported CLEC switched access lines serve small business and residential customers.

New entrants have pursued a variety of strategies for entering the local market to serve consumers. For instance, CLECs providing full facilities-based competition account for 6.24 million of the CLEC access lines. Of that number, cable telephony providers served almost 2.6 million lines (mostly residential), and other full facilities-based competitors (fiber-providers, for example) served over 3.6 million lines. Of particular note, nearly 6.5 million consumers report that their wireless phone is

their only phone. Partial facilities-based CLECs, using a combination of self-owned facilities and unbundled network elements leased from incumbent local exchange carriers (ILECs), serve over 4 million lines. In total, nearly 16.7 million customers are served by facilities-based competitors.

CLECs providing service to consumers using no facilities of their own (*i.e.*, relying exclusively on those of an ILEC) account for over 11.9 million of the total CLEC access lines. Of that, approximately 4.48 million consumers are served by CLECs using resale (as provided by the 1996 Act and unaffected by current rulemakings) and another 7.48 million consumers are served by CLECs using UNE–P (pursuant to FCC regulations).

Deserving special notice, the most significant competition in voice (local and long distance) has come from wireless phone service. As of June 2002, 129 million consumers subscribed to wireless telephone services, providing a direct alternative to wireline infrastructure for local telephone services. There are currently six national carriers (two that are BOC-owned, and four that are independent) and a host of smaller carriers and price competition and innovation have been very strong. It is estimated that anywhere from 3–5 percent of these wireless consumers use their wireless phones as their primary local phone service.

In addition, broadband connections have also put pressure on wireline networks as many consumers that migrate to broadband for their Internet services have dropped their second telephone lines (which were used for dial-up Internet services). Moreover, 2002 saw the introduction of reliable Internet telephony services through a broadband connection. Companies such as Vonage are providing consumers with a direct substitute to their traditional wireline phones.

These various sources of competition have contributed to the first declines in total access lines for the four major ILECs since 1933 (the only previous year where access lines declined).

Competition also has increased exponentially in the long distance market. The corollary of opening up the local phone market was allowing incumbent local carriers to enter the long distance market (previously barred by law from doing so) after satisfying the requirements of section 271 of the Act. At present, Bell Operating Companies (BOCs) have obtained regulatory approval to offer long distance in 35 states, bringing new competitive alternatives to that market. Prices have declined substantially over the period since the Act, due principally to wireless substitution and extensive expansion of long distance capacity.

Competition is moving forward in the broadband market. Broadband, or highspeed lines connecting homes and businesses to the Internet, increased by 27 percent during the first half of 2002, from 12.8 million to 16.2 million lines. DSL lines in service increased by 29 percent during the first half of 2002, from 3.9 million to 5.1 million lines. On the cable platform, broadband service increased by 30 percent during the first six months of 2002, from 7.1 million to 9.2 million lines. At the end of June 2002, the presence of broadband service subscribers was reported in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands, and in 84 percent of the Nation's zip codes, compared to 79 percent six months earlier.

Clearly, a significant amount of competition has emerged since the Act. For residential customers in particular, facilities-based providers have contributed the lion's share of that competition.

Current FCC Proceedings

The Commission has before it a number of major proceedings that will attempt to improve and advance the goals of the 1996 Act. With the benefit of hindsight, we will be able to assess the last seven years and consider how we might improve the regulatory environment to more aggressively promote facilities-based competition, to promote major investment in advanced communication infrastructure, and to reduce regulation—all hallmarks of the Act.

Local Wireline Competition Policy

Local competition is one of the principal objectives of the Act—meaningful, longterm, sustainable competition. Over the next six months, the Commission will consider and decide two sets of proceedings that will address certain aspects of the Commission's implementation and enforcement of Congress' unbundled network element (UNE) regime. These proceedings will determine which of the ILECs' network elements must be unbundled and offered to competitive entrants at regulated wholesale rates. And, will establish an effective and efficient enforcement regime to evaluate the incumbent's provisioning of these facilities and services to competitors.

1. Triennial Review of UNE Rules

The First Swing—Strike One

The FCC has had a difficult, trying time in its effort to establish the unbundled network element rules. Shortly after the Act was passed the Commission promulgated a set of local competition rules that included a mandate requiring that all network elements be unbundled for competitors. And, despite arguments that such a regime undercut the separate wholesale requirement that the complete network could be purchased at the deeply discounted prices available for each unbundled element. This became known as the UNE platform, or UNE–P. The sentiment at the time was to "jump start" competition by biasing the rules significantly in favor of easy entry. This understandably aggressive competitive stance, coupled with a capital market awash with cash for new ventures, enticed nearly 300 new competitors to rush into the market.

These rules were struck down by the Supreme Court in 1998. The Court held that the Commission was not giving fair weight to Congress' directive that the Commission unbundle only those elements that would impair the viability of entry. The Court found the Commission's stance too generous to new entrants and not faithful to the statute, concluding "if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) [the impairment standard] in the statute at all." Instead, "[i]t would simply have said . . . that whatever requested element can be provided must be provided." The UNE rules were thus vacated.

The Second Swing—Strike Two

In 1999, the Commission attempted to respond to the Supreme Court's decision and craft new UNE rules. It modified its interpretation of the impairment standard slightly and crafted a set of rules that substantially mirrored the old, still allowing access to all network elements (rendering UNE–P still available) in nearly all markets. In that *Order* (known commonly as the *UNE Remand Order*), the Commission announced that it would reexamine its list of network elements every three years (it is from this commitment that the present Triennial Review takes its name). In response to this pronouncement, the Commission under my leadership initiated its first triennial review of its unbundled network element regime in December 2001, to ensure that our regulatory framework reflects current marketplace conditions and stays faithful to the goals and provisions of the Act.

During the course of compiling our record in this proceeding, the United States Court of Appeals for the District of Columbia Circuit struck down the Commission's *Order* and subsequently vacated the Commission's second set of UNE rules.

The court again found that the Commission had not given sufficient significance to the impairment standard. It pointedly held that the Commission had to consider much more rigorously whether there were competitive alternative sources of supply in different markets. It also criticized the Commission's "open-ended notion of what kinds of cost disparity are relevant" for purposes of identifying impairment. In particular, "to rely on cost disparities that are universal as between new entrants and incumbents in *any* industry is to invoke a concept too broad, even in support of an *initial* mandate, to be reasonably linked to the purpose of the Act's unbundling provisions." (Emphases added.) The court emphasized that unbundling is not an unqualified good under the statute, for it imposes others costs that can undermine the Act's goals. The Commission had to strike a balance between competing concerns, rather than merely embrace unimpeded unbundling. The court consequently vacated all the unbundling rules, effective February 20th of this year.

It is very important to understand the legal exercise that is before the Commission. Under the court mandate, there will be no unbundling rules at all in a few weeks if the Commission does not act consistent with the court's ruling. The Commission must establish, from the ground up, the clear impairment of each and every element that it orders unbundled. This is important to grasp, for it is often misunderstood, or misrepresented in the heated debate about UNE–P. "To UNE–P or not to UNE–P" is not the question before the Commission. UNE–P is not a network element, nor does the statute provide for it as a complete entry vehicle. UNE–P is a consequence of previous regulatory decisions that required all network elements be unbundled, thereby making a full platform possible (that is, the platform is an aggregation of all the individual elements). If even one of those elements cannot be sustained under a more rigorous impairment analysis, the UNE–P will not be government mandated as an alternative, though it may be privately negotiated in the marketplace.

It bears repeating that seven years into the Act, there have yet to be a set of unbundled network element rules that have survived judicial review, despite two major Commission attempts. Hopefully, the third time is the charm. It is vital the Commission craft a judicially sound set of rules in the Triennial Review in order

to finally settle this critical chapter of implementing the Act, and stabilize the foundation of the wireline local competition industry.

The legal mandate to rework the UNE rules is reason enough to recommend the Triennial Review, but not the sole reason. I believe, as prior Commissions and the courts have held, that Congress rightly sought to promote facilities-based competition. Facilities-based competition offers a number of compelling benefits:

- Greater product differentiation, offering consumers more robust choice than available through resale.
- Less reliance on an incumbent, whose self-interest will rarely be aligned with assisting a new competitor in having access to its own network at steeply discounted prices.
- Greater infrastructure investment, stimulating the downstream market for equipment suppliers, like Lucent and Nortel, as well as promoting more jobs.
- Greater network redundancy, providing more alternatives should homeland security risks threaten our network.

While the statute provides a number of vehicles for competitive entry, including resale and unbundled elements, it is widely recognized that in the long-term there should be a transition to facilities in order to reap the greater benefits of competition. In determining which elements should be unbundled for competitors, the Commission will take into account stronger incentives for facilities-based entry or transition thereto.

The Commission's third attempt to implement Congress' unbundling requirements through the Triennial Review proceeding will address several core components of our unbundling framework. First, it will involve the application of the statutory "necessary" and "impair" standards and a determination of whether, and if so, how, the Commission should take into account other goals of the Act, such as the development and deployment of new communications infrastructure and services. Second, it will consider, consistent with the recent D.C. Circuit ruling, the appropriate level of granularity in defining the specific network elements and markets at issue. Third, it will address the proper role of state commissions in the implementation of our unbundling rules.

The Wireline Competition Bureau will have an item for the full Commission's consideration on the floor by the end of the month.

2. Performance Standards

In addition to the Triennial Review, the Commission began in 2001 a rulemaking proceeding to consider, for the first time, whether the Commission should establish and enforce national performance measurements and standards for ILEC provisioning of unbundled network elements, which many states and CLECs have urged. While the Triennial Review examines network elements and determines whether competitors should have access to them, the performance measures proceeding examines whether competitors have efficient and effective access to them. After much discussion with all segments of the industry, the consensus is that competition policy would be enhanced by a small number of specific, enforceable performance-based rules.

In response to our notice of proposed rulemaking, we received a variety of proposals—everything from completely occupying the field, to establishing a list of independently enforceable federal measures, to enhancing existing state penalties by adding federal penalties. We are working through the pros and cons of each of these proposals, and will move forward with a plan that ensures that the market-opening provisions of the Act are backed by a strong, effective and efficient enforcement regime that creates greater consistency, certainty and clarity in the marketplace. Indeed, it is for this reason that I have made my repeated requests to Congress for greater enforcement authority for the Commission.

In examining possible performance requirements, however, we must be mindful of the important work that state commissions around the country have done in this area, and make sure that any federal standards we adopt advance our common goal of fully and faithfully implementing the Act. Enforcement should be something carriers take seriously, and not merely a cost of doing business, and one way to do this is to make sure that we are working together, and not at cross-purposes, with the states.

The Wireline Competition Bureau will present its recommendations to the full Commission in the second quarter, 2003.

Broadband Deployment

As I have stated on many occasions, broadband deployment is the central communications policy objective in America today. If the United States is to: (1) empower

consumers to enjoy the full panoply of benefits of the information age; (2) provide a source for long-term, sustainable economic growth for our country; and (3) continue to be the global leader in information and network technologies—then, as Congress recognized in the Act, the development and deployment of broadband infrastructure will play a vital role.

To my mind, the primary challenge in front of policymakers today in promoting broadband is determining how we can help drive the enormous investment required to turn the promises of broadband into reality. While figures are a bit facile in this area, by many estimates DSL cannot reach 50 percent of households, because of technical limitations that can be overcome only by building out the network. Cable has substantially deployed its data network (controlling 70 percent of the residential market), but still is unavailable to a significant number of households. Other technologies are deploying, such as wireless, powerline and satellite, but significant capital investment and technical research is needed to push those platforms to a wider addressable market. At the Commission, we have initiated a number of proceedings to address this broadband challenge, guided by the following principles:

- *First*, get it built—everywhere. Encourage investment in new advanced architecture.
- *Second*, promote the vibrancy of these new Internet platforms through a minimally regulated environment.
- *Third*, promote multiple platforms for the delivery of broadband internet. The biggest obstacle to so many policy goals in the wireline voice context is the last mile problem. Our goal is to encourage multiple pipes to the home in the future broadband world.
- *Fourth*, unleash the innovation that has been characteristic of the computer and software industries.

1. Triennial Review

As part of our Triennial Review proceeding, the Commission will consider several broadband related questions. Specifically, the Commission will address the unbundling obligations, under the Act, where an ILEC deploys next generation fiber facilities into its network or invests in fiber all the way to the home. In addition, the Commission will address the unbundling obligations for the high-frequency portion of the loop, commonly referred to as "line sharing." Again, we anticipate that the Wireline Competition Bureau will make its formal recommendations to the full Commission on these issues by the end of this month.

2. Wireline Broadband Item

In an effort to limit regulatory uncertainty, the Commission, in February 2002, initiated a rulemaking to address the appropriate statutory classification of broadband Internet access services provided over the traditional or future wireline telephone network. In the Notice of Proposed Rulemaking (NPRM) in this proceeding, the Commission tentatively concluded that this service is an "information service" as defined in the Act. In addition, the proceeding asks both the regulatory implications, if any, of that proposed classification on existing regulations and on what the appropriate regulatory framework for the provision of wireline broadband Internet access services should entail. Finally, the item also sought comment on whether facilities-based broadband Internet access service providers should be required under the Commission's statutory authority to contribute to support universal service.

The Wireline Competition Bureau will provide its recommendations in this proceeding to the full Commission in the second quarter of 2003.

3. Second Cable Modem Service Order

In addition to the *Wireline Broadband Item*, the Commission issued a Declaratory Ruling and Notice of Proposed Rulemaking in March 2002. That *Declaratory Ruling* classified cable modem service, a broadband Internet access service provided over cable facilities, as an "information service" under the Act. The Commission, in the *NPRM* portion of the Order asked interested parties to comment on the appropriate regulatory framework for the provision of that information service. Specifically, the Commission sought comment on the scope of the Commission's jurisdiction to regulate cable modem service; whether we should require cable operators to offer ISPs access to their facilities; and the proper role of state and local franchising authorities in regulating cable modem service. Many of these questions are similar to those that arise in the telephone broadband context and should responsibly be considered together.

The Media Bureau will have its recommendations on the questions raised in the *Cable Modem NPRM* to the full Commission in the second quarter of this year.

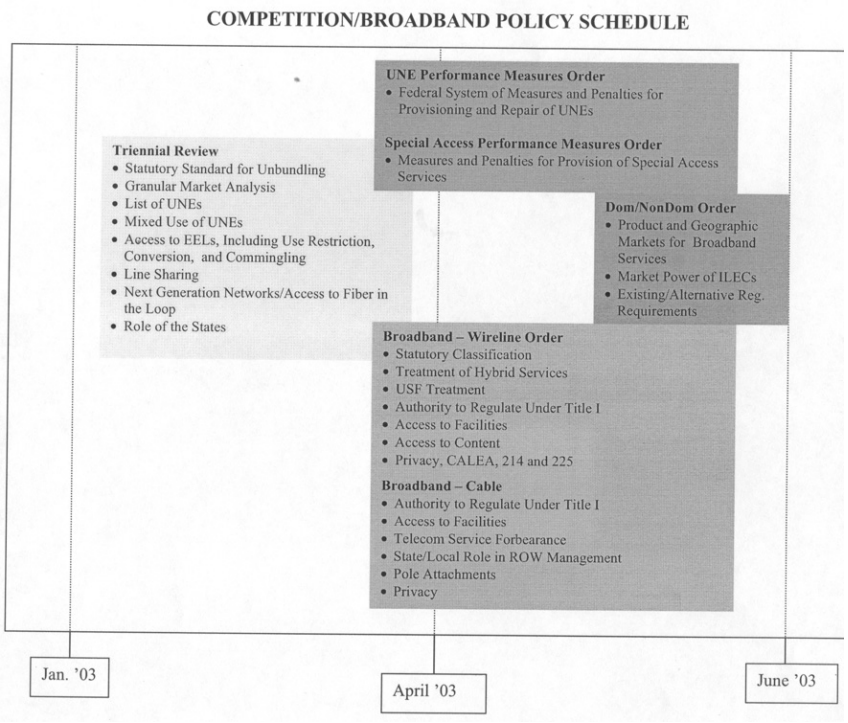
4. Dom/Non-Dom Proceeding

Finally, in December 2001, the Commission initiated a review of the current regulatory requirement for ILECs broadband telecommunications services. The Commission sought comment in this proceeding on whether the Commission should make changes, based on marketplace developments, in its traditional regulatory requirements of ILECs' broadband transmission services. These transmission services are not broadband Internet access services offered to residential consumers, but high-capacity transmission services offered to business consumers and competitive carriers. The Commission sought comment on the relevant product and geographic market for these broadband transmission services; whether the ILECs possess market power in the market and whether dominant carrier safeguards or other regulatory requirements should govern ILECs' provision of these services.

The Wireline Competition Bureau will have their recommendations to the full Commission by the close of the second quarter.

Conclusion

As you can see, these next six months will be an incredibly busy and significant time for the Commission in the areas of local competition and broadband deployment policies. These decisions will be vital to our efforts to advance the digital migration in this country, and faithfully implement the will of Congress so that consumers can continue to reap the Act's intended benefits. In addition, these decisions will help bring some much needed regulatory certainty and clarity, especially in the face of the numerous adverse court decisions over the last five years, so that the marketplace can adapt and stabilize and industry participants can vigorously compete, invest and innovate—all to the benefit of the American telecommunications consumer.



Chairman HOLLINGS. Thank you, Mr. Chairman.

Commissioner Martin?

STATEMENT OF HON. KEVIN J. MARTIN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Commissioner MARTIN. Thank you, Mr. Chairman, and thank you for this invitation to be here with you this morning.

Chairman HOLLINGS. Bring that a little closer.

Commissioner MARTIN. I look forward to the insights you will provide and trying to answer any questions you might have.

As I said during my confirmation hearing, I recognize that the Commission is a creation of Congress, and I welcome the opportunity to discuss the Commission's activities with you.

As you know, the telecommunications industry has been responsible for much of the Nation's economic growth during the past decade. I believe the availability of advanced telecommunications is essential to the continued strength of the economy in the 21st century.

There is no question, however, that these are turbulent economic times for the telecommunications sector. Companies are struggling under too much debt, unable to recoup the past investment they have made; markets are valuing companies at depressed levels, leaving companies with little capital; and carriers are postponing the purchase of equipment necessary to deploy competitive local and advanced services, leaving the manufacturers to suffer the consequences. And as more manufacturers founder, we risk being left with too few domestic providers of critical infrastructure. This can be a significant threat even to our national security. And finally, investors are questioning whether communications companies continue to be a profitable industry in which to risk capital.

But this it not just about companies; it's about real people. Unfortunately, the impact of this downturn has not been limited to the companies in the telecommunications sector. Employees and their families throughout the Nation have experienced real pain resulting from the economic downturn and the numerous bankruptcies that have occurred. By the middle of last year, nearly 500,000 employees in the sector had lost their jobs, and the industry had lost over 2 trillion in stock value. As a result, many people saw their life savings disappear overnight just as they were hit by layoffs, with little or no severance pay.

Several proceedings currently pending in the Commission could have a significant impact on the industry. I believe we have an opportunity to craft a balanced package of regulations to revitalize the industry. We should spur investment in next-generation broadband infrastructure while also maintaining access to the network elements necessary for new entrants to provide competitive services.

I believe it is critical to create a regulatory environment that encourages the deployment of new broadband infrastructure. Incumbents should have the proper incentives to invest the capital necessary to make 21st century broadband capabilities available to all Americans. This, in turn, would allow consumers to experience the benefits of next generation services and applications that new broadband networks can offer.

In addition, I believe it is essential to continue to encourage local competition. We need to maintain the ability of new entrants to access elements of the incumbent network that are essential for com-

petitive services. By maintaining this access, consumers will continue to receive the benefits of local competition. Such an approach is vital if we are to ensure that all areas throughout the Nation, including rural America, continue to enjoy the benefits of competitive choice.

In that spirit, I offer the following three priorities for Commission action. I believe the Commission should prioritize new investment and deployment of advanced network infrastructure. I believe the Commission should focus on creating a regulatory environment that allows and encourages companies to invest in and deploy advanced services. I fear that without a stable regulatory framework for deploying and providing such services, our country's communications network could remain stagnant, not improving and not developing. The many people without access to advanced services now, particularly consumers in rural and underserved areas, would remain without. And competition, the driver of innovation, growth, and effective pricing, would remain minimal. But even if we change our underlying regulations governing the provision of basic telephony, companies will not invest in advanced services unless we ensure the regulations will not deprive them of the ability to make a sufficient return on their investment.

Second, I believe the Commission must minimize further questions. We must avoid creating a greater uncertainty or prolonging ambiguity. To put off decisions that have the greatest impact on the marketplace to another day would only aggravate current market conditions. It also would potentially prolong the angst and uncertainty that surround the deployment of advanced services.

And finally, I believe the Commission must faithfully implement the Act and be responsive to the courts. We must address the court's recent criticism of our existing unbundling framework while still keeping our eyes on Congress' goal of ensuring that local markets are truly open to competition. We must rigorously review our list of required elements for unbundling and determine which are necessary for sustained competition, but we must also ensure that access to those essential facilities continues.

Assessments of whether access to an element is necessary to provide service may vary significantly among different markets, States, and regions. State commissions have worked well with the Commission in implementing the requirements of the 1996 Act. A more granular review could allow for state cooperation and input, especially regarding highly fact intensive and local determinations.

As you can see, a number of issues before us are vital to consumers and the marketplace and need timely resolution. Nevertheless, I believe we must begin somewhere. The framework I have set forth would achieve our goals without favoring any particular industry. And this calls for a delicate balance. We need to make sure that incumbent networks are open to competition and, at the same time, provide incentives for both incumbents and new entrants to build new facilities.

Again, thank you for inviting me and my colleagues to be with you today, and I look forward to trying to answer your questions.

[The prepared statement of Commissioner Martin follows:]

PREPARED STATEMENT OF HON. KEVIN J. MARTIN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Thank you for this invitation to be here with you this morning. I look forward to listening to the insight you will provide and trying to answer any questions you might have. As I said during my confirmation hearing, I recognize that the FCC is a creation of Congress, and I welcome the opportunity to discuss the Commission's activities with you.

As you know, the telecommunications industry has been responsible for much of the Nation's economic growth during the past decade. And the availability of advanced telecommunications is essential to the continued strength of the economy in the 21st century. There is no question, however, that these are turbulent economic times for the telecommunications sector.

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 even to our national security. Finally, investors are questioning whether communications continues to be a profitable industry in which to risk capital.

But this is not just about companies, it is about real people. Unfortunately, the impact of this downturn has not been limited to the companies in the telecommunications sector. Employees and their families throughout the Nation have experienced real pain resulting from the downturn and the numerous bankruptcies that have occurred. By the middle of last year, nearly 500,000 employees in the sector had lost their jobs, and the industry had lost over $2 trillion in stock value. As a result, many saw their life savings disappear overnight just as they were hit by layoffs, with little or no severance pay.

Several proceedings currently pending at the Commission could have a significant impact on the industry. I believe we have an opportunity to craft a balanced package of regulations to revitalize the industry by spurring investment in next generation broadband infrastructure while also maintaining access to the network elements necessary for new entrants to provide competitive service.

I believe it is critical to create a regulatory environment that encourages the deployment of new broadband infrastructure. Incumbents should have the proper incentives to invest the capital necessary to make 21st century broadband capabilities available to all American consumers. This in turn would allow consumers to experience the benefits of next generation services and applications that new broadband networks can offer.

In addition, I believe it is essential to continue to encourage local competition. By maintaining the ability of new entrants to access elements of the incumbent network that are essential for competitive services, consumers can receive the benefits of competition. Such an approach is crucial if we are to ensure that all areas throughout the Nation, including rural America, continue to have access to the benefits of competitive choice.

In that spirit, I offer the following three priorities for potential Commission action:

First, the Commission should prioritize new investment and deployment of advanced network infrastructure. I believe the Commission should focus on creating a regulatory environment that allows and encourages companies to invest in and deploy advanced services.

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

Even if we change our underlying regulations governing the provision of basic telephony, companies will not invest in advanced services unless we ensure that our regulations will not deprive them of the ability to make a sufficient return on their investment.

Second, the Commission must minimize further questions and avoid creating greater uncertainty or prolonging ambiguity in this area. To put off 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 faithfully implement the Act and be responsive to the courts. We must address the court's recent criticism of our existing unbundling framework, while still keeping our eye on Congress's goal of ensuring that local markets are truly open to competition. We must rigorously review our list of required elements for unbundling and determine which are necessary for sustained competition, while also ensuring that access to essential facilities continues.

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As you can see, a number of issues before us are vital to consumers and the marketplace and need timely resolution. Nevertheless, we must begin somewhere.

I believe the framework I have set forth would achieve our goals without favoring any particular industry. This calls for a delicate balance: we need to make sure that incumbent networks are open to competition, but, at the same time, provide incentives for both incumbents and new entrants to build new facilities.

Again, thank you for inviting me and my colleagues to be here with you today. I am happy to try to answer any questions you might have.

Chairman HOLLINGS. Thank you, Commissioner.

Commissioner Abernathy?

STATEMENT OF HON. KATHLEEN Q. ABERNATHY, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Commissioner ABERNATHY. Good morning. Good morning, Mr. Chairman and distinguished Members of the Committee. It is a distinct pleasure and privilege for me to come before you for the first time during my term as a Commissioner to discuss the state——

Chairman HOLLINGS. Get that microphone up close; I'm sorry; just pull it a little bit closer so we can all hear.

Commissioner ABERNATHY.—to discuss the state of competition in the telecommunications industry and to listen to your concerns and respond to any questions that you may have. Your passion regarding these issues comes through loud and clear this morning.

As I reflect upon the state of competition and the appropriate role for the FCC to pursue, I am guided first and foremost by the statutory direction provided to us by Congress. Another key guiding principle that comes into lay is the importance of crafting clearly defined rules and then strictly enforcing those rules. And finally, the best measure of our success, as mentioned by Members of the Committee, will be whether citizens are benefitting from increased innovation, increased choice, and lower prices.

The telecommunications marketplace is more competitive today than at any time in history, with the wireless sector enjoying the most robust competition. Market forces have prompted wireless carriers to lower prices sharply and to introduce a broad array of innovative new calling plans, features, and services.

On the wireline side, long distance remains extremely competitive, but local competition has been slower to take hold because of the historical market strength, as mentioned by the Chairman, of the incumbent wireline providers. Nevertheless, the number of access lines served by competitive local exchange carriers continues to increase.

Broadband services also have become increasingly competitive. Cable modem and DSL services are rapidly expanding, and there

are promising developments in the area of wireless and satellite technologies, as mentioned by Senator Boxer and Senator Allen.

Despite these positive trends, the last few years plainly have been a tumultuous time for the telecommunications marketplace. Overly optimistic projections of data growth spurred companies to invest in excess capacity. And when the dot com bubble burst, investors demanded retrenchment. In a scramble to shorten the path to profitability, many carriers went bankrupt. And in turn, equipment manufacturers were forced to write off inventory and lay off workers.

Investment also has been chilled by regulatory uncertainty in the wake of successive court reversals of the FCC's core local competition rules, as mentioned by Mr. Powell. The U.S. Supreme Court held that the Commission's initial unbundling rules failed to include a meaningful limiting principle. And later, the D.C. Circuit Court of Appeals reversed and vacated the rules adopted on remand, stating that the Commission's analysis was inconsistent with the statutory mandate given us by Congress.

In response to these court losses, I believe a critical role for the FCC in furthering the development of competition is to promote regulatory certainty. Having worked for ILECs, CLECs, and wireless providers, I know that companies, whether incumbent or new providers, put investments on hold when unable reliably to assess the regulatory risks that they will face.

Two critical ways for the Commission to promote regulatory certainty are, first, to ensure that our rules adhere closely to the text, structure, and purpose of the Communications Act; and, therefore, they will withstand judicial scrutiny. And second, to promote a policy of swift and stringent enforcement when our rules are violated.

Another key role for regulators is keeping up with the rapid pace of technological change in market developments. Otherwise, we run the risk of becoming irrelevant, or, worse, implementing regulatory requirements that harm the public interest. For example, the Commission should continue its efforts to define broadband Internet access services and to grapple with the regulatory implications of these statutory classifications. While I recognize that the broadband issue raises difficult, controversial questions, these questions will not go away by virtue of our unwillingness to craft an appropriate regulatory scheme.

Finally, as Chair of the FCC's Joint Board on Universal Service, I want to emphasize the importance of ensuring that universal service remains sustainable in today's rapidly changing marketplace and that new competitive services are available to all Americans.

Thank you for the opportunity to share these thoughts with you this morning and to learn from your experiences. I look forward to responding to any questions you may have and working with you to achieve our common goals.

Thank you.

[The prepared statement of Commissioner Abernathy follows:]

PREPARED STATEMENT OF HON. KATHLEEN Q. ABERNATHY, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Good morning, Mr. Chairman and distinguished Members of the Committee. I appreciate the opportunity to appear before you to discuss the state of telecommunications competition. Competition is thriving in many respects, but at the same time the telecommunications industry is facing enormous challenges. I will begin by providing background information on the growth of competition as well as my assessment of key challenges confronting competitors. I will then discuss my views on the appropriate role for regulators in this environment.

I. State of Competition

The telecommunications marketplace is more competitive than at any time in history, with the wireless sector enjoying the most robust competition. We have six national wireless providers and many regional players. Consumers have benefited from the fruits of this competition, as providers have been forced to lower prices sharply and to introduce a broad array of innovative new calling plans, features, and services. Indeed, as wireless providers struggle to achieve or maintain a positive cash flow, some analysts have argued that the wireless sector may be *too* competitive—that is, that some consolidation may be necessary to restore its fiscal health.

On the wireline side, competition has been slower to take hold because of the historical market strength of the incumbent wireline providers. Nevertheless, the number of access lines served by competitive local exchange carriers (CLECs) continues to increase. CLECs serve more than 11 percent of the Nation's lines—including approximately 8 percent of residential and small business lines. These carriers have employed a broad range of entry strategies: Some rely entirely on their own facilities; some deploy their own switches but rely on the incumbent carrier's loops; some provide service exclusively through unbundled network elements; and some rely on total service resale. Consumers have a choice of at least two local carriers in 67 percent of the Nation's zip codes, and about 93 percent of all households are located in those zip codes. This data suggests that we are headed in the right direction competitively but the incumbent LECs' market strength requires continued regulatory intervention.

Broadband services also have continued their ascension and have become increasingly competitive. There are now more than 16 million high-speed lines in service, including more than 14 million to residential and small business subscribers. Cable modem and DSL providers both increased their penetration by about 30-percent in the first half of 2002 alone. Perhaps most importantly, the gap between urban and rural deployment appears to be narrowing. While cable modem and DSL providers serve the vast majority of the broadband market today, there have been promising developments with respect to wireless and satellite technologies. For example, wireless carriers are beginning to introduce third-generation data services, Wi-Fi networks are becoming increasingly robust and are expanding their range, and several companies and joint ventures have announced plans to launch the next generation of satellite broadband services in the near future.

II. Economic and Regulatory Challenges

While these statistics and technological developments in the abstract present a positive portrait of the overall competitive landscape, the last few years plainly have been a tumultuous time for the telecommunications marketplace. Overly optimistic projections of data growth spurred companies to invest enormous amounts of capital to boost network capacity. While demand for telecommunications services grew briskly, it did not grow at a sufficient pace to justify the massive build-out of fiber capacity. Eventually, when the dot-com bubble began to burst, the financial community realized that there was a wide gulf between the supply of network capacity and the demand for data transmission. Investors responded by insisting that network owners retrench and demonstrate profitability over a much shorter time horizon than initially projected. A downward spiral ensued, as many telecommunications carriers went bankrupt after failing to generate sufficient revenues to service their accelerating debt loads. The resultant slowdown in capital expenditures ultimately left equipment manufacturers with surplus inventory and personnel. No segment of the industry was left unscathed. Not only did the economy suffer from devalued businesses and widespread layoffs, but several companies—most notably, WorldCom—appear to have resorted to financial deception to mask poor performance. This fraud compounded the downturn by shaking investors' confidence in the truthfulness of financial statements.

On top of these economic factors, the telecommunications marketplace is beset by regulatory uncertainty as a result of successive court reversals of the FCC's core local competition rules. When the FCC first adopted unbundling rules pursuant to

section 251(c), the U.S. Supreme Court remanded the Commission's interpretation of the "necessary and impair" standard in section 251(d), holding that the Commission had failed to develop a meaningful limiting principle. After the FCC adopted new rules on remand, the D.C. Circuit Court of Appeals reversed those rules on the grounds that the Commission's analysis was not sufficiently "granular," the Commission disregarded the costs associated with unbundling obligations, and the Commission failed to consider the significance of intermodal competition. These court setbacks have left providers with little guidance about the network elements that will be available at regulated cost-based rates and have put at risk some current business plans that were developed around the now-vacated rules.

III. Regulatory Responses

A. Promoting Regulatory Certainty

The Telecommunications Act of 1996 was enacted to "promote competition and reduce regulation," and there is no question that regulators play a pivotal role in overseeing the transition to the fully competitive markets envisioned by Congress. As I have emphasized since taking office,[1] one critical role for the FCC in furthering the development of competition is to promote regulatory certainty. In an economic environment where carriers would have a difficult time raising capital even under the best of regulatory circumstances, the absence of clear rules can deal a crushing blow. Even where capital is available, incumbents and new competitors alike put investments on hold when they cannot reliably assess the regulatory risks they will face. It is no exaggeration to say that a company may prefer receiving an adverse ruling to having no rules at all; in the former case, the company can adjust its business strategy and move on consistent with the regulatory parameters, while in the latter the result is often paralysis.

1. Adhere to the Text of the Statute

One of the best ways to promote regulatory certainty is to adopt rules that are consistent with congressional intent as set forth in the statute. While appellate risks are endemic in the administrative rulemaking process, they can be diminished significantly by ensuring that rules adhere closely to the statutory text, structure, and purpose.

The costs of regulatory uncertainty are significant. Carriers develop business plans based on the FCC's regulations, and when those regulations are subsequently found to violate the statute, business plans must be scrapped. In a worst-case scenario, a company may be unable to survive under the new regulatory regime. The risk of such outcomes can be diminished in the future through the exercise of greater discipline and conservatism in our interpretation of the statute. Therefore, as the Commission considers new unbundling rules, my paramount goal is to ensure that, irrespective of my own policy preferences, our decisions will comport with the statute and with the directives we have received from our reviewing courts.

The Commission's initial efforts to develop unbundling and interconnection policies were largely theoretical, by necessity. We now have the benefit of several years of real-world experience under the Telecommunications Act of 1996. We therefore have a better understanding of which facilities competitors truly need at regulated, cost-based prices, and those they can self-provision or obtain at market-based rates. The D.C. Circuit Court of Appeals also has instructed us to bear in mind that unbundling imposes significant costs (it can deter investment in new facilities and impose substantial transaction costs) in addition to benefits (stimulating competitive entry), and I will attempt to strike an appropriate balance in our pending rulemaking.

2. Ensure Swift and Stringent Enforcement

Another crucial part of promoting competition in a stable regulatory environment is pursuing a strong enforcement policy. Market-opening mandates are worth little to competitors unless they are swiftly and stringently enforced. Indeed, a record of poor enforcement can deter competitive entry and investment just as surely as an absence of rules can. This goal requires a concerted effort by the FCC and our colleagues at the state level. I am pleased that this Commission has aggressively punished violations through forfeitures and consent decrees that have imposed the maximum fines allowed by law. The state commissions also have a good track record in policing the marketplace. I strongly support Chairman Powell's call for increased enforcement authority to ensure that the maximum forfeitures are sufficient to deter anticompetitive conduct by even the largest entities. I also support the adop-

[1] For a full explanation of my guiding regulatory principles, see *My View From the Doorstep of FCC Change*, 54 Fed. Comm. L. J. 199 (March 2002).

tion of national performance standards for unbundled network elements, and potentially for special access services as well, to ensure that the Commission is able to detect and respond to discrimination and other rule violations.

B. Keeping Pace With Technological and Marketplace Changes

Another key role for regulators is keeping up with the rapid pace of technological change and market developments. Otherwise, we run the risk of becoming irrelevant, or worse, implementing regulatory requirements that harm the public interest. I have accordingly been a strong proponent of addressing gaps in the law and developing a coherent regulatory framework for broadband services. Since the Communications Act does not specifically define broadband Internet access services, the FCC must select one of the existing service categories—information services, telecommunications services, and cable services. For several years, the Commission declined to resolve the fierce debate over the appropriate classification of cable modem service. As the Commission remained on the sidelines, providers did not know which regulatory rules would apply, and some therefore were reluctant to invest capital. Making matters worse, courts began to step in to provide their own statutory interpretations, which unfortunately were not consistent.

I am pleased that the Commission last year classified cable modem service as an interstate information service and proposed a similar analysis for the DSL Internet-access services provided to consumers. I also support moving expeditiously to clarify the regulatory implications of our statutory classifications, including issues relating to ISP access, universal service contributions, access by persons with disabilities, and the scope of our discontinuance rules. Only by tackling these difficult questions head-on can we provide the kind of stable and predictable regulatory environment that encourages investment in new products and services. I also believe that the analytical framework the Commission has begun to construct ultimately will help harmonize divergent policy approaches to cable modem and DSL services, and, in doing so, promote efficient investment and deliver increased benefits to consumers.

This principle of keeping pace with change is equally important to our promotion of non-market-based public policy objectives, such as the preservation and advancement of universal service. That is why the Federal-State Joint Board recently took a fresh look at the services that should be eligible for support, and why the Commission and the Joint Board have made it a top priority to ensure that our contribution methodology for the federal support mechanisms responds to changes in the way people now communicate. I supported the interim measures the Commission recently adopted, but I remain concerned that our existing revenue-based contribution framework will not be sustainable long term in light of the increased prevalence of bundling and the difficulty distinguishing among revenues from interstate telecommunications services, local telecommunications services, information services, and customer premises equipment. It therefore remains my goal to promote more comprehensive reforms that will enable the Commission to protect universal service in this changing environment.

The same principles lead me to support examining our media ownership rules to ensure that we are keeping pace with changes in the media landscape. In addition, section 202 of the Act compels such a review, and recent court decisions have underscored the urgency of conducting a rigorous examination. We must ascertain whether the congressional objectives of promoting competition, diversity, and localism continue to be served by our existing ownership restrictions, or whether changes are necessary. Most of the rules at issue were established before cable television became the dominant form of entertainment, news, and information that it is today, and before the advent of the Internet, direct broadcast satellite service, and satellite digital audio radio service. Even within the traditional broadcast world we have had an expansion of programming and we are on the verge of another revolution as the DTV transition is gaining momentum. These dramatic changes compel us to analyze whether our existing rules best serve the public interest.

Finally, a related reason for keeping pace with technological change is that legacy rules may not merely be ill-suited to new services or technologies—those rules may actually harm consumers by curtailing the development of facilities-based competition. This is a critical concern, because we must encourage the development of new platforms and services that will challenge incumbent providers if we are to fulfill the overarching congressional interest in substituting a reliance on market forces for regulation to the extent possible. I have therefore advocated a policy of regulatory restraint when it comes to nascent technologies and services. We should not reflexively assume that legacy regulations should be carried over to a new platform, but rather adopt rules that are narrowly tailored to the interests in protecting competition and consumers. For example, as wireless carriers and satellite operators strive to enter the emerging broadband market, we should avoid saddling them with

regulations simply because other providers may be subject to them. The fact that cable operators pay franchise fees and that DSL providers are subject to detailed nondiscrimination requirements does not necessarily justify imposing identical measures on new broadband platforms.

In time, the Commission should pursue regulatory parity, because differential rules cause harmful market distortions. But a good way to achieve that end is to exempt incumbents from legacy regulations when new platforms take hold and diminish the need for market intervention, as opposed to regulating new platforms heavily during their infancy. The danger associated with the latter approach is that it threatens to prevent the nascent platform from developing at all—and in turn to prevent consumers from reaping the benefits of facilities-based competition.

I thank you for your time. I look forward to hearing your views and answering your questions on how the Commission should promote competition and consumer welfare in the telecommunications marketplace.

Chairman HOLLINGS. Thank you.

Commissioner Adelstein?

STATEMENT OF HON. JONATHAN S. ADELSTEIN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Commissioner ADELSTEIN. Mr. Chairman, Senator McCain, thank you for inviting us today to discuss the future of competition in the telecommunications industry. It is a real honor to be back here before the Senate, and it is nice once again to see my friends and colleagues on the staff.

As you have discussed, the FCC is now carefully considering these key issues, and it helps each of us, I think, to hear from you and all of the Members of the Committee on these pending decisions.

One of the top priorities of the 1996 Act, an essential focus of mine, is to speed the deployment of broadband. The Act makes clear we must extend the benefits of the latest technologies to all Americans, rural and urban, including those who are economically disadvantaged and those who have disabilities. Our entire economy will benefit. If we speed broadband deployment, it can help restore telecommunications as an engine for economic growth. It can fuel a turnaround, not just for the telecommunications sector, which has lost over half a million jobs, but for the growth and productivity of the entire economy.

Our international competitiveness is also at stake. International security is affected. We must roll out secure broadband networks quickly, especially in the face of global terrorism.

For these reasons, our goal must remain to achieve the greatest amount of bandwidth for the greatest number of people. This hearing focuses on one of the two foundational pillars of the Act that drive deployment—competition. Its twin pillar, universal service, ensures that service will reach even those areas where competition falls short. Congress' goal in building the Act upon these twin pillars was to ensure that all Americans have access at reasonable and affordable rates to the best telecommunications system in the world. And I think we have that, and I think it is important that we maintain that through the proper policies on the issues that we are discussing today.

Growing up in South Dakota, I have learned the importance of including rural America in this equation. The high cost, low incomes, schools and libraries, and rural healthcare funds, as Senator Rockefeller and Senator Snowe well know, have brought tele-

communications services to many people who would not otherwise have them. Although universal service does not now support advanced services, it lays the groundwork that makes it possible for consumers to get them.

We are currently at a crossroads. The telecommunications sector faces enormous challenges, as we have heard today. Job losses are on the rise, and consumer bills are up, as well, as Senator McCain and Senator Lautenberg have noted. And while investment is down in the capital markets, there is no money available to provide new capital for innovation and for new service development.

In taking steps to restore confidence, we must take care not to undermine the competition that has emerged so far. The Act envisioned many forms of competition. Facilities-based competition may well provide its most durable form. We need to encourage it, along with all types of competition that Congress anticipated. Both intermodal and intramodal competition could provide strong pressures that will drive down prices, improve services, and offer consumers more choices.

As Senator Allen and Senator Boxer have noted in the case of Wi-Fi, wireless services offer a dynamic new avenue for competition in both broadband and voice communications. We must encourage innovation and manage the spectrum more efficiently in order to maximize those opportunities. Where competition takes hold, the FCC is charged by law with taking the next step, deregulation. They are two sides of the same coin. You cannot have one without the other.

The issue before us now is how to determine, as specifically as possible, whether the presence of competition is sufficient to permit deregulation, as envisioned by the Telecommunications Act.

Once meaningful competition allows the FCC to modify or repeal its rules, we cannot walk away from consumers. I believe, like Chairman Powell, that enforcement will give the FCC the tools it needs to correct wrongs that may occur as a result.

And Congress clearly made the state commissions our partners in implementing the Act. Decisions on competition policy should reflect Congress' directive that we are to achieve its goals with the assistance of state commissions. All the FCC's decisions reflect an understanding that Congress intended every American to have access to telecommunications services and eventually to advanced services at reasonable and affordable rates. Congress gave the FCC the tools it needs to attain these goals through universal service, competition, and subsequent deregulation.

Again, thank you for inviting me to testify, and I look forward to your questions.

[The prepared statement of Commissioner Adelstein follows:]

PREPARED STATEMENT OF HON. JONATHAN S. ADELSTEIN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman, I thank you and Senator McCain for calling this hearing on the future of competition in the telecommunications industry. The Federal Communications Commission is now confronting this key issue head-on, and it will help all of us to hear from you and all the Members of the Senate Commerce Committee as we consider several pending decisions.

One of the top priorities of the Telecommunications Act of 1996 and, therefore, a central focus of mine as a Commissioner, is to speed the deployment of broadband

and other advanced services. The Act makes clear we must extend the benefits of the latest technologies to all Americans—whether they live in the inner city, the suburbs or rural areas.

Our entire economy will benefit if we speed broadband deployment across our country. Broadband deployment will help restore telecommunications as an engine for economic growth. It can fuel a turnaround not just for the telecommunications sector, which has seen a loss of over half a million jobs, but for the growth and productivity of the entire economy. Not only domestic economic recovery, but also international competitiveness is at stake, for we must maintain our traditional leadership in a global economy with foreign competitors who have long since begun building their own broadband networks, often with heavy state subsidies. We will win in the end, because we have correctly chosen a market model to drive deployment, but that choice behooves us to take note, and to take careful, considered action, when investment slows to a halt, as it has in our domestic telecommunications markets.

Secure broadband networks are also crucial for our national security. We cannot allow tomorrow's critical infrastructure to roll out slowly, particularly in the face of global terrorism. Nor can we neglect the importance of maintaining domestic sources that provision our networks.

For these reasons, our goal must remain to achieve the greatest amount of bandwidth for the greatest number of people.

This hearing focuses on one of two foundational pillars of the Act that drives deployment and service quality: competition in the marketplace. Its twin pillar, universal service, ensures that deployment and quality will reach even those areas where competition and the marketplace fall short. Ultimately, Congress' goal in building the Act upon these twin pillars was to ensure that all Americans have access, at reasonable and affordable rates, to high quality telecommunications services, including advanced services.

Growing up in South Dakota, and working as a staffer in the Senate, I have learned the importance of including rural America in this equation. We must fashion policies to help reverse the trend of economic decline and population loss facing many rural communities. The High Cost, Low Income, Schools and Libraries and Rural Health Care Funds have brought services to many people who would not otherwise enjoy them. Although universal service does not now directly support advanced services, it lays the groundwork for the creation of networks that make it possible for consumers to access them.

As you know, we are currently engaged in a number of proceedings that will have a significant impact on competition. Our General Counsel has advised us that open proceedings place constraints on our discussions. I can and will nevertheless discuss the context of how I understand Congress directed us to implement the law.

Two proceedings are now occupying much of our efforts. One is the Triennial Review that determines which, if any, of the current slate of Unbundled Network Elements, or UNE's, the FCC should maintain or remove from the current list under the Act's "necessary and impair" standard as defined by the courts. Another is the proceeding that addresses whether the FCC should treat broadband services provided by incumbent local exchange carriers as telecommunications services regulated under Title II of the Communications Act, or as information services under Title I. The disposition of these two items, among others, is critical to the mission of implementing the 1996 Act according to Congressional mandate.

We are currently at a crossroads. The telecommunications sector faces enormous challenges. Job losses are on the rise, as are consumers' bills, while investment is down.

In taking steps to restore confidence, we must take care not to undermine the competition that has emerged so far. The Act envisioned many forms of competition, both among traditional wireline and intermodal telecommunications services. In the wireline arena, some competitors are facilities-based, while others compete through resale at negotiated prices, and others through the UNE system under TELRIC pricing. Many have argued persuasively that facilities-based competition will provide the strongest form of competition that is most beneficial to consumers, but we must encourage all types of competition Congress anticipated.

We must also recognize the evolution of competition in the growth of intermodal competition, and faithfully implement Congress' directives by creating opportunities for both intermodal and intramodal competition. Both can provide strong competitive pressures that will drive down prices, improve services and offer consumers more choices.

Wireless services offer a dynamic and burgeoning new avenue for competition in both broadband and voice communications. We must encourage new and innovative

technologies, and more efficient spectrum management, to maximize those opportunities.

Where competition takes hold and becomes stable, the FCC is charged with taking the next step: deregulation. They are two sides of the same coin. Without one, you cannot have the other. The issue now before us is how to determine, as specifically as possible, when the presence of competition is sufficient to permit the deregulation envisioned by the Act, and how that deregulation should go forward.

Once the presence of meaningful competition allows the FCC to modify or repeal rules and regulations, we cannot walk away from consumers. I believe, like Chairman Powell, that enforcement will give the FCC tools it needs to correct wrongs that may occur as a result of deregulation.

Congress clearly made state commissions our partners in implementing the Act. They play a key role in helping us to determine if a competitor is eligible for universal service. They also are required to determine whether the Bell Operating Companies have satisfied section 271 requirements in states and should be permitted to provide long distance services. Congress also chose to have the state commissions arbitrate interconnection agreements between incumbent providers and their competitors. Decisions on competition policy should reflect Congress' directive that we are to achieve the goals it established with the assistance of the state commissions.

The Commission's decisions on these matters should reflect an understanding that Congress enacted the Telecommunications Act for the good of consumers. Congress intended all Americans, both rural and urban, to have access to telecommunications services, and eventually advanced services, at reasonable and affordable rates. Congress gave the FCC tools to attain these lofty, yet attainable, goals through universal service, competition and subsequent deregulation.

Chairman HOLLINGS. Commissioner Copps?

STATEMENT OF HON. MICHAEL J. COPPS, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Commissioner COPPS. Thank you, Mr. Chairman. I am honored to be here today. I always appreciate the opportunity to return to the Senate, where I spent many years working under the leadership of my mentor and my friend, Senator Hollings. And I am pleased to note also that I have been privileged to know Senator McCain for many years, and I look forward to working with him as he reassumes the Chairmanship of this Committee. I'm looking forward to working with all of the Members of this distinguished group.

The hearing does take place at the start of what promises to be a truly historic year at the Commission, a year that is going to determine how these industries look for years to come. So this hearing affords me and my colleagues an excellent opportunity to obtain the guidance of the Committee as we approach decision time.

On all these issues, I strive first and foremost to maintain my commitment to the public interest. It is at the core of my own philosophy of government. More germanely, it permeates the statutes which the Commission implements. In fact, the public interest is cited more than 110 times in the Communications Act.

My public interest objective as an FCC Commissioner is to help bring the best, most accessible, and cost-effective communications system in the world to all of our people, whether they live in rural communities, on tribal lands, are economically disadvantaged, or are in the disabilities communities. Each and every citizen of this great country should have access to the wonders of communications. And I really do not think it exaggerates much to characterize access to communications in this modern age as a civil right.

Today, having access to broadband is every bit as important as access to basic telecommunications services was in the past. Broadband, as has been noted here already, has become a key to our Nation's systems of education, commerce, jobs and entertainment, and, therefore, key to America's future. So I want to help make sure all of our citizens have that access.

I sympathize about concerns of a lack of regulatory clarity in this area, but I am not sure whether we are, in fact, heading in the direction of providing greater clarity. So far, we have raised many more questions than we have answered. It could be that we have raised too many questions. In any event, our answers had better be good.

Before we reclassify broadband services, for example, we had better understand the potentially far-reaching implications of our actions on such issues as rural deployment, universal service, and homeland security. We had also better understand the impact of our actions on a pillar of the Act, competition. Competition has the power to give choices to consumers. And with more options, consumers reap the benefits—better services, greater innovation, higher technology.

As competition develops, we can meet another core goal established by Congress: deregulation. The 1996 Act is a deregulatory statute, but I really do not believe it was envisioned as deregulation at one fell swoop. Rather, it was to be deregulation over time, as competition took hold. Where markets function properly, we can rely more on market forces to constrain anticompetitive conduct. Where competition does not exist or market failures arise, however, we must respond with clear and enforceable rules tailored to serve the public interest. The choice is not between regulation and deregulation; it is a question of responsible versus irresponsible deregulation. And the public interest never gets deregulated away.

Managing the transition from monopoly to competition is, therefore, a tricky business. Each day, every day, we need to be about the job of pursuing Congress' goal of competition and consumer choice. First, we must use our current authority to reduce the chance that, in a competitive marketplace, corporate misdeeds and mismanagement will injure American consumers or the competition that Congress sought to promote in 1996. Second, we need to gather more and better data to inform commission decisionmaking. These efforts should include completing our proceedings on performance measurements, and they should include better follow-up on what happens in a state following a successful application for long distance authorization. We have a lot of work to do on that one.

Third, we must be increasingly focused on enforcement, sure and swift and sending a clear message. Fourth, we must have concrete plans for protecting the consumers in the event a carrier ceases operation or otherwise disrupts service.

In all of these areas, we must work closely and cooperatively with our colleagues on the state level. The path to success is not through preemption of the role of the states. We rely on state commissions for their efforts to open local markets to competition and to evaluate the openness of local markets in applications for long distance authorization. Similarly, state commissions are often best

positioned to make the granular fact-intensive determinations about any impairment faced by competitors in local markets. The importance of federal/state cooperation cannot be overstated, and it would be worse than unfortunate if our decisions on the upcoming proceedings led to less cooperation with our state partners.

As we move forward on these decisions, I encourage all parties to work together to help us find constructive solutions. All too often, the protagonists seem interested only in throwing the long ball in the legislative or the regulatory arena. But there is no simple panacea for all the ills that plague the telecom industries. My take is that everyone needs to take a deep breath, avoid kneejerk reactions, and lower the decibel level. We need to look for, first, incremental steps that can put us on the road to larger solutions.

In this regard, I was pleased to learn of discussions among incumbents and competitors begun at the urging of leading state regulators, like Dave Svonda of Michigan. These discussions endure after the first couple of sessions, and I understand they may even be making some progress. I hope everyone who is participating will make a New Year's resolution to keep them going. And I think it would be tremendously helpful to hear some encouraging messages from the top of the corporate ladder where any solutions arrived at by this group will have to be blessed.

Perhaps those in industry who would like to see the Commission less involved in their daily affairs would be well advised to look for collaborative solutions among themselves rather than getting to dug in that agency or congressional action becomes the only way out.

What I have said about the importance of decisions on telecom this year applies equally, indeed, more so, to the media landscape. The Commission is currently reviewing virtually all of its media consolidation rules, and at stake in this proceeding are core American values of localism, diversity, competition, and maintaining the multiplicity of voices and choices that undergird our precious marketplace of ideas and that undergirds our democratic system. At stake in this vote is how TV, radio, newspapers and the Internet will look in the next generation and beyond. And I am, frankly, concerned that we are on the verge of dramatically altering our Nation's media landscape without the kind of national dialogue and debate that these issues so clearly merit.

Suppose for a moment that the Commission votes to remove or significantly modify the ownership limits. And suppose just for a moment that we made a mistake. How do you put that genie back in the bottle? And the short answer is that you cannot. And that is why we need, truly need, a national dialogue all across America with as many stakeholders as possible taking part in the Commission, in Congress, in the media, in the heartland of the country.

So, Members of the Committee, these are some of the major issues on our plate this year. I approach these proceedings hopeful that the Commission will show proper restraint in remaking the communications world and will not presume to undercut the statutory competitive framework. We must be at pains not to let a zeal to deregulate before meaningful competition develops, cripple the very competition that Congress sought to engender.

Thank you again for inviting me to be here and for giving me the opportunity of working with you as together we try to build a better world for all of our citizens through communications.

[The prepared statement of Commissioner Copps follows:]

PREPARED STATEMENT OF HON. MICHAEL J. COPPS, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman, Senators, I am honored to appear before you today. I always appreciate the opportunity to return to the Senate where I spent many years working with my mentor and friend, Senator Hollings. And I am pleased to note also that I have been privileged to know Chairman McCain for many years and I look forward to continuing to work with him as he reassumes the Chairmanship of this distinguished Committee.

This is the first time that I have appeared before you as a Commissioner of the Federal Communications Commission. I want to thank you for the privilege of being an active participant in the deliberations of the FCC as the telecommunications revolution transforms our lives and remakes our world. It is a responsibility that I undertake with the utmost seriousness.

When I appeared before this Committee in 2001 at my confirmation hearing, I told you that I was an optimist about the future of telecom and about communications technologies generally. A year and a half later, tough times though these are, I remain an optimist. It was just a couple of years ago that all the analysts were in high orbit over anything even remotely related to telecom. You'll remember how they pitched prosperity forever, with telecom leading the way into some brave new world that would no longer be subject to the vagaries of the business cycle. Then recession hit, and all those experts went—on the turn of a dime—from irrational exuberance to equally irrational pessimism.

I think they were wrong on both the upside and the downside. Sure, the business plans of some companies were faulty, but the technologies behind them not only remain—they proliferate. Plus, this "boom-and-bust-and-boom-again" cycle that we have lived through in telecom is really nothing all that new—it has accompanied other great technology and infrastructure rollouts throughout our history. Excess enthusiasm and risky investment at the outset, the bubble bursts, and then—if the infrastructure need endures and the technology is viable—growth returns. I think the same will happen here. While no technology will ever lay the business cycle to rest—I think we all understand that now—a technology as substantive and transformative as telecommunications is not going to remain fallow for long. I am encouraged that, at long last, some of the experts are beginning to see the end of the telecom downturn. I'm encouraged by the more balanced approach that a few of these experts are beginning to show. Because, in fact, what's coming down the road is going to make all of the dramatic telecommunications changes of the past century—and they *were* dramatic—pale by comparison. Communications technologies will not only be a part of America's 21st century prosperity, they will lead the way. Broadband, wireless, Wi-Fi, digital broadcasting and interactive media, telemedicine and telecommuting are already joining the parade, and around the corner where we can't see yet will be much, much more.

There is another factor at work here. Part of the market's problem is uncertainty about policy directions on such things as competition and broadband deployment. This hearing takes place at the start of what promises to be a truly momentous year at the Commission, going to the heart of competition in many industries. In 2002, we teed up issues that have the potential to substantially remake the communications landscape of America for many years to come. Two thousand two was, in many ways, prologue, because voting on the issues comes in 2003. I am pleased to participate in this discussion today and obtain the guidance of the Committee as we begin this critical year.

At all times, I strive to maintain my commitment to the public interest. As public servants, we must put the public interest front and center. It is at the core of my own philosophy of government. More germanely, it permeates the statutes which the Commission implements. Indeed, the term "public interest" appears over 110 times in the Communications Act. The public interest is the prism through which we should always look as we make our decisions. My question to visitors to my office who are advocating for specific policy changes is always: how does what you want the Commission to do serve the public interest? It is my lodestar.

My overriding objective as an FCC Commissioner is to help bring the best, most accessible and cost-effective communications system in the world to all of our people—and I mean *all* of our people. That surely includes those who live in rural com-

munities, those who live on tribal lands, those who are economically disadvantaged, and those with disabilities. Each and every citizen of this great country should have access to the wonders of communications. I really don't think it exaggerates much to characterize access to communications in this modern age as a civil right.

No one should underestimate the force of the Congressional commitment to universal service. A critical pillar of federal telecommunications policy is that all Americans should have access to reasonably comparable services at reasonably comparable rates. Congress has been clear—it has told us to make comparable technologies available all across the Nation. Many carriers serving rural America have made, or plan to make, significant investments in communications infrastructure. But they need certainty and stability to undertake the investment to modernize their networks, including investment in broadband. Rural carriers face unique and very serious challenges to bring the communications revolution to their communities. As we move forward on all of our proceedings, including, among others, universal service decisions, broadband policy, access charge reform, and intercarrier compensation, we just must do everything we can to make certain that we understand the full impact of our decisions on rural America. If we get it wrong on these rural issues, we will consign a lot of Americans to second-class citizenship.

Today, having access to advanced communications—broadband—is every bit as important as access to basic telephone services was in the past. Providing meaningful access to advanced telecommunications for all our citizens may well spell the difference between continued stagnation and economic revitalization. Broadband is already becoming key to our Nation's systems of education, commerce, jobs and entertainment and, therefore, key to America's future. Those who get access will win. Those who don't will lose. I want to make sure we all get there.

I sympathize with the concerns about the lack of regulatory clarity in this area, but I question whether we are in fact heading in the direction of providing greater certainty. The Commission has already placed cable modem services into Title I. We reached a similar but tentative conclusion for wireline DSL providers in an NPRM last year. My worry is that we are taking a gigantic leap down the road of removing core communications services from the statutory frameworks intended and established by Congress, substituting our own judgment for that of Congress, and playing a game of regulatory musical chairs by moving technologies and services from one statutory definition to another.

Before we move all the chairs, we had better understand the potentially far-reaching implications of our actions for such issues as homeland security, universal service and ensuring that all Americans, including those living in rural and high-cost areas, have access to advanced services. Law enforcement has raised concerns about the implications of this decision on its ability to protect our citizens. And the Federal-State Joint Board on Universal Service recently concluded that a Title I decision would mean that the universal service fund could never support broadband access. Additionally, rural carriers have expressed concerns about cost recovery for broadband deployment. We need to provide carriers with the certainty and stability to undertake investment to modernize infrastructure in rural communities.

We had also better understand the impact on a second pillar of the Act—competition. Competition has the power to give choices to consumers—choices of services, choices of providers, choices of technology, and choices of sources of content. When consumers have more options, they reap the benefits—better services, greater innovation, higher technology, and more robust discourse.

We need to talk also about the intersection between competition and deregulation. As competition develops, we are enabled to meet another core goal of Congress—deregulation. The 1996 Act is at base a deregulatory statute. Not deregulation all at one fell swoop, but over time, as step-by-step competition takes hold. So the Act clearly envisions deregulation as competition expands to replace monopoly. Where markets function properly, we can rely more on market forces—rather than legacy regulation—to constrain anti-competitive conduct. Where competition does not exist or market failures arise, however, we must respond with clear and enforceable rules tailored to serve the public interest. The choice is not between regulation and deregulation; it is a question of responsible versus irresponsible deregulation. And the public interest never goes away.

As Congress foresaw, we are now seeing competition both *within* delivery platforms and *among* delivery platforms, with increasing convergence of industries, of services, and of markets. Facilitating competition both within and across platforms—and *both* are important in the statutory framework—presents a great challenge to a regulatory agency like the FCC. Managing the transition from monopoly to competition is tricky. To assume that a simple hands-off approach can be the midwife for a brave new competitive world is to ignore the facts of life. Promoting

competition is a hands-on, not a hands-off job. Each day, every day, we need to be about the job of pursuing Congress's goal of competition and consumer choice.

First, we must use our current authority to reduce the chance that, in a competitive market, corporate misdeeds and mismanagement will injure American consumers or the competition that Congress sought to promote in the 1996 Act. In light of all the accounting depredations we have witnessed in the financial world regulated by the SEC, we need to reassure ourselves that our own accounting procedures and requirements are in good stead. Our accounting data inform our decisions about the reality of competition and the protection of consumers. Some traditional FCC accounting rules may be good candidates for extinction—and the Commission has already done a good bit of extinguishing—but it may be that the new times in which we live demand some new procedures. In that regard, I am pleased that the Commission and the states have come together in a new Joint Conference on Accounting to look at these challenges, I hope from the bottom up. I am also pleased that Chairman Powell designated me as a member of this Joint Conference.

Second, we need to gather more and better data to inform Commission decision-making. I would also note the need for such data to *sustain* our decisions legally once they are made, especially in light of the often activist approach of some of the courts who watch so zealously over the FCC and accord it such minimal deference. We have come to rely over the years perhaps too much on self-reported industry data or Wall Street analysts for information to make critical decisions. We must commit to doing the hard work of collecting our own data rather than relying on potentially misleading and harmful financial, accounting, and market information produced by corporate sources subject to clear biases and market pressures. And we must conduct more of our own analyses of the industries we regulate.

These efforts should include completing our proceedings on performance measurements that have been pending for over a year. And they should include better follow-up on what happens in a state following a successful application for long-distance authorization. One thing this Commission has done to promote competition is to move briskly ahead on section 271 applications. No year comes close to matching the pace of 271 approvals—many of which I supported—during the past 12 months. But competition is not the result of some frantic one-time dash to check-list approval. It is a process over time. It is about—or should be about—creating and then *sustaining* the reality of competition. Our present data on whether competition is taking hold is sketchy and non-integrated. We need better data to evaluate whether and how approved carriers are complying with their obligations after grant of the application, as Congress required. I was troubled that the Commission recently moved forward with deregulation efforts by allowing the sunset of separate affiliate requirements without the benefit of such information or analysis. It is only with good data and continued vigilance that we can ensure that consumers reap the benefits of competition—greater choice, lower prices, and better services.

Third, we must be increasingly focused on enforcement. The 1996 Act developed a bold vision for a vastly different telecommunications world, one in which the vitality of competition was to replace the heritage of monopoly. As competition grows and regulation is reduced, enforcement becomes even more important. This Commission has taken forward steps on enforcement, but there still is the need to make our enforcement more efficient, more effective, and broader reaching. In addition to the broad enforcement authority given to the Commission in section 4, the statute gives the Commission the authority to conduct investigations and audits, to issue subpoenas, assess forfeitures, issue cease-and-desist orders, and revoke licenses. We must use all of the tools we have. Revoking some wrongdoer's license would send a real wake-up call to those who seek to misuse the Nation's spectrum.

Fourth, in a competitive environment, we must establish a concrete plan for how we will protect consumers in the event a carrier ceases operations or otherwise disrupts service. A central responsibility of the FCC is to protect the network from dangerous disruption, not only for consumers, but for critical public safety, military, and government users. We need to make sure we do all we can to protect consumers and ensure that they do not face service disruptions.

In all of these areas, as we make decisions in our proceedings this year, we must work closely and cooperatively with our colleagues at the state commissions. The Telecom Act is very much a federal activity, using the term "federal" in its historical context of the state and national governments working together. The Commission and the state commissions have a joint responsibility under the Act to ensure that conditions are right for competition to flourish. The path to success is not through preemption of the role of the states.

We rely on state commissions for their efforts to open local markets to competition. We rely on state commissions to evaluate the openness of local markets in applications for long-distance authorization under section 271. Similarly, state com-

missions are often best positioned to make the granular, fact-intensive determinations about any impairment faced by competitors in their local markets. The importance of federal-state cooperation cannot be overstated. It would be worse than unfortunate if our decisions in the upcoming proceedings led to less cooperation with our state partners.

As we move forward at the Commission to consider these decisions, I would also encourage parties to work together to help us find constructive solutions. All too often, parties seem interested only in throwing the long ball in the legislative or the regulatory arena. But there is no simple panacea for all the ills that plague the telecom industries. My take is that everyone needs to take a deep breath, avoid knee-jerk reactions to each others' suggestions, and thereby lower the decibel level. We need to look for first small steps. Incremental steps that can put us on the road to workable solutions. In this regard, I was pleased to learn of some incipient discussions among incumbents and competitors that began on the fringes of the recent NARUC Conference in Chicago. I congratulate everyone who is taking part in them and those who seized this opportunity to get a conversation going. There are those who remain skeptical that this process can accomplish anything, and they may be right, although their very skepticism only endangers those chances more. The discussions endure after the first couple of sessions, and I understand that they may even be making some progress. I hope all who are participating will make a New Year's resolution to keep the dialogue going. It would be helpful to hear some encouraging messages from the top of the industries participating in these discussions. Perhaps those in the business world who would like to see the Commission less involved in their daily affairs would be better off looking for collaborative solutions among themselves rather than getting so dug in that agency action becomes the only way out.

Finally, let me mention something that we should *not* do. We should not use the current situation as an excuse to back away from competition. This is fundamental. Instead, we must renew our efforts to *promote* competition. It is during recessions and tough economic times when we hear the pleas for less competition and increased consolidation. But re-monopolization is not the cure for telecom's problems. Instead we should vigorously pursue Congress's goal of competition and consumer choice.

It is difficult to over-estimate the importance of the decisions that are going to be made on the competition issues. In the coming months, we will decide whether to keep, modify, or scrap many of our competition rules. Talk about important decisions—there is the potential here to remake our entire communications landscape, for better or for worse, for many years to come. The stakes are enormous.

This applies not only to telecommunications, but also to the media landscape. The Commission is currently reviewing virtually all of our media consolidation rules. These rules, among other things, limit a single corporation from dominating local TV markets; from merging a community's TV stations, radio stations, and newspaper; from merging two of the major TV networks; and from controlling more than 35 percent of all TV households in the Nation.

At stake in this proceeding, as I see it, are core American values of localism, diversity, competition and maintaining the multiplicity of voices and choices that undergird America's precious marketplace of ideas and that sustain our democracy. At stake in this vote is how TV, radio, newspapers, and the Internet will look in the next generation and beyond. And at stake is the ability of consumers to enjoy creative, diverse and enriching entertainment springing forth from the well-springs of America's creative genius rather than from the surveys of Madison Avenue advertisers.

The elimination of radio consolidation protections in 1996 has already led to conglomerates owning hundreds (in one case, more than a thousand) stations across the country. More and more programming originates outside local stations' studios—far from listeners and their communities. Today there are 30 percent fewer radio station owners than there were before 1996. Most local radio markets are now oligopolies.

Some media watchers argue that this concentration has led to far less coverage of news and public interest programming and to less localism. Many feel radio now serves more to advertise the products of vertically integrated conglomerates than to inform or entertain Americans with the best and most original programming. Additionally, I am concerned that we have not analyzed the impact of consolidation on the increasing pervasiveness of offensive and indecent programming as programming decisions are wrested from our local communities and made instead in distant corporate headquarters. Is it simple coincidence that the rising tide of indecency—whether sexual, profane, or violent—is occurring amidst a rising tide of media industry consolidation?

I am frankly concerned that we are on the verge of dramatically altering our Nation's media landscape without the kind of national dialogue and debate these issues so clearly merit. The stakes are incredibly enormous and we must, simply *must*, get this right. We need the facts. We need studies both broad and deep before we plunge ahead to remake the media landscape. And we need to hear from people all across this land of ours.

Suppose for a moment that the Commission votes to remove or significantly modify the ownership limits. And suppose, just suppose, that it turns out to be a mistake. How would we ever put *that* genie back in the bottle? The answer is that we could not. That's why we need—truly *need*—a national dialogue on the issue. We need it all across America with as many stakeholders as possible taking part. And in my book, *every* American is a stakeholder in the great Communications Revolution of our time.

Mr. Chairman, Senator Hollings, distinguished Members of this Committee, these are some of the major issues on our agenda. I approach these proceedings hopeful that the Commission will show proper restraint and will not presume to undercut the statutory competitive framework. Instead, the Commission should use these proceedings to understand the marketplace better in our role as policy implementers and not policy makers. And we must be at pains not to let a zeal to deregulate before meaningful competition develops cripple the very competition that Congress sought to engender.

Thank you for inviting me to appear before you and for the privilege of serving as a Commissioner of the FCC during these historic times. I look forward to working with each of you as we build a better future for all our citizens through communications.

Chairman HOLLINGS. Well, thank you. And I appreciate the admonition that we be more deliberate in the approach to the problem.

I think back in 1976, I was in Beijing in an earthquake, and I can hear little Wong running down the hall of that hotel, "Be calm, be calm—earthquake." For all of us who want Chairman Powell to immediately get investment going, jobs going, business going, as long as "Be calm, be calm—war"—as long as there's war in imminence, there's not going to be any investment in telecommunications or anything else. The market shows that. And that is the situation we are in with the entire economy.

And the exercise that is going on now in the Congress is political. It is not economic. We ended the fiscal year just three and a half months ago at a $428 billion deficit. That is, we spent $428 billion more than we took in. We put into the economy $428 billion stimulus. And now, in this 3½ months in this fiscal year—October, November, December, and part of January—$159 billion. That is $587 billion stimulus in 15 months, and we still are level and losing more jobs, more manufacturing and everything else.

So, even if you solve the war problem, even if you pass the $30 to $40 billion a year—and both sides are arguing they will always get together—nothing is going to happen this year with respect to a big investment in broadband. I would like to get it; you would like to get it. But obviously it does not pay. The Bell companies, who have that last line in, and could really serve the residences, it does not pay. So there is no use to go through an exercise about facility-based operators. We had 300 facility based operators in CLECs, and we are down to 60. They are broke. Who is going to finance them?

Otherwise, you have got, yes, cable coming along, because it does pay for them to put another service in where they have already got a line. So they have got 70 percent of the residential. The Bells have got 70 percent of the business, on broadband.

Now, we could change it some maybe with Wi-Fi and some combinations. Look at that. Tell us, technically. You folks have got the expertise, and you here are the best of experts.

But what I find is this pellmell race, in order to act like you are doing something just when competition starts, and here it is, seven years—my own Bell South, they took seven years to comply. Now they have complied in the entire region without a change in the law, but they delayed us some seven years. When John Clendenon told me that December 1995, "We will be into long distance in a few months," I checked with him, the last wording of the law—I said, "Now, John, does that suit you?" He was down in Florida already, on vacation in December. You and I were up here working. He said, "Yeah, that is fine. We will be into long distance in a few months." Now it is seven years later.

So they are in—and the very people that are hollering "Parity, parity, let us level the playing field," are the ones that have got it unlevel. They have still got 88 to 90 percent of the last line into the home and the business.

So let us remember here this one question. I am quoting from this morning—and I just saw this a minute ago—"For years"—this is the editorial—"Bell monopolies push to disconnect competition. For years, the law wasn't an issue because states let the Bells charge exorbitant fees that kept competitors out of their markets. Now that several states are ordering them to cut their network fees, competition is emerging and phone rates are decreasing. On Monday, AT&T announced plans to compete in Washington, D.C., after the local government cut the charges for tapping into the network operated by Verizon. Nationwide, 11 percent of local phone lines were serviced by competitors through last June, nearly double their share two years earlier. Faced with the real first test to their grip on local service, Verizon and the other Bells are crying to the Federal Communications Commission that they were forced to rent their networks at a loss. They want to go back to the way it was, higher fees for rivals, and less choice for consumers. Through a court ordered decision—though a court ordered decision won't come for a month, all five FCC Commissioners have an opportunity to make clear which side they're on when they testify today at the hearing before the Senate Commerce Committee."

Are you on the side of the higher prices and less competition, or not?

Commissioner POWELL. Absolutely not. First of all, I would urge that if we are going to submit articles for the record, that the opposing view that is in the *USA Today* article also be included, because I think it demonstrates that these are legitimate and difficult issues to which responsible people have differing viewpoints about the right way to maximize consumers.

I would like to take on what I think for a moment, which is the great mythology of what this exercise is really about. I think what you should hope from your regulators is that we are not sitting around just deciding whose side to join in the way that they present the debate and be either Bell- or CLEC-oriented, either what the Bells want, or those who hate them want, in and of themselves. I hope that public policy is clear-eyed and focused on what the right economic conditions and limits of the statute are.

One thing about that, the Commission must act constitutionally, which is it must act faithful to the statute, as interpreted by the judiciary.

I think it bears emphasizing that the UNE–P regime is compelled, as much or more, by anything that for seven years the Commission has afforded access to all elements, and not once yet, not once in that seven years, have those rules been in place in a sustainable way. As has been mentioned, they will be vacated on February 25th—not just one of the elements; all of the elements. For that reason, the Commission's obligation is truly pointed and significant, and that is one of the reasons we are acting.

Congress put the impairment standard in the provision to ensure—not just as a protection for Bell operating companies to not unbundle things they do not want, but as an insurance that the kind of competitive entry you would get would be the kind that was long term, meaningful, and sustainable, that there are some obligations for a long term competitor to bring something to the party and that—not just be able to access another's network because it would be beneficial or preferable, but only because it was really necessary. Two courts now have condemned the Commission of failure to give faith to that provision.

I cannot tell you what the outcome of our proceeding will be, but I can tell you that it is driven significantly by an obligation to read that statute faithfully in a way that the courts have interpreted and produce a list of elements, including potentially some participation by the states, that is faithful to those interpretations.

It is not about, I think, although the BOCs would love for it to be about whether they are losing money or not, or whether they are suffering or not—this is also just as much about the kind of competition we are going to get or not.

I have seen a lot of entry in the five years I have served in the Commission, and I have seen a lot of bubbles burst. I have seen a lot of excitement and euphoria around numbers like the Chairman mentioned, 300 entrants—300 entrants who are not with us today, who are not with us in part because the foundations of the models were flawed, because they were unsustainable. And they were not facilities-based providers. Many of them were those who took advantage of regulatory arbitrage opportunities. Many are not. Many of those that have survived bankruptcy and are remaining as viable competitors in the market are partially or fully facilities-based. There is room for all of it.

But I do think that the government should be thoughtful about what kind of competition it wants to incent in a way that is long term and viable, and that we are not sitting here five years from now wondering what happened if another bubble were to burst. And that is what we are guided by. That is the exercise that we are forced to undertake. I think it is faithful to the statute, and I think it is as razor-sharp focused on promoting competition as any other alternative promoted by a company.

Chairman HOLLINGS. Very good.

Senator McCain had to be excused.

Senator Burns?

Senator BURNS. Let us shift gears here a little bit. I think it was sort of an historic thing that happened this past week. In fact, last

month—that came into light at the Consumer Electronics meeting out in Las Vegas—but last month, the major cable operators and consumers electronic companies reached an agreement that will foster the retail availability of digital television sets that connect directly to cable systems. Consumers will be able to buy plug and play DTV sets that will be capable of receiving high-definition programming services provided by cable operators without the need of a set-top box. The availability of digital plug and play television sets will help speed the transition from analog to digital television and allow the government to reclaim valuable spectrum for wireless 3G use. I want to commend both the cable and the consumer electronics industry for reaching that agreement.

This major breakthrough clears an important hurdle in DTV transition. I would like to hear your view on this agreement and the potential that it has for this transition to move forward. Any Commissioner, I ask you all.

Chairman POWELL. Well, let me just state briefly, Senator, that we are equally excited about the breakthrough, because I think it is a breakthrough. The industry has been struggling for many years to try to solve that problem. The Commission has been relatively involved in trying to spur that sort of negotiation and those sorts of breakthroughs all year long. I have personally been deeply invested in it and have had very strong support from my colleagues.

I do think it is significant. I do think it is what consumers are waiting for—the understanding that when they buy a set at Circuit City, they understand and can have an expectation about bringing it home, plugging it into their cable system or their other systems, and having it work and provide that panoply of programming.

The Commission acted quickly in response to the announcement, and just last week initiated the notice of proposed rule-making that would be required to do the governmental aspects of possible implementation of that agreement. It certainly is one of my priorities. We are working to do that as quickly as possible to be another spur in the transition.

Senator BURNS. Anyone else want to comment on that?

Commissioner COPPS. Well, I would just say I, too, am encouraged by that action. These things do not happen in a vacuum. I think we need to commend the Congress for the role it took in trying to encourage the players to get together, and I think we should commend Chairman Powell for the leadership role he has taken to try to get the players together to make this happen, too. We are making progress, I think, at long last in the digital TV issue.

And just as an aside, without opening up a whole other area, I hope while we are looking at areas like set-top boxes and DTV tuners and all of that, that we will afford, and that you will afford, some time to look at the public interest responsibilities of digital TV broadcasters also, because I think that is just critical to the success of the transition.

Commissioner ADELSTEIN. I, too, share your enthusiasm, Senator Burns, and the enthusiasm of our Chairman and Commissioner Copps, for the deal that was reached between the cable industry and the consumer electronics industry. I think it will make it much easier for consumers to be able to just plug and play their tele-

vision sets. They will buy it, they will plug and play, and that will really speed along the transition.

I recently saw some of the exciting new products at that show you mentioned, the consumer electronics show, and it was amazing what is happening with digital television. The manufacturers are doing an outstanding job of putting new products out, and the price points, I think, are coming down dramatically, which is essential if we are going to get the transition done. Because if people cannot afford these new sets, then we are not going to get to the point where we can get the spectrum back.

The point of this is to maintain free over the air television at the same time that we move the transition along to the point that we can get the spectrum back from the broadcasters, because it is so urgently needed for public safety and other uses.

Commissioner MARTIN. I agree, as well, with the statements my colleagues have made about the importance for consumers that they have been able to reach this agreement, and also the recommendations. And we all congratulate Chairman Powell. It was really at his encouraging of the industry that they were able to do that. So I would agree with both those comments.

Senator BURNS. This morning, I think you heard from most of the Senators that serve on this Commission some concern about whenever we start talking about doing things in Washington, D.C., and then circumventing the states' PUCs. What should the states' role be in this transition area of competition in the local loop? Should the states' role be preempted when it comes to implementing the act in local markets? And if pricing is decided only by the incumbents, what is the competitor's recourse if the price is not based on economic cost? What role do the local PUCs play, in your view?

Chairman POWELL. In my view, the states play an extraordinarily significant role, and a role provided to them by Congress. First of all, with respect to pricing, the Congress squarely conferred upon state commissions expressly in section 251 and 252, the authority to establish prices for the wholesale unbundled network elements. More importantly, states also are the sole regulator of retail rates. In many ways, state PUCs have their hands on probably the two most significant levers with whether competition will work or not: that is, the retail revenue and the wholesale revenue associated with the economic question. That is a profound and significant obligation.

With respect to unbundling elements and other roles, the statute often speaks to them, as well. I think the word "preemption" is being thrown around in this debate incredibly lightly without a thoughtful reflection of what the statute actually provides. Section 251, in my opinion, clearly confers on the FCC authority to make unbundled network determinations. But the statute also very specifically says that states are permitted, pursuant to their authority, to develop interconnection policies, but only if they do not conflict with the federal regime or otherwise undermine their impairment.

So to the extent to that there is a preemptive effect under the statute, it is one that Congress has put in the statute expressly. And I do not think it is particularly a question about whether we reach out to preempt them. I think it is always going to be a ques-

tion of whether a rule that we impose pursuant to our obligation, whether or not it is in direct conflict with a rule that a state might otherwise impose. And Congress concluded that, should that be the case in any given instance, the federal rule would be supreme in that context. That is clearly laid out in the statute. I do not think that is FCC discretionary preemption. I think it is the resolution of conflict as provided for by the Act.

Commissioner COPPS. I would see the role of the states as a role of full partner, certainly not to be preempted lightly. As the Chairman says, occasions may come when there is preemption, or where some general standards are set. But, in point of fact, what the courts are telling us is, a lot of times, that we do not have the granularity of evidence to sustain our rules and regulations. That is where we need to turn to the states, because they can get that kind of granularity quicker than we can.

I would also say, though, that it is easy to talk about more cooperation and full partnership, but it is hard work. You have got to reach out and do it every day. You go to the meetings, talk to these people, make sure they are involved in all the decisions. And I have tried to devote a good bit of my time to that, and I think my colleagues have, too. It is an important relationship, and it should be a full partnership.

Commissioner ADELSTEIN. Well, I would agree with that sentiment that the states play a key role in this, and the local PUCs do an outstanding job of helping the Federal Communications Commission to make market-opening determinations in their respective states.

I would note, Senator Burns, that you have an outstanding PUC commissioner in Bob Rowe, from Montana, a good friend of yours and a good friend of mine, who I think exemplifies the kind of commitment and decency and intelligence that can reside in the state commissions. And it would be tragic if we did not draw upon that kind of experience and knowledge in making these kind of determinations about market opening.

Just a comment on the issue of the conflict that the Chairman raised between potentially federal policy and state policy. I would note that is in section 251(d)(3) of the act, which is entitled "Preservation of State Authority." So we need to be very careful in considering this as to whether or not we are taking a section that talks about the preservation of state authority and using it as a means of, in fact, limiting state authority. So these are the kinds of issues that we need to debate in front of the Commission.

Commissioner ABERNATHY. Senator Burns, I think the one point I would add is that this statute was well crafted, as far as creating critical roles for both the states and the federal regulators. If we do not work together and in tandem, then we are lost, because these issues are so terribly complex. So I do not envision any preemption in the sense of the FCC reaching out and taking away authority from the states. Rather, I am going to be guided by the statutory language and the roles that are defined there, and work in cooperation with our colleagues, because that is the only way that we will be able to deliver this vision to the consumers across America.

Commissioner MARTIN. The Federal Government and the states have worked cooperatively and play a complementary role in trying to implement the local provisions—local competition provisions of the Telecommunications Act, and I think that the courts have challenged us to try to develop a more granular analysis, and I think that we should try to take advantage of the local PUCs' expertise and experience in this regard. So I would forward to continuing to have a cooperative relationship with them.

Senator BURNS. Thank you.

Chairman HOLLINGS. Very good.

Senator McCain?

Senator MCCAIN. I want to thank the witnesses.

Consumers often pay more for cable television than their local telephone bill. The Commission recently rejected the proposed merger of Echostar and Direct TV. Meanwhile, cable rates continue to escalate faster than the rate of inflation.

In response to the Commission's action, Gene Kimmelman, of Consumers Union, stated, "The merger of the two dominant providers of satellite TV naturally raised concerns, but this merger could have been structured in a way that actually helped consumers by making satellite television a legitimate competitor to cable."

If a stronger DBS competitor is not permissible, do you see any other competitor capable of restraining rates offered by cable companies? Are there any policy changes we should be considering to addressing rising cable rates?

Chairman Powell?

Chairman POWELL. First of all, on your point, I understand and thoroughly considered the kind of arguments that Mr. Kimmelman was making in the context of Echostar. With all due respect, in my own personal opinion, I thought the anticompetitive effects of the merger far outweighed the putative benefits of that, and that was our judgment. It is interesting that we often debate——

Senator MCCAIN. And what is the competitor to cable?

Chairman POWELL. If cable—first of all, our conclusion was, DBS is a viable competitor to cable. Both DBS providers are a viable competitor to cable. I think the facts will indicate, even with price increases, there has been disciplining effects of them entering the market.

I think you are right to be concerned about rising——

Senator MCCAIN. Where have those disciplining effects manifested themselves?

Chairman POWELL. For example, two out of——

Senator MCCAIN. Not—certainly not in cable rates.

Chairman POWELL.—two out of three new cable subscribers—two out of three new multi-channel subscribers, choose dish over cable. Dish, with its digital packages has driven greater investment and innovation in the cable network by forcing cable to upgrade systems to digital interactive product, to force them to begin to look at cable modem service and invest in developing that. I don't want to diminish the rise of cable rates, but I think competition often has multiple effects, other than just price, and I think there are some of those that have been seen.

I think that the greatest missing piece in competition in cable still is the phone company infrastructure. I think it is probably the most significant potential out there that has yet to be invested in and deployed to be a competitive video alternative, but there have been minimal efforts at that. I think the video over DSL experimentation out in the Qwest territory is the kind of thing that ultimately—not in the short term, but ultimately—I think are going to be both necessary for those companies' survival, and probably critical to continued competitive discipline in cable.

Senator MCCAIN. Well, a lot of consumers would like to see some of those positive effects, Chairman Powell, which they have not seen yet. In fact, the cable rates have been rising rather than decreasing, despite all of those marvelous technological breakthroughs that you have described.

For all of the witnesses, starting with Chairman Powell, the preamble of the 1996 Telecom Act states that its principle purpose is to, "promote competition, reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers, encourage the rapid deployment of new telecommunications technologies."

What statutory changes would you suggest, if any, to help accomplish the Act's stated purpose? Beginning with you, Chairman Powell.

Chairman POWELL. Well, Senator, I do not know if any dramatic changes to the statute are necessary to achieve those goals. I do think that the Congress is going to increasingly be called upon to understand the new derivations of services that are a consequence of technical change and convergence. While I am aware, and credit that in 1996 there was a general understanding about advanced services, I really do not believe that it could have been so prescient to understand the kind of technological migrations and conversions we are seeing today. And they are straining, almost to a level that cannot be contained, the parameters of the statute in some ways.

The statute still is very Balkanized, that, if you are a certain kind of carrier and you put that label on your head, that is your regulatory environment. If you are a different kind, that is your regulatory environment. Half the fights we are having today are over labeling. What classification are we going to stick on your forehead? Because the regulatory consequences flow from that.

But increasingly, there will come a day that you will have a hard time distinguishing a BOC from a cable company. I think there is going to come a day you are going to have a hard time distinguishing a wireless provider, what we call today, from a telephone company. And I think that we are going to have to ask ourselves questions about the competitive dynamic that somebody, by virtue of their history or their legacy, is treated one way; and by another's history or legacy, treated another way.

So at one point, the Congress considered Title VII in the original concept, and it might have been premature in 1996. But I do think coming rapidly is a day in which wrestling with the question of a converged communication market, it is going to be really, really important.

And I would add, because so many Senators are rightly concerned, as we are, about universal service, how the universal serv-

ice mechanisms are going to migrate with technology, as well, and what new initialized judgments are we going to make about how to continue to promote those goals in the most effective way.

Senator MCCAIN. Mr. Martin?

Commissioner MARTIN. In addition to addressing some of the issues related to the convergence and harmonization of our regulatory regime as it applies to different technologies, I have been supportive of the Chairman's call for additional enforcement authority, that the Commission would have an additional ability to enforce the rules that it does have. So that would be the only other change that I would add.

Senator MCCAIN. What changes are those?

Commissioner MARTIN. The ability to increase, actually, the Commission's ability to find companies when they were in violation of the Commission's rules.

Senator MCCAIN. Ms. Abernathy?

Commissioner ABERNATHY. Thank you. I, too, support increase fine and forfeiture authority. I think that enforcement is going to become more critical as we move forward in this new competitive age.

And I guess I would look at the issues that we are tackling when it comes to broadband regulation and the distinction between whether it is a Title I or a Title II service. We are making, I think, the right decisions, based on the statute as it is written today. But, as pointed out by Chairman Powell, the distinctions between what is a broadband versus a wire-line service, versus a cable service, are rapidly being eliminated. What we are trying to do——

Senator MCCAIN. I guess I had better restate my question. Are there any statutory changes that you feel need to be made to the 1996 Telecommunications Act?

Commissioner ABERNATHY. Not specifically that I can think of.

Senator MCCAIN. Thank you.

Mr. Adelstein?

Commissioner ADELSTEIN. Well, in my many years as a Senate staffer, I was much more comfortable making legislative recommendations than I am in my current capacity. But I would say that I share the view of the others that has been expressed, and the Chairman's contention that additional enforcement authority is warranted, particularly if we are going to move in the direction of deregulation where we are not going to have some of the mechanisms in place, the rules in place, that if there are violations of the rules that remain, there has to be strong enforcement authority. And given the vast size of some of the companies that we are overseeing, it is very hard to really get their attention with a small pinprick of the size of the forfeiture and fine authority that we currently have.

I would also say that it may be appropriate to look at the bankruptcy laws, in terms how they function and how the FCC's role, vis-a-vis bankruptcies, are, in relation to telecommunications companies, which—we have seen a rash of bankruptcies, and there are some real questions about how much authority we have in working with bankruptcy courts to ensure that consumers are protected as bankruptcies occur.

Senator MCCAIN. Dr. Copps?

Commissioner COPPS. I think my first inclination is always to see if there is not something in the current statute that can address the problems we have got. I know the statute has not delivered the kind of services or results that you or many other Senators or a lot of the American people would have liked to see. But on the other hand, I do not think it is the hundred-yard dash to perfection. It is kind of the long, hard contest of application. So I think that is the first recourse. So I do not know that I have any suggestions for right this second.

I do think, though, that in the area of media consolidation that I talked about earlier, that it could well be that we are going to have to make the statute probably clearer there. I think some of the suggestions that have been raised here with regard to bankruptcy are extremely germane. Convergence was mentioned. I think we can deal a bit with that right now, and we should go through that exercise and maybe come to Congress with some options before we suggest specific changes with regard to that.

And then we have the outstanding question of universal service, a lot of debate going back and forth. It is all teed up for a decision. Hopefully we can navigate our way through that. But if not, then it might be necessary to come to Congress and look for further guidance with regard to that.

Senator MCCAIN. Thank you, Mr. Chairman.

Chairman HOLLINGS. Thank you.

I want to thank Senator Brownback and Senator Wyden for yielding to Senator Lott, who has an 11:30 meeting.

Senator Lott?

Senator LOTT. Thank you, Mr. Chairman, and thanks to my colleagues for allowing me this time. I just have a couple of questions, even though I am sure we could go on for quite some time with questions.

On the point that Senator McCain was just making, we want to reserve our rights and our responsibilities as a legislative body, but we want you to act to interpret what we have done, and then we want the states to be involved, too. So you are in the position of being criticized if you do act and criticized if you do not act sometimes, and I know you are in a difficult position. But this is a critical area, and I think you are going to have to step up to some of these decisions, which the law requires, and now the courts are requiring. So I know it will not be easy, but good luck as you face some of these decisions you are coming up to.

But I also think that the point that Senator McCain was making is a critical one. As we move forward, I think we, as a Congress, and you, as the regulatory body, should work together and think seriously about, do we need to, and the last time I used this word, it caused some consternation because different people interpreted what I said way beyond what I meant—we may need to "tweak" the law some. And that is not to say that we tilt it one way or the other, but it was—we passed it in 1996. My goodness, the world has changed so much in this area.

And so I hope that you will seriously think about that and maybe be prepared to talk with us, either privately or in subsequent hearings, about what we might need to do in the future to review the law.

And in that question, Chairman Powell, and maybe some of the others would want to respond, the basic question is, is the 1996 Act working to increase new local and long distance competition and provide lower rates, or not?

Chairman POWELL. I think it is working, but it is not working in an optimal way. I think that it is working to bring entrepreneurial activity. It is working to induce competitive alternatives. As I think Senator McCain mentioned, and I would say it is true of local rates, too, we have not seen significant price-disciplining effects as a consequence of the activity across the board, which is one of the goals in the preamble.

I think that we have—if you are talking about reduction of regulation being one of the roles, I mean, I think we are still pretty much in the midstream of really having ballooning regulations in order to continue to deal with the permutations going on in the market, rather than a reduction.

For all the talk of us deregulating and some accusations that it is reckless, I will assure there will be hundreds of pages of rules that come out of any decision we reach in the next few weeks to oversee the decision. I would take issue that there is anything going to be radically deregulatory about some of the things that we do under the statute.

But more importantly, I think that innovation and investment are important. I mean, I think it easy to say, "Let's mechanically apply the statute, and that does not matter," but it does matter because of this migration point that I am trying to emphasize, which is, the whole country has to move from its matured analog infrastructure to advanced digital infrastructure if this country is going to go into the next century of communications, period. I feel very strongly about it. This is about moving the old to the new.

Yes, incrementalism has its place, but so does boldness, when it is called for. And I think that this country will find itself at a competitive disadvantage, not delivering the kinds of advanced services to its citizens, if it does not work on the kinds of economics, stimulus of investment, regulatory environment that promotes rather than retards that kind of activity. Wireless is a perfect example.

I will leave it at that. I can make several proposed legislative recommendations about things that I think we are going to have to do to make spectrum reach its full potential, which we are beginning to see lately in things like Wi-Fi.

Commissioner COPPS. Could I just——

Senator LOTT. Anybody want to add to that?

Dr. Copps?

Commissioner COPPS. I'd just comment briefly, if I could.

A perfect act? No, of course not. But perfect flop? I do not think so either. And I think one thing we need to keep in mind is, we have got to give this some time to work. We have spent an awful lot of time in the courts since 1996 in litigation. We have been through ups and downs in the economy that were wrenching for the industry. And we have been in a rule and regulatory writing process. And all of these things, I think, make a final judgment on this Act—history's final judgment—very, very difficult.

I do not think there is any question that the Act has spurred competition in wireless, in broadband, with the CLECs. It is a de-

regulatory act. But, again, it is how you interpret that. I interpret it as an incrementally deregulatory act. I think coming in to change the act at—every time there is a change is wrong. I think many of these technologies that we are looking at right now, the new technologies that are going to save us, are in themselves transitional technologies. They are going to change in a few years. So we cannot just always be changing every chapter of the law to accommodate transitory technologies.

I think the Act did create a new federal-state balance, which was good. I think it recognized convergence, and it made a strong statement on behalf of universal service.

All of that being said, I do not think my personal view of what the Act is or how successful it was is really very important. My job is to implement the Act as it is written.

Senator LOTT. Let me ask Mr. Martin this question. As we look at revising the spectrum policy, what are your views on the best way to ensure that this valuable asset can be used most effectively to provide new and expanded communications options for rural areas, like in my State or Maine or Montana or North Dakota?

Commissioner MARTIN. Well, certainly the changes in technologies that are occurring are allowing us to adopt rules that are more flexible and allow technologies actually to take more advantage of different pieces of the spectrum, higher frequencies, and potentially allow us to take much advantage of the—and a much more efficient use of spectrum going forward. So I think that that is one thing that I think the Commission, in its rules, makes sure it takes into account.

And I also think that the Commission should be trying to set forth clear spectrum decisions as it relates to interference and trying to establish a more definitive statement about what levels of interference are actually allowed. I know that's one of the things the Spectrum Policy Task Force had tried to address, and I think that that would probably be something that would be helpful for us to encourage the more efficient use of spectrum going forward.

Senator LOTT. Quickly, one last question. And Mr. Adelstein, maybe I could ask you to respond to this one. One of the issues that we have dealt with in the past and that you are going to be dealing with is this media ownership review question. And I wonder what your views are on the impact that these changes in rules would have on individual stations in communities, especially regarding coverage of local news. Because I really am concerned that if we go about this the wrong way, we are going to have a further deterioration of that local involvement in the local coverage.

Commissioner ADELSTEIN. That is an excellent question, Senator Lott. We are confronting some of the most important questions in the history of the Commission on media ownership, the largest review we have ever undertaken, and I am aware of your longstanding leadership on trying to maintain a diversity of voices and to maintain a localism of coverage, which have been the hallmarks of the Federal Communications Commission's job in maintaining media diversity.

We have had the court remand to us a number of these rules. The D.C. Circuit Court has found that the FCC has not adequately justified those rules. And I would have to commend the Chairman

for undertaking a series of studies to try to determine what the proper evidentiary basis is for these rules so they can be sustained in court. I think we need to continue that analysis. We need to reach out to Americans and to hear what they have to say in the—in every part of the country about these rules, because it will affect every American very profoundly.

The Congress required us to do, in a biennial review, to review all of these rules to determine if they continue to be, in the words of the Telecommunications Act, "necessary in the public interest." And in doing that, I think we need to stick to the traditional FCC hallmarks of diversity of voices, localism, and competition in the media, and that will preserve a free marketplace of ideas and the free flow of ideas in this country.

Senator LOTT. Ms. Abernathy, would you like to add anything to that?

Commissioner ABERNATHY. I think the only thing that I would add is that we are acutely aware of how important our review of the media ownership rules are. That is why we have got hearings scheduled. That is why we have had over 2,000 comments. We have released six consumer oriented studies, six market based studies. What we are focused on is ensuring that we develop a record with data that will support whatever limits we ultimately decide are appropriate in order to preserve diversity, localism, and competition.

Senator LOTT. Thank you, Mr. Chairman.

Chairman HOLLINGS. Very good.

Senator Brownback?

Senator BROWNBACK. Thank you very much.

I want to express my support for the reform-minded comments and thoughts that I have heard put forward here that seem to me to be based on market realities. It seems to me you are looking to move forward in a reform-minded way, based on market realities, the reforms I am hearing the sentiments put forward about. I want to express my support for that.

Chairman Powell, when you talked about the Balkanization of the actual law itself and putting different labels on people's heads, and that determined the level of regulation, I would hope that as you wrestle with that issue you would not regulate up one group to say, OK, "Well, let's regulate this to try to level the playing field," but rather we would regulate down to try to create more of an open atmosphere for people as those thoughts come forward. It just looks like, to me, you could go either way, or you could do nothing with it, as well. But if we have got that sort of system and if we can't get it changed statutorily, you have got some parameters to be able to allow that competition to take place, very much on an awareness of what is happening in the market. You can move a lot faster and better than we can here in moving a bill through Congress or any sort of changes that we might try to make.

I do want to note something that came up in a number of comments, that there were a lot of my colleagues and people interested in Wi-Fi as a way of being able to move forward making Broadband available through the use of a particular technology. But is it not true that Wi-Fi requires wire-line broadband connection in order to

connect to the high-speed Internet? Is that not going to be required to make that technology work?

Chairman POWELL. Yes, the way the technology is currently configured and deployed. Right now the leading standards of 802.11a, b, and g, in its various versions, have a limit in their range—at best, 300 feet on an 802.11b network. At some point, it has to be connected to the Internet. Whether theoretically—and I think you will see this at some point, that you begin to backhaul wirelessly, those will either come from more robust wireless technologies or you will begin to find clever ways to knit these networks together. If you were to go to New York City today in Bryant Park in Manhattan, you would find the entire park wired with Wi-Fi by integrating various wireless access points together so that you basically have seamless coverage of the whole area.

Yes, somewhere, ultimately, there is probably a big, fat pipe that plugs that into the Internet, but the key is how far away from the consumer can that ultimately be? I think we reach a magic point if that point can be farther than the traditional last mile, meaning I can get my Wi-Fi connection and my Internet service past, say, the phone company's last-mile copper line or past the cable's last. If I can then do that, I am getting into the backbone where I have a whole host of additional competition and providers to access to.

So, yes, under current technology. But I think one of the things that people are very, very excited about is, at least to some degree, it holds out the potential of connecting up with other kinds of platforms for more robust service.

Senator BROWNBACK. Which is all good. It just—you know at the present time——

Chairman POWELL. Right.

Senator BROWNBACK.—if we are excited about this technology, and I think we should be, and it is right to be, you have got to hook into this big, fat pipe. And right now, a consumer using Wi-Fi still has to get within 300 feet of a big, fat pipe.

Chairman POWELL. That is right.

Senator BROWNBACK. And so if you are in your home or your business, you have got to be within 300 feet of that big, big connection somewhere to be able to make this work.

I think it is good to be excited about it. I think it also, though, points out the need to be able to get those pipes, that final last mile, into people's homes and into their businesses, and that is something we have been wrestling with for some period of time and maybe, hopefully, we will be able to get some of that resolved this year.

I want to ask, just briefly, of Commissioners Copps and Adelstein and maybe others, as well, I noted in my opening statement to you about all the studies that have been taking place on the impacts of the entertainment—and particularly of violence—and on children and the longstanding regulations that have existed in the FCC in this particular area. Is the Commission, or are you as Commissioners, interested and committed to pressing on this area now that we have such a quantity of medical data and studies that are showing the impact in this particular area? Have you considered it, and will you commit to redoubling your efforts to focus on this area?

Commissioner COPPS. Well, speaking for myself, I am tremendously interested, and I appreciate very much the leadership you have shown on the issue. I do not think we are doing an adequate job in dealing with the issue of indecency. Every day, I hear from dozens, hundreds, sometimes thousands of people who are put off by the kind of programming their children are being forced to watch, whether it's excessive sexual content or excessive violence on the airwaves. I think, personally, and I have suggested recently, that if we are not doing a good enough job in dealing with indecency and we are not enforcing it, maybe we need to look again at our Commission definition of indecency. And when we do so, I have specifically said, I think we should deal with the subject of violence on television. It is not easy to deal with; it is merely necessary to deal with it.

I think as good a case can be made for violence as obscenity, or violence as indecency as can be made for excessively graphic sexual content. So I think you are onto something that is important not only to me and to the Congress, but I think it is important to the American people. I think we need to do something about it. I think they want us to do something about it. And you certainly have my commitment, and I am going to do everything I can to move the ball forward on that.

Senator BROWNBACK. I want to support that sentiment. And again—in yesterday's *USA Today* front-page story about the level of violence now at the kindergarten level, saying that it is just backing down more and more within the system. And I would urge you, as well, to focus on violence first. I think the data—the medical data—is the strongest and the most thorough there.

Commissioner ADELSTEIN. Well, I would applaud those sentiments that were expressed by Commissioner Copps. He has done an outstanding job of showing real leadership on this issue. And I might add that, Senator Brownback, you've also had a long legacy of leadership on this issue. And I have learned from it personally.

I recall that at our—my confirmation, that you raised to me a study on violence and the effect of violence on television, excessive violence, on children, that children do not have a filter to be able to keep that out. It goes right through to the very base of their brain in a way that adults have filters that are able to keep that out. And so it could have damaging impacts on our children beyond what we could possibly imagine.

And as a new father—I have a child who is nearly two years old at home—it was particularly profound for me to recognize that problem, and now I am extremely careful about watching what it is that he sees on television. And I am very concerned about it.

You know, we see some of the best programming on television these days, and some of the worst, and we need to try to uphold the law. The law requires that we prevent indecency over our airwaves, and the court has upheld that during hours when children watch. And we need to enforce the law that we have on the books. That is our obligation, that is our sworn oath as Commissioners of the FCC.

And one way that we can also help is to do more to promote the V-chip. As a—again, as a new father, I am trying to explore how that works and trying to work with that on my own television set,

and we need to do more to help consumers know about how the V-chip works, and how they can use that to try to control what it is that their children see on television.

Senator BROWNBACK. I thank you.

Commissioner COPPS. Senator, may I add one more comment to that?

Senator BROWNBACK. Yes, please.

Commissioner COPPS. I know in the great communications world, everything is connected. Senator McCain was talking about cable rates. You have to look at that in a wide context, and I think as we deal with media consolidation and industry consolidation, we have to look at that.

The same thing applies here when we are talking about indecency. Is it—and violence on TV—is it simple coincidence that we have a rising tide of indecency, and a rising tide of violence on the airwaves at the same time that we are experiencing rather a heavy dose of consolidation? I do not have the easy answer for that question, but I think it is a question that we surely should answer before we move to final decisions on some of these consolidation issues.

Chairman HOLLINGS. Senator Wyden?

Senator WYDEN. Thank you, Mr. Chairman. I will begin with you, Chairman Powell, but I would like other Commission Members involved in this as well, and that is the question of media concentration. Today there are five companies that drive broadcasting in America—Disney, News Corp, Viacom, Clear Channel, and AOL Time Warner. And the Commission is looking at relaxing a number of rules on media concentration, and it seems to me that there is a very real possibility that what the Commission is going to do is shift policies so that basically one company could own everything in town. One company could own the paper and several TVs and the radios and the Internet network and essentially the whole ball game. And I would like to hear how a sky-is-the-limit policy is going to help the consumer, because I think that today's telecommunications policy has got to be seen through a consumer prism.

And why don't we start with you, Mr. Chairman, and I would like to engage the other Members of the Commission, as well, because I think this is going to say a whole lot about what communication is going to look like for our kids and our grandkids. And with five rules on the line this spring, we need to know where the Commission stands on media concentration.

If we could begin with you, Mr. Chairman.

Chairman POWELL. I think it is an excellent question and worthy of debate. The first thing that I would say is a little bit on the premise, which is, candidly, I do not believe anything coming out of the Commission's decision is going to result in the ability for one person to own everything. I think that is a straw man. It is not——

Senator WYDEN. I am talking about one company essentially owning everything in town. You will oppose a policy like that?

Chairman POWELL. First of all, you would have to believe a policy like that would be—one, be able to pass the muster of an antitrust division review; two, whether that would be able to pass the muster of a market transaction review in a public interest standard

at the Commission. But we do not know what the outcomes of the rules are yet. It is important to note that that is an ongoing deliberation.

I am skeptical, however, that some of the more melodramatic versions of what is likely to come out of the Commission are actually an accurate reflection of the way the majority of the Commission thinks about that. You have me at a disadvantage, because I cannot tell you what the rules will be, or not.

I would emphasize we are reviewing them, mostly because this body told us we had to, that we had to every two years, and that we had to justify them. Whether regrettable or not, the court has interpreted that provision to require us to prove that they have the benefits we assert in order to justify them. And if we do not, the court has said that it will vacate them, and, indeed, has vacated a number of them. Of the last four major media cases in court, we lost all four, either on constitutional, arbitrary and capricious grounds.

So I think what we are doing is, number one, a response to your mandate to go through the biennial review and look at the rules in the context of the modern marketplace. I do not think anything we have suggested diminishes the importance of the values of diversity, localism, and viewpoint variety. I have never suggested that those are less critical values in the modern American media marketplace than they have ever been. The question is, what body of rules will most promote those objectives and pass judicial scrutiny and be faithful to your biennial review provision.

And I would leave you only with the one point. Most of our rules are 30 to 40 years old. That is not to say that they are outdated in and of themselves, in terms of what they are trying to achieve. But the candid truth is, they are somewhat incoherent as matched against the actual media marketplace.

Forty years ago, there was not even cable television, yet 85 percent of Americans today get their news information and media from cable. The court looks at us and says, "How can you just write that out of your consideration of ownership limits?" And I think the Commission has to come up with a coherent way to look at the marketplace, an empirical justification for its rules. And whatever it can do in that context, it will do.

Senator WYDEN. Are you at all troubled by the fact that Clear Channel went from 40 stations to 1,240 stations in just a few years?

Chairman POWELL. Candidly, I am troubled, and I think that is a consequence of statutory deregulation. We are often criticized as the institution that did that. Much of that deregulation is a consequence of the section of the statute.

I would also note, though, that I could demonstrate our concern, even though this was a principal focus of the two previous Commissions. The Commission, under my leadership, has moved to block a number of radio transactions, and previous Commissions never moved to block a single one. I was a Commissioner before for three years. There was never a single radio merger designated for hearing. Presently, under our leadership, there are a number of them currently in hearing.

I am concerned about the concentration, particularly in radio, and I think that we are not constructing a regime that will not provide a meaningful filter for undue concentration.

Senator WYDEN. How do you do the proceeding involving these five regulations so as to produce a different regime? I mean, what you have said, frankly, encourages me. I came here, as always, with the greatest respect for you, but very troubled by where the Commission is headed. You have told me, "Don't sweat it. We're not going to go out there and take the brakes off everything." I would like to have you amplify a little bit——

Chairman POWELL. Well, I would——

Senator WYDEN.—just on your thoughts about——

Chairman POWELL. I would be happy——

Senator WYDEN.—a new regime.

Chairman POWELL. I would be disingenuous if I would say that when we are done, you will love everything we did, but I will say that I do think that is the characterization of our activity, not the one that is popular in the newspapers about rabid deregulation of the media industry.

What do I think? I think that we have to start looking at the media marketplace through the eyes and ears of consumers. We talk a lot about consumers. Part of what the empirical study is designed to do is to try to put substance on how consumers actually access information, as opposed to seeing them through the historical battles of broadcasters versus cable guys versus satellite guys, that I think presents a very warped perception of the way consumers actually access media.

If, for example, cable is a significant medium by which consumers actually watch television, I think we have to include that in the base of how we determine media viewpoints and concentration. So I think we have to have a broader view of what constitutes the media marketplace.

I also think that we need to be more calibrated. That is, a couple of our rules, in my opinion, are three-cushion shots to a problem, that when you get through going through the gyrations of trying to stop, you realize there is a better way you could do that much more directly and much more simply. A lot of times, for example, the strongest arguments about the national ownership limit are about really trying to preserve localism. In many ways, I often wonder, well, then why do we not specifically focus on the rules about what you can own locally, rather than trying to do it through a number of three-cushion shots to the problem? So that is another thing we are looking at. We are looking at whether there is a more direct, cleaner, sustainable way to do the same thing.

And I would submit if—this is another area where I feel a profound obligation, because these things have constitutional import. Whether we like the media companies or not, we are being measured against a First Amendment standard.

If I really did not care about media ownership, I would do nothing, and let—the courts will vacate every last rule before I am done. That is where we are headed at the moment.

Senator WYDEN. Could we just get the other Commission Members on the record, Mr. Chairman, on this? I think this media con-

centration issue is so critical, I would just like to hear from the other Commission Members.

Commissioner COPPS. Senator, I am not going to tell you, "Don't sweat it." I hope you will sweat it.

Senator WYDEN. I will tell you, Chairman Powell has told me that he does not want to see one company call the shots in a given town, but I am still very troubled about the prospects of where we are headed, and that is why I would like you all on the record.

Commissioner COPPS. Well, I do not think we are being melodramatic in saying that some of the changes that have been suggested for our consideration, although we do not have an item on this yet, obviously, can fundamentally remake the media communications landscape. And that is pretty important, I think, to every American citizen. It goes to the kind of entertainment you get, to the homogenization of programming that we have seen, and the debates with the music lists, and how do you get—if you are a creative artist in a town or a region, how do you get your music played in an era of consolidation? And the short answer some have suggested is that it is becoming increasingly difficult.

It goes to the whole nature of our democratic process, sustaining that marketplace of ideas. And it is not—obviously, if we are going to do away with these rules—the Chairman says we are not going to do away with them, but if you do away with something like newspaper cross-ownerships, newspaper/broadcast cross-ownership, you do create some pretty far-reaching ownership opportunities in that particular locality.

But even if you do not go that far, if you are going to increase the caps by 5 percent or 10 percent or 15 percent, is that minor or is that major? We do not know. We have not teed that up for consideration yet. I think it is a pretty major question. It could be that that 10 percent can fundamentally remake what is going on in a town in your state.

So it goes to the fundamentals, and that is why I said I am so committed to trying to energize and to spark a national debate. This should not be an inside-the-Beltway issue, because it goes to the rights of every citizen of this country on the kind of entertainment they and their kids are going to have, the kind of democratic dialogue, the openness to ideas that they are going to have. There is nothing as important as this in our agenda. And as I say, I hope—I hope you and your colleagues will sweat it, because it is important.

Senator WYDEN. Other Commission Members?

Commissioner MARTIN. I agree with the concerns that have been raised about the level of media concentration that has occurred in some sectors, and that could occur. And I think we do need to be cognizant of the importance of localism and diversity and maintaining those core principles or core values the Commission has tried to foster in our media ownership rules in the past.

That being said, I do think we need to respond to the court's direction that we justify those rules going forward and that we take into account the new voices that are out there. And I think there is a way to do that and still maintain that localism and diversity.

And finally, I would just say, in response to some of your concerns about the radio consolidation, that I think the Commission

should also be cognizant of unintended consequences that could potentially occur with the way our rules interact. One of the things that may have occurred in the radio context is that the way we define the market may have actually allowed for increased consolidation beyond the level which Congress may have envisioned when it changed the law in the Telecommunications Act. And I think that that may have had some consequences, as well, that would allow for relatively small markets to be treated as larger markets than they actually are, the way we have defined them. And I think that is something else that the Commission needs to be aware of as it goes forward and considers these rules.

Senator WYDEN. I want to hear from the other Commissioners—and my point is, that is a valid concern. But to go from 40 stations to 1,240 stations in a few years is why this Congress has got to be concerned about it, and we are going to go after this every day.

The other Commissioners, if we could?

Commissioner ABERNATHY. Yes, the media concentration proceeding is a critical proceeding for us, because, unlike in the telecom arena where technology continues to drive products and services to consumers—and hopefully we do not mess it up too much—I think in the media consolidation area, we have our fingers on exactly how we are going to be receiving information in the future.

Having said that, the idea that all of our existing rules, as they were written for an entirely different environment, that they should not be changed, that they should not be adapted to ensure that we promote diversity and localism and competition, I think that would also be naive.

So we are committed to a diverse source of media information for consumers. I think our goal is to gather as much critical data as possible, assimilate it, understand it, understand what is driving the market, and figure out what is the best way to achieve diversity and localism and how all of the different media interact with each other in delivering products and services to consumers.

Commissioner ADELSTEIN. Senator Wyden, your question goes to the very heart of our democracy and how our citizens receive information, entertainment, news and local public affairs. I cannot imagine a more important issue that we are going to undertake as a Commission than this one. I do believe the Commission is undertaking it with all the seriousness with which it deserves.

You pointed to the issue of radio consolidation, which is a large concern of mine, as well. And as the Chairman pointed out, that was a result of the Telecommunications Act of 1996, which entirely eliminated the cap on radio ownership that one owner could have. Now, if you do not like that, that is like a canary in the mine. If that is an outcome that is a concern, and it may well be—the canary in the mine was something that would warn the miners whether it was safe to go forward or to enter in—then the question here is, is it safe for us to go forward with this kind of thing in other areas of the media? We are looking at cable and television and newspaper-television cross-ownership. Do we want to go down that path in those areas? We need to make a very careful determination about that.

Senator WYDEN. My time is up, and I am going to be on canary alert, folks, because I think this is just about as serious as it gets.

Thank you, Mr. Chairman.

Chairman HOLLINGS. Senator Dorgan?

Senator DORGAN. Mr. Chairman, in 1996 we had a debate about this, and I actually offered an amendment on the floor of the Senate that you might remember and—to restore the old ownership limits on television stations. I won on a recorded vote at about 4:00 in the afternoon. And then, a Senator changed his vote in order to allow reconsideration, and then dinner occurred, and apparently three to four Senators had an epiphany over dinner, changed their votes, and the other side won. So we have had a long, tortured history with this issue.

But I was most interested in my colleague's questions. And Chairman Powell, I listened to your answer, a long, thoughtful answer, and I don't have the foggiest idea where you come down on this, having listened carefully.

[Laughter.]

Senator DORGAN. Do you not agree, for example—let me take it from the specific to the general—do you not agree, for example, that if you had moved last month to Minot, North Dakota, and all of the commercial stations in that city are owned by one company, that there has been a diminution of competition, that it is diminished, that it is not beneficial to the consumer to have no competition among the radio stations, commercial stations, in Minot? Would you agree with that?

Chairman POWELL. I would agree with that, and I would also say that that situation specifically that you are referring to, which you and I have discussed, is a consequence of the market definition that the prior Commission used that Commissioner Martin referred to. It is also something that I teed up at the proceeding that is currently underway in an effort to fix that.

Yes, I would agree it is a problem. I think it was particularly a problem in that case because of the way the market was defined. And that problem, I think we teed up to try to address, and——

Senator DORGAN. And I appreciate that. But I guess the reason all of us are sensitive to this is that we read and hear the sounds coming from the Commission that they are talking about relaxing the ownership rules at a time when what we see is massive concentration. And let me just—when you talk about additional voices out there, when you add cable to the mix, ownership is even more complicated. Ninety percent of the top 50 cable channels are owned by four companies—Disney, AOL Time Warner, Viacom, and News Corp. When you talk about more voices, are you talking about more voices by one ventriloquist?

[Laughter.]

Senator DORGAN. And is this not a case where, when people talk about diversity, there is, in fact, less diversity?

I guess I am just very concerned about this. I appreciate Dr. Copps' work on it. I think all of us ought to be concerned when we see this massive concentration occurring, because localism in the media is very, very important. When an anhydrous ammonia car goes off a track in Minot, North Dakota, in the middle of the night, ask yourself who was working at the station. Who was working at

the radio station? Or was it being run through a board 1,500 miles away? You know what I am talking about.

The reason we are asking these questions is because many of us are very concerned about concentration, which is the antithesis of competition.

Now, let me—and you may want to respond to that, but let me just go to one other point, if I might, on the issue of the competition in local exchanges, because that is another issue that I mentioned in my opening statement. I mentioned a train wreck earlier, and there was a fellow named Joe Connelly who actually decided in the early part of this century, the first 25 or 30 years, that you could make money by staging train wrecks. You could actually charge people, and then buy two old locomotives and lay a track and have a big train wreck. And he made a lot of money. "Head-on Joe Connelly," they called him.

My concern about a train wreck here—and you are not going to—nobody is going to charge to have the American people watch this—but if you decide tomorrow or next month or next year that this switch will not be available, for example, to local competitors because you think there ought to be facilities-based competition, you will, in my judgment, do dramatic injury to those very competitors who I think will be able to move to facilities-based competition.

It did not happen with respect to the long-distance market quickly. MCI and Sprint, I believe, were allowed, for a good many years, to use the facilities of AT&T, during which period—a long period—they were able to become facilities-based competitors. But my feeling is that we must care a lot about this, and that we have less competition than I expected six to seven years after we wrote the Act, and I worry very much that we will have dramatically less competition if the Commission moves forward and removes the capability of having competitors come in to use those unbundled facilities.

So those are two very important areas that I'm very concerned about. I like all of you. And let us assert, for the record, by unanimous consent, you are all great people.

[Laughter.]

Senator DORGAN. But you have an enormous responsibility. And if you get it wrong, we are going to have much, much more concentration and much less competition, and the American consumer, in my judgment, is going to suffer grievous injury.

So, Chairman Powell, why do you not respond to both of those areas?

Chairman POWELL. I will try, in reverse order.

I think it is important to understand what is and isn't available in the local competition. You are right, in the long-distance competition carriers were able to resale for a very long time. Resale is a provision available under the local rules as well. Nothing in the unbundled network element proceeding addresses, in any way, shape, or form, the statutorily provided resale mechanism, which is generally the functional equivalent of what long-distance companies used in the future.

The second point I would make is that I have to give faith to all parts of the statute that Congress crafted. I have had two courts of the United States, the highest in the land, say the impairment

analysis is a filter. What is important about that is that nothing being contemplated by the Commission is going to result to absolutely no access to the incumbent's network. I will pledge that to you right now. That is not possible under the statute. That is not within my view of what the right economics are.

Indeed, in the numbers that I gave in the beginning, a substantial number of competitors in the United States, more than are using UNE–P, are providing competitive alternatives in the United States market without using UNE–P, because you are going to be able to get elements to which you would genuinely be impaired in order to provide local service. We are talking about which pieces and on what terms and conditions.

When I read the stories that Senator Hollings has referred to, some of the articles, I just lose it, shaking my head at the drama with which people suggest that contemplated in the proceeding is the complete removal of the ability to access the incumbent's network and rent them at advance cost. It is just simply not——

Senator DORGAN. But Mr. Powell, the contemplation is the removal of the most likely opportunity to be able to provide competitive service. That is—I mean, you can talk about the mouse at the door, but there is a big lion out there.

Chairman POWELL. I just happen to, respectfully, disagree with you, that I do not accept—even though I do not think it prejudges where we are, I do not accept that the only likely opportunity for meaningful competition in the United States is a full UNE–P offering and nothing else.

Senator DORGAN. No, we are not having that, you are going to win a debate we are not having. I am not talking about it being the only circumstance. But I am saying the most likely circumstance to promote competition is for competitors that are non-facilities-based at this stage of their competition to be able to—with reasonable pricing, to access those unbundled elements.

And if the issue is pricing—and I have some sensitivity to the Bell companies, if this is not priced adequately, let us reprice it. Let us have a proceeding on that.

Chairman POWELL. I would repeat my points. Number one, resale is always, and continues to be, available under the statute, first and foremost. Nobody is going to not have that option available to them. A lot of them do not like that it is not discounted. On average, resale is discounted 20 percent. On average, a carrier like AT&T has said to Wall Street, "We will not enter unless we have 50 percent margins." Sure, if TELRIC provided a 50 percent margin, that might be preferable, but resale is absolutely in the statute and sacrosanct.

The other thing about the unbundled network elements, there will still be unbundled network elements available in these markets; but where the impairment standard cannot be satisfied, no matter what the mechanism for that is, those certain elements will not be. Just to give you an example about switching, UNE–P being provided most significantly by the major long-distance carriers, each of them have already deployed switches in virtually all of the markets that they serve.

So, I mean, I cannot say what will be the consequence of that, but I really do not accept that they—there are no viable competitive options without that.

Senator DORGAN. But no one is asserting that. Let me just——

Chairman POWELL. Well, it seems so.

Senator DORGAN. Well, no, no one's asserting that. But the most viable option is an option you may well take away. That is the point.

Let me make—Mr. Chairman, the red light is on, but I would make one final point.

A couple of the Commissioners described circumstances under which they alleged there would not be, as a result of their proceedings, preemption with respect to state officials. But the fact is, the description of what you would do described preemption almost exactly, and I guess I am confused about that. They claim not to be preempting, but, in fact, the description of the precedence that Federal action would take is exactly preemption, is it not?

Chairman POWELL. I can only tell you, to the extent there is any preemption, it is by operation of this statute, which says quite clearly, under section 251, only where decisions are in conflict or would undermine the implementation of the Federal statute, that the Federal rule governs. That is the only preemption I am referring to, the one that the statute lays out and commands that I faithfully employ. That is all.

Senator DORGAN. Is it not by operation and interpretation of the statute—and this hearing is about the interpretation of the statutes?

Chairman POWELL. I would argue quite forcefully, as an attorney, that this aspect of the statute is not ambiguous and is relatively clear.

Chairman HOLLINGS. Senator Snowe?

Senator SNOWE. Thank you, Mr. Chairman.

I also, too, want to add my voice to the concerns expressed about the relaxation of media ownership rules. Now, I know that the Commission is undertaking a major review, and I am pleased, Chairman Powell, that you have authorized field hearings to be conducted. And I know, Dr. Copps, you have been a strong proponent of holding those types of field hearings. In fact, I would recommend that they be done on a geographic basis across the country, because truly this is a critical issue.

If you are talking about diversity and competition and localism, I do not know whether or not, when we are talking about the enormous consolidation that has occurred within media conglomerates, that it is serving the public interest.

When you think about the fact that we used to have 1,400 plus newspapers, and we are now down to 300 independent newspapers, or that five major companies own a preponderance of the largest stations in the country, newspapers, online services, then you really, I think, have to look at this issue with a critical eye. So I just want to add my voice of concern with respect to that issue.

In fact, I understand the FCC issued a statement that it did not—it released pieces of research which contend that diversity is growing in programming and ownership. And obviously that has been an issue that has been counted by other organizations. And

I would be interested to know, given the kind of consolidation that has occurred, how, in fact, would have diversity been promoted under those circumstances.

Chairman POWELL. Well, again, I would not fix on a particular study and act to defend it. I am not the author of studies, and I do not know which specifically you are referring to. And I also do not defend the absolute proposition that somehow concentration equals diversity, or, or I also, equally, do not agree that concentration always does not equal diversity. In fact, I am always intrigued by this discussion with—by reference to history.

The "golden age" of television that I assume was the concentration environment that people prefer was dominated by three major networks, period. Indeed, some of our studies show that in 1960, there were 15 minutes of network news a day compared to the—and local news, with 15-minute brief productions of that—compared to the multiple hours of it that we have today.

Again, I do not and will not be the one who says that concentration is an unqualified good; nor do I accept that getting larger is an unqualified bad. One way that I can make the second point is to only suggest that one of the things is, quality news production happens to be one of the most significantly expensive programming endeavors in the United States media environment. A lot of times one of the things we have seen that has been discouraging is smaller and independent stations not being able to meet the costs associated with maintaining news departments—reporters, equipment necessary to do that. Sometimes when we have allowed combinations, the efficiencies associated with it often bring a news organization back into being.

You know, there are a lot of problems with other major media outlets. But on the other hand, today the average consumer has available to them a multitude of more channels on the average television product than at any time in history. Is the Outdoor Channel, is the History Channel, is Bravo, is A&E, is The Sopranos, is ER, is all of that a negative consequence of concentration? I think some of that is the benefits of a growing and sophisticated media operation.

But I am not—and I do not want to be maneuvered into the position of trying to argue that concentration is a complete good. I happen to be an antitrust lawyer who believes strongly it is not. But I also think it is just as indefensible to suggest that some of those combinations have not resulted in very important benefits for consumers. I would match the media environment in the United States to any Western democracy in the world for its breadth, depth, and diversity. I certainly do not want the British system, the French system, the German system. And I think that there is plenty of room to follow those cherished values, improve the impact on diversity, not let Citizen Kane take over the media, but at the same time be responsible about what consumers really see and hear.

Senator SNOWE. Well, what is your timetable, Chairman Powell, on this issue?

Chairman POWELL. Senator Snowe, I—the timetable, roughly, is the mid to late spring, which we have announced on prior occa-

sions, and we can keep you posted on the pace of that schedule, but that is generally the operating administrative schedule.

Senator SNOWE. And have you received much input on this issue at this point? I know you have——

Chairman POWELL. I would argue we have received more input than on almost any imaginable issue. At last count, we had 2,000 comments.

Senator SNOWE. Yes.

Chairman POWELL. And by the way, the vast majority of them are comments from individual consumers and not companies and organizations and institutions. We have had the good services of consumer public-interest groups who have published Web sites and documents on how to file comments with the FCC. There has been a massive amount of news coverage over the issue.

So, yes, we have had an extensive amount of input. You can always argue we can have more, but we are not limitless in resources or limitless in time and ability, and at some point, you have to make responsible decisions about the best uses of your resources.

Senator SNOWE. Well, I just hope that the trends are not ignored. I mean, I think you have to evaluate that very carefully and to understand the implications and the ramifications of moving considerably in that direction. I mean, there is—unquestionably something has changed dramatically, and I think we have to evaluate it very closely to understand the impact of that trend.

Concerning the issue of competition, getting back to the 1996 Act—and obviously it was not the end-all and be-all, and we obviously were not soothsayers when it comes to predicting the new services.

One of the issues that was obviously central to that debate and crafting that legislation was the idea of mitigating the advantages of those who—those companies providing local services so that you can invite competition and other companies having the ability to enter that market. Have those advantages been mitigated over time by the local companies?

Chairman POWELL. Yes. I mean, it is tough to answer completely. Meaning, do I think some of them have? Yes, most definitely, both probably principally by the regulatory oversight obligations of both the 271 process and other regulatory proceedings that have helped try to pry open local networks. In that sense, there has been some mitigation of the advantages.

But in the marketplace, I mean, I think one of the things that is most difficult about the premise of the statute is the incentives are somewhat misaligned, which is one of the most frustrating things that I confront with a large Bell operating company, is they have a thousand ways to Sunday to make it difficult. Not all of them are easy to police from one Federal agency, or I would even submit from the PUCs across the states. One of the reasons we have asked for greater enforcement authority is to try to be more effective in that.

But I do think there is something to be said to trying to balance incentives slightly better so that you are not just relying exclusively on trying to bring someone to their knees who otherwise does not want to submit, that you can find win-win situations in which the balance of the policies or the economics will incent more posi-

tive behavior. And I think that is one of the things both state and federal commissioners are starting to realize and try to work on. It is also one of the things I think that underlines questions in the UNE–P proceedings. So——

Senator SNOWE. Yes.

Chairman POWELL.—they are still strong. I mean, if you own 80 or 90 percent of the market and you already have a network that is deployed and built, those kinds of advantages, I think, as everybody recognizes, are not lightly eroded. And I do not think that we are going to do anything that will turn back an effort to continue to make inroads.

Senator SNOWE. You mentioned earlier that those who survived had been facilities-based, and those who have not did not—many who—many of the companies that did not survive were not facility-based of the 300 I think you mentioned. So, from that standpoint, are you suggesting, then, that those obviously who have had that market for a long period of time and have been there providing local services have an extraordinary advantage?

Chairman POWELL. The incumbent?

Senator SNOWE. Right.

Chairman POWELL. Oh, of course. Of course they have an extraordinary advantage. I think certainly Congress recognized that when it——

Senator SNOWE. But do you see that correlation between those who survived and those who did not? Are you suggesting that is the case? It is because they are facility-based operations that they had that advantage that you—that others could not——

Chairman POWELL. Yes, I would say a word——

Senator SNOWE.—overcome in entering that market?

Chairman POWELL.—I would say a word about that, because I think that is an important point. What are the advantages if you have some of your own facilities? And, by the way, I have not argued that inter-modal is the complete solution, that you have to have all your own facilities.

What are the advantages if you have some? Number one, you have the ability to product differentiate and control your costs to a much greater degree than if you just resell the incumbent's network. A consumer can see the potential of a real qualitative distinction. I do not know about you, but I do not want to be called and have my dinner interrupted for someone to urge me to switch local service when there will not be any price advantage, any product differentiation advantage; I am just being bothered. I do not think that is the competition we hope this effort lands on.

If you have more control of facilities, you can differentiate your products, you can control your costs, you have less dependency on this recalcitrant incumbent. I think that if everything were to proceed indefinitely with a resale model, which I think has advantages as a transitional one, you would be committing us forever to have extraordinary regulatory effort in the management of that recalcitrant relationship. So I think those who have facilities find that that gives them an advantage.

The other thing that gives them an advantage is their redundancy. If something goes wrong in the incumbent's network, they have a greater robustness to survive. One of the things that I saw

on September 11th is, when Verizon's facility was damaged in New York because of the World Trade Centers, anyone completely using their services is equally damaged. The redundancy that maybe our new homeland security imperatives require would be to try to incent more redundant facility deployment in the country.

And then, finally, I tend to have a focus on facilities, because I think that is who equipment suppliers sell to, people who buy gear to build networks. Lucent, which I think is a national jewel, is lying barely breathing on its bed. This is where the research and development is done in this country for advanced networks. If we lose that, if we lose the equipment suppliers, the people who do the R&D, the former Bell Labs organization, I think we're going to be worrying about a lot more than even our understandable goals about competition.

So if you are a facilities provider, you are buying something from somebody, and I think that is an advantage. Previous Commissions have held that that is what we should be trying to drive to. That does not mean flash cut, but it does mean to have incentives to push the transition in that direction.

I would conclude by saying I have often heard people talk about the anti-competitive powers of an incumbent, and we are not supposed to trust them to do the right thing. I take just as skeptical an eye about an entrant who promises that they are going to move in the direction this country needs, but do not want any incentives or obligations or rules to do so, "Just trust us." I do not trust them any more than I trust the incumbents not to act anticompetitively. I think rules should be structured to try to create incentives to move them in that positive direction.

Senator SNOWE. Well, just a follow up question. Will you be developing criteria that dictate fairness on these elements? I mean, I think the question is—it is an issue of fairness, and it is leveling the playing field, to be sure. But if you remove some elements from the network, how are you—on what basis would you be making that decision and determining that will affect—either advantage or disadvantage somebody trying to enter the market?

Chairman POWELL. It is another way of saying, what meaning will we give to the impairment standard? And I think that we will probably focus on criteria that try to evaluate, number one, sort of, process or physical limitations. If you take the loop, for example, it's a pretty tall order to suggest somebody can reconstruct the whole loop infrastructure. So, those kinds of physical impairments will be important, and process impairments.

The other thing is we will responsibly look at the economic realities associated with different kinds of models. There could be models that are theoretically positive but economically prohibitive, meaning truly prohibitive. No one would be able to do that, no one could do that. That might constitute impairment. But it will not be enough that it is just harder. It will not be enough that it is just marginally more expensive.

These are arguments that the Commission made in its prior decisions that the court rejected, which is, it is okay for you to try to true-up truly prohibitive increases in cost, but it is not okay for you to say, just because it costs something, or costs more relative to the

regulatory mandated price, that that is enough to unbundle an element.

And so, that is what we have to do, look at that kind of economic criteria. And I truly do not know what this Commission will decide are the other results of it.

Senator SNOWE. Thank you.

Chairman HOLLINGS. Senator Fitzgerald?

STATEMENT OF HON. PETER G. FITZGERALD, U.S. SENATOR FROM ILLINOIS

Senator FITZGERALD. Thank you, Mr. Chairman. Members of the Commission, thank you all for being here.

Before I get into telecom, I do want to second Senator Brownback's remarks regarding standards over the airwaves broadcasts. I have had a lot of complaints in the Chicago area about so-called "shock jocks." Some—a radio program being directly targeted at young high school kids where there, I have even had a group that came in and played to me what sounded like incitements to violence. And I guess the Commission has been active in fining several of those stations, but apparently that has not been enough of a deterrent, at least in my state, and sooner or later, somebody is going to cross a line that I think the Commission may want to consider pulling the license, because I do not think your current regime of fining is really having an adequate effect.

With respect to the subject of this hearing—and I guess I would like to start out directing this question to Chairman Powell—you said in your opening statement, and you quoted the preamble to the Telecom Act, saying that competition is the central objective of the Act. And everybody seems to agree on that. One of the rules you will apparently be considering in your Triennial Review is a request by the Baby Bells to have their broadband service reclassified as an information service. If that were to happen, Chairman Powell, could the Bells not then make the legal argument that they need not unbundle the loop used to provide that service? And if that argument were to be successful, would that not kill competition in the small business market, given that cable companies do not provide broadband service for small businesses?

Chairman POWELL. First of all, just a point of clarification—that classification question will be in a separate proceeding, I just wanted to make clear——

Senator FITZGERALD. Oh, that is right.

Chairman POWELL.—that that is not the Triennial. Some—there are broadband questions in the Triennial, but the specific one you are interested in——

The law is tricky and sometimes convoluted here, but I would tell you that today the average Internet service provider does not have access to unbundled loops. That is not the way they are—they are not getting access to their telecommunications inputs in that manner. The AOLs of the world, the Earthlinks of the world, are buying services out of tariffs pursuant to a regime we call "Computer 1, 2, and 3," not through unbundling network elements, because the statute is very specific that only telecommunications service providers are able to get elements in that way. AOL, Earthlink,

Microsoft Network by no means qualify and do not receive their inputs in that manner.

The question is more carriers that are buying inputs to, in essence, turn around and sell wholesale other services to the likes of AOL and MSN instead of the BOC, and what they are under the terms of the statute. That is one question this will answer.

But I also would like to emphasize that many people believe—and I understand the anxiety, but I sincerely, and as genuinely as I can represent it, do not agree that Title I means there is no ability to reach these kinds of questions. If that were true, then the Commission would have never been able to regulate cable at all, which has asserted complete jurisdiction over them under Title I long before the Congress passed the Cable Act of 1984. The very regime that governs Internet service access to elements today, Computer 1, 2, and 3, are rooted in the Commission's Title I authority, not in its Title II authority.

So my view is, one of the things that is being pursued here is to try to have as clean a slate as possible to make the regulatory judgments about broadband that are unique to it as a service, as opposed to inadvertently triggering or bringing the whole realm of common carrier regulations to this new and emerging medium just by virtue of its definition.

So information service, if that is what the Commission does, I would submit strongly does not automatically mean that nobody can get access to it. It does not automatically mean that there would not be rules or regulations governing its use, but it would mean that the burden was incumbent on the Commission to make those decisions——

Senator FITZGERALD. Well, I am not sure we are on the same wavelength here. Pardon the pun. But I am thinking about the case where a Baby Bell is providing DSL service in, say, the Chicago area, and CLECs are providing a competing DSL service using that last loop of the incumbent SBC. If you classify the Baby Bells' broadband services, or reclassify them, as information service, is it not true that then the Baby Bells could make the legal argument that they need not unbundle the loop used to provide that service?

Chairman POWELL. It might be, but solely for purposes of that service. So the argument would be the CLEC you describe in your hypothetical is now the functional equivalent of AOL, and it will have access to that element, perhaps, not by the unbundling regime, but by a separate regime if or how the Commission develops or modifies it.

Senator FITZGERALD. So if you do this reclassification, you still plan to allow for competition in the DSL services for small businesses in some other way? Is that——

Chairman POWELL. Well, I cannot yet tell you what the answer to the question is of the pending proceeding, but I would suggest that the reclassification, in and of itself, does not answer the question whether you could still require access to that infrastructure. That question is going to be taken on in the proceedings——

Senator FITZGERALD. But will this not—here is what I mean, you do that reclassification—you talk in your opening statement about capital formation and solving the problem of legal uncertainty. Whatever you may say here, or think, I am sure that the Baby

Bells could hire lawyers who could make the argument in court that they no longer have to unbundle the loop used to provide those DSL services. And that would bring so much legal uncertainty that it would, in my judgment, probably, by itself, destroy capital formation in the—for competitors of the Baby Bells in providing DSL service.

Would Dr. Copps care to comment?

Commissioner COPPS. Yes, I would like to comment on that, because I think your question goes right to the heart of the matter. We have been talking about the necessity for stability and predictability and ginning up investment and all that, and here we are, I think, creating a lot of uncertainty. I think the question that you raised about the RBOC is a legitimate question.

There are many, many others that are involved in this reclassification of broadband services at Title I. What is it going to do for access for Americans with disabilities, which are guaranteed now under Title II? What is going to happen under Title I? What about slamming protections? What about rate averaging and rate integration? What about universal service? What is the impact on the Internet? The questions just go on and on. What is the impact on our ability to address homeland security?

We have got to know where we are going on this before we jump into that, and I assume we will take our time and get to those answers. But it is something that is just fraught with tremendous consequences, and I am not attracted to the argument that we have got ancillary authority over in the kind of regulatory Never-Never Land of Title I, because all we have got is questions now. We do not know anything about the willingness of this Commission to go in and fill that Title I with ancillary protections.

And I would also point out that ancillary protections are kind of sitting ducks for the courts. So there is more instability and more time if we do not know where we are going.

Senator FITZGERALD. Ms. Abernathy?

Commissioner ABERNATHY. I guess the one point that I would add, Senator, is that I know what the RBOCs might try and argue, but my view is that so long as there is an underlying telecom service being provided, then you are entitled to the loop under unbundled routes under the UNE rates. Now, if after providing that telecom service, you then carry data over that same loop, I am not going to restrict what is carried over the loop, but the criteria, the qualifying factor, for access to the loop is, is it a telecom service? And those parties that you are talking about provide telecom services to end users, so they are entitled to access to the loop.

Senator FITZGERALD. Well, I think that the different answers we got here themselves suggest what kind of legal uncertainty could be thrown out there, and I would urge you to tread very cautiously here, because a lot of companies have gone out, raised a lot of money under what they thought were the rules of the game. And if you wind up moving the goal posts in the middle of the game, I think that you could inhibit capital formation in the telecom area for eons to come. So you have got to be very, very careful here.

And I would also want you to think about extending the time for your periodic reviews of your regulations, because constantly changing the regulations is something that itself must be inhibiting

capital formation in the area. Sooner or later we have to have rules, and we have to know that they are not going to change, for people to have business plans developed and so that they can go out and raise capital and stick with their business model. But if there is this constant uncertainty that when the Commission changes, or when they have another rule that they are going to move the goal posts again, nobody is going to want to have anything to do with this field. And I think that is almost as important a consideration that you—it is almost as important that you have fixed rules that do not change frequently as that you get the rules right, because we may never be able to get the rules exactly right. But at a certain point, they have to be firm, and cannot be constantly changing.

Chairman POWELL. Senator, if I could just conclude on this point. And—I could not agree more, but that is exactly what we are doing. The suggestion that we have rules and they are stable and everybody is using them and now we are changing them belies the reality of what the status of the rules are. For seven years now, the rules that we have had have been swamped with litigation by virtue of the way the Commission crafted them. Right now, those rules are set to expire, set to expire by order of the court. We have gone to the courts twice, including to the Supreme Court, and been rejected. It is for that very reason that I think we have this profound obligation to do the unbundled rules today, and to do them in a way that we generally, in our very best judgment and that of my colleagues, believe will be sustainable in a judicial environment to get the very stability that you are suggesting.

Senator FITZGERALD. Could I make a final comment? I know my red light is——

Chairman HOLLINGS. Yes.

Senator FITZGERALD. One of the reasons a lot of corporations in American choose Delaware corporate law, as opposed to, say, Idaho corporate law, is because the rules, the court interpretations, are very well established, and almost every phrase in the Delaware corporate law has been litigated and interpreted, and companies feel that they know what the law means and how it is going to be interpreted.

In the seven years since the Telecom Act has been law, we are going through a period where its meaning is being interpreted and litigated in the courts. But at a certain point, we will reach some stability. If we keep having new regulations that invite new litigation over new interpretations, this could go on forever. And so I would just encourage you to think about what you do very, very carefully.

And with that, this hearing has gone on an awful long time, and so——

Chairman HOLLINGS. Senator Lautenberg?

Senator LAUTENBERG. I agree with the Senator from Illinois that this hearing has gone on a long time, and I notice one thing here, Mr. Chairman, that the red light here does not mean what it means out in the street. Out in the street, it means keep going, but go faster. And so—and this, for me, is kind of a homecoming and makes me, as I sat here, wish that I had not taken a two year sab-

batical, and just stuck it out. And I would have been next to one of, closer to one of you, and——

[Laughter.]

Senator LAUTENBERG.—and I would have deprived this audience of having to sit here all this time.

Very simply, and—Mr. Powell, I want to commend you for your eloquent and thorough testimony, and that of your colleagues, as well. It is obvious that you have a lot to think about and have—and you and your associates here have put in time thinking about some very complicated issues.

I would like, in this case, not to hold my colleagues too long, but to get to a kind of fundamental question that bedevils me, and that is that we—with all of the pressure that we assume would be on, from a competitive standpoint, that we would see an improvement in local phone rates, well, from 1997 to the current times—no, to 2001—we have seen mobile phone rates drop nearly 33 percent, long distance drop 21 percent over the same period. Local phone rates, on the other hand, have increased nearly 15 percent in this same period. And those statistics say to me that we need to do much more to lower local phone rates, at least to present the opportunity to lower local phone rates.

Is there a plan in the FCC's agenda to move local rates down? And if so, how would you say that we get there?

Chairman POWELL. The one thing I would note, Senator Lautenberg, is what is very different in the local market is, number one, the local rates are regulated, in contrast to the wireless industry and the long-distance industry, number one, and they are not regulated by us. Meaning, what the local rates are or are not are a consequence of the actions of local State utility commissions in setting those rates or permitting those rates to be changed. We have little to nothing, directly, to say about that process.

We are a partner, in that we are trying to help create a competitive environment that will put pressures on those rates and in those markets. But even with competition, those rates being moved or modified still require an affirmative decision of that regulatory authority, and not just simply a free-floating market response like we have in those other two markets.

And then the last thing I would commend to you, and I think is part of the difficulty here, is that we have two systems at play with local rates. One of them is competition, but one of them is universal service. And a substantial amount of rates in the United States are subsidized by virtue of the universal service program, so they are not really reflective that often of actual economic costs, but they are reflective of whatever subsidy costs are being permitted by the local rate authority. It has been one of the things that has been challenging, because we care a lot about universal service, but it is very difficult to entice an entrant to compete for below-cost service and hope the government makes them whole against the actual cost of providing that service.

I can only say that all of that is imbedded in our universal service proceeding about subsidies. All that is imbedded in our efforts to promote competition. But ultimately, at the end of the day, while those rates are still regulated, they are principally the province of state commissions.

Senator LAUTENBERG. Well, does the Commission not have some responsibility to make certain that these marketplaces are more competitive? And by—and we see all kinds of actions in the courts, as well as before the commissions, appealing for more open competition, and it does not seem to be happening. The fact is that the operating companies appealed for their higher rates based on their need to invest further in infrastructure and in new technologies and so forth.

So are we saying to the public at large that, "Listen, you have got to pay higher rates so that these companies can improve their own competitive position," or do we have an open marketplace where newcomers, or those who can compete effectively have an entry point into the market so that we can enforce the fact that we really want to see competition for these subscribers and for lower rates?

Chairman POWELL. I think the answer is both. I mean, I think there is a hybrid here, which is yes. I think there is a national commitment to try to open up markets for competition. But it still sort of begs the question, because as long as the rates are not actually reflective solely of competitive dynamics, there is a lot of other reasons in a given set of rates why they are what they are.

For example, many times state commissions, understandably, are fighting to have quality improvements in the residual network and want or impose obligations on carriers to make those investments to improve quality of service. This is going on in, for example, the former Ameritech region in an aggressive way. A lot of times the carrier says, "Well, it'll cost X, and I don't have that revenue," and the state commission will agree to rate increases in an effort to provide that functionality.

The other thing is, I think the statute in both certain Commission policies that we would all agree are merited have been things that have forced us to put additional costs on consumer bills. For example, we want local number portability, the ability to switch carriers and keep your number. That is a charge on your local bill. We wanted the schools and libraries program to make available broadband services to consumers. That has become a charge on the local bill. E–911 services, ubiquitous in the United States, has become a charge on the local bill. So while we have had these other pressures, we have also had a number of understandable legal mandates that have also raised the price of local bills that we just have to accept responsibility for as well.

Senator LAUTENBERG. Mr. Chairman, I will hold this no longer. Thank you very much for the opportunity to appear here today.

Chairman HOLLINGS. Well, of course, the Committee is indebted to each of you.

Let me—Chairman Powell, you testify eloquently about facility-based competition here today, yet over the, three to four years ago, in the SBC/Ameritech merger, the Commission ordered that they enter at least 30 markets outside of its region as a facilities-based competitor provider. But nothing is really done. Otherwise, when you come to the UNEs that you are now about to take certain elements—back in 1999, Chairman Kennard was trying to create a national list of UNEs. And I quote my authority now, Chairman Powell, "I disagree sharply that we should designate the same ele-

ments of the incumbent's network for unbundling in every region of the Nation." This raises such questions as whether regulators with closer proximity and more intimate knowledge should take a leading role in that analysis.

Or, again, with respect to just the questions being asked, with respect to now calling telecommunications information in the broadband proceeding, you say here in the FCC ruling on the Echostar/Direct TV merger, and I quote Chairman Powell, "At best, this merger would create a duopoly in areas served by cable. At worst, it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, inevitably result in less innovation and fewer benefits to the consumers. This is the antithesis of what the public interest demands."

Now, that is for video program, but somehow you seem to think that is acceptable to the telecommunications market, because that is exactly what will happen when you take it out of Title II and put it under Title I. Those are the kind of things that disturb us here at the Committee.

If you wanted to comment, I would yield. Otherwise, I know that it is the luncheon hour.

I would officially let the record show that I want to thank—is Chairman McCain coming back? I want to thank Chairman McCain, because he and his staff have worked with our staff in getting you folks together.

Senator Lautenberg commented on the red light. The truth of it is, this has been a wonderful opportunity for each of the Commissioners to express themselves, and I hope we can have further hearings of this kind, because it has been very valuable to all of us. You can tell how maybe misinformed we are, misdirected or whatever else, but the Committee is indebted to each of you, and we appreciate it very much.

We will be in recess, subject to the call of Chairman McCain.

[Whereupon, at 12:45 p.m., the hearing was adjourned.]

A P P E N D I X

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ERNEST F. HOLLINGS TO HON. MICHAEL K. POWELL

Question 1. Chairman Powell, you have expressed a strong interest in developing "facilities-based" local competition. Wireless carriers have invested tens of billions of dollars in spectrum and their own extensive facilities. You have identified wireless networks as perhaps "the best hope for residential consumers." Even with their own networks, however, wireless carriers remain dependent on the Bells for connections between cell cites and mobile switching centers. Despite clear language in the Telecommunications Act, the Bells have sometimes refused to provide these interoffice links to wireless carriers as unbundled network elements. Given the importance you have placed on promoting "facilities-based" and inter-modal competition, can we expect the Commission to confirm that the Bells must provide these links as UNEs to wireless carriers?

Answer. Wireless carriers constitute significant facilities-based competitors in the local telecommunications market today. Notwithstanding any difficulties wireless carriers may have had in obtaining unbundled network elements ("UNE"), there are now over 140 million wireless customers nationwide, and of these, an estimated 6.5 million customers use their wireless phone as their only phone. As to the content of the *Triennial Review Order*, I cannot provide detailed information beyond the information already publicly disclosed by the Commission in its press release of February 20, 2003. (As a courtesy, please find attached a copy of the Commission's February 20, 2003 press release, at Appendix 1.)* I can, however, assure you and the Committee that the *Order* will clarify the extent to which wireless carriers may obtain unbundled network elements.

Question 2. When the Bells ask the FCC for authority to provide long-distance service in a state, they argue that UNE–P based competition is *facilities-based* competition. The Commission has always agreed. Why would the Commission now eliminate UNE–P on the grounds that it is *not* facilities-based competition? How can the Commission justify relying on UNE–P to give the Bells regulatory relief, only to eliminate it as a competitive alternative after it has granted that relief? Does the Commission now intend to revisit all of its long distance orders and revoke those that relied on UNE–P?

Answer. As a threshold matter, the Commission did not rely exclusively on the availability or use of UNE–P in granting any section 271 application. Indeed, each of those decisions was consistent with the unbundling requirements as they stood on the date each Bell Operating Company ("BOC") filed its application, and each of those decisions appropriately found that the BOC had taken the steps necessary to open its markets to competition consistent with the requirements of section 271. To the extent subsequent interpretations of section 251 call into question the Commission's determinations under section 271, the Telecommunications Act of 1996 ("1996 Act") provides, under section 271(d)(6), for receipt of complaints from parties and notice and hearing to determine whether a BOC continues to meet the conditions of section 271.

Moreover, Congress did not, in the 1996 Act, provide for the availability of UNE–P as a separate entry strategy for competitive carriers in section 251. As you know, Congress acknowledged three entry strategies in section 251: full facilities based entry; no facilities entry via resale; and access to unbundled network elements subject to the 1996 Act's "necessary" and "impairment" limiting standards. The availability of UNE–P is a consequence of the Commission's, not Congress', broad reading of the necessary and impairment standards that resulted in the unbundling of nearly every individual element of the incumbent's network. As we all well know, however, the Commission's interpretation has been vacated by the courts twice (first the Supreme Court and most recently by the D.C. Circuit).

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*The information referred to has been retained in Committee files.

Finally, I would acknowledge that the specific concerns raised in your questions are largely moot as a result of the majority's decision to delegate the impairment analysis as it relates to switching (a vital component of UNE–P) to the states. Accordingly, I do not believe the Commission will be required to address the issues raised in your questions in the near term.

Question 3. Competitors generally offer local voice telephone service to consumers at prices 10–50 percent less than the Bells. If competitors lose the UNE–P or access to critical UNEs and cannot continue to offer service at these prices, will the 20 million customers served by competitors be able to obtain service from the Bells at the same competitive rates they currently enjoy? Moreover, can the FCC ensure that millions of potential new customers, in addition to the 20 million existing customers mentioned above, have available to them similar competitive offerings and discounts?

Answer. As a general matter, a substantial number of Americans benefit daily from facilities-based competitive offerings. Indeed, of the price savings you cite in your question, actual marketplace experience demonstrates that facilities-based competitors offer the most significant competitive benefits for consumers—both as a matter of price and innovation. For example, cable companies offering facilities-based local voice telephony offer discounts over 50 percent to consumers over the Bell offering (see response to Senator Boxer's first question for a description of Cox's offering in California). Consumers are also benefiting from the innovation that facilities-based competition is ushering into the marketplace, such as Internet-capable mobile phones or free long distance services in the case of wireless. Other facilities-based providers are employing Voice Over Internet Protocol ("VoIP") to compete for the local phone subscriber, offering consumers with a broadband connection the ability to choose over 100 area codes. The result for a consumer living in a separate area code than her family is that not only can she save herself money (with a cheaper phone plan) but she can save her family money (as family's formerly long distance calls to her are now billed as local).

As I noted above, an estimated 6.5 million customers use their wireless phone as their only phone. Moreover, as detailed in the Commission's most recent report regarding local telephone competition, as of June 2002, competitive local exchange carriers ("CLECs") reported that they provided service to 6.2 million lines over their own facilities, meaning that they did not use unbundled switching or loops. Accounting for another 7.5 million lines, incumbent local exchange carriers ("ILECs") reported that they provided unbundled access without switching to over 4 million end user lines and that almost 3.5 million end user lines are served via traditional resale—an entry mechanism guaranteed to all competitive entrants by Congress. Completely separate from these developments, technologies like VoIP are gaining subscribers in both the business and residential markets. None of these competitors need UNE–P to provide competitive services to end users, and, as demonstrated above, consumers are benefiting from lower prices, and just as importantly, from new, innovative services and applications. Accordingly, the assumption that only the Bell Operating Companies ("BOCs") would be able to provide competitive services if competitors did not have access to UNE–P is not borne out by the experience of the market.

Moreover, if access to switching were limited or removed, I believe competitors would develop innovative facilities-based strategies faster. It is worth noting, though, that switching is only one element. At no time has the Commission ever considered a blanket "termination" of section 251's requirement that ILECs provide unbundled access to elements of their networks. The Commission could not terminate this requirement consistent with the 1996 Act.

This is, however, speculative, as the majority of the Commission voted to defer to the states to determine whether to continue to make UNE–P available. Although I do believe that certain competitors will continue to be able to make competitively priced services available over their own facilities, they will have to compete with UNE–P based competitors who benefit from substantial regulatory subsidies, potentially hindering the efforts of facilities-based competitors. Thus, although consumers will enjoy some short-term benefit from this engineered competition, the long-term benefits of robust, facilities-based carriers may be damaged.

Question 4. The D.C. Circuit's decision in *USTA* v. *FCC*, remanding the Commission's unbundling and line sharing rules, was inconsistent with the Supreme Court's holding in *Verizon.* However, the FCC's pending proposals to reduce competitors' access to network elements seem based on a similar predicate to the Court's suggestion that competitors using UNEs do not offer "real" competition to the incumbents.

Do you believe that UNE–P competition is not real competition?

If so, why? If not, why would the FCC seek to curtail such competition?

Answer. I do not believe that UNE–P competition is a sustainable form of competition and I believe it does not provide nearly as many benefits or as much value to consumers as do providers who control at least some of their own facilities. Although I believe that UNE–P may have limited use as an entry and transitional strategy to facilities-based alternatives, UNE–P is wholly artificial in that the viability of its economics are completely controlled by regulatory micromanagement not just of the critical inputs, but of the wholesale prices of those inputs. Nothing in our great country's history suggests that such government engineered competition is sustainable or brings consumers real value. Moreover, unlike UNE–P providers, facilities-based competitors (whether full or partial) can provide consumers with differentiated products, services and pricing regimes while lessening their dependency on their primary competitor, the incumbent, for their critical inputs.

Question 4a. Do you believe, as the FCC stated in its petition for rehearing, that the "limitations that the panel's decision can be read to impose have no basis in the statutory text and appear to be inconsistent with several provisions of the 1996 Act"?

Answer. Yes. The court's decision appeared to hold that the 1996 Act itself severely limited the Commission's discretion as to how to conduct its impairment analysis under section 251 of the 1996 Act. It was thus proper for the Commission to seek rehearing of the *USTA* decision given that, regardless of the underlying substance, the D.C. Circuit's decision can be fairly read to impose a far more restrictive standard of review than is warranted under applicable precedent. *See Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). It is a separate question, however, as to whether the Commission must apply limiting principles in its unbundling analysis as a reasonable exercise of its authority. Indeed, the Supreme Court has told us that we must do so. *AT&T Corp.* v. *Iowa Utils. Bd.,* 525 U.S. 366, 387–90 (1999).

Question 5. On October 9, 2002, I wrote, along with Congressman Markey, to urge the Commission to pursue certiorari of the *USTA* decision referenced in question 4. above. The FCC has since decided not to do so. In our letter, we stated "If you do not plan to pursue *certiorari,* please explain your reasoning in detail including your legal justification for such a change in posture." Now, almost four months later, we have yet to receive a response explaining your decision not to pursue *cert.* in any detail, or setting forth any legal justification for the change in Commission posture. Please provide me with answers that are responsive to our request made on October 9, 2002.

Answer. On September 4, 2002, the U.S. Court of Appeals for the District of Columbia Circuit denied the Commission's rehearing request concerning *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415 (D.C. Cir. 2002), *petition for writ of cert. pending, WorldCom, Inc.* v. *United States Telecom Ass'n*, No. 02–858 (filed Dec. 3, 2002). The Commission filed its rehearing petition in *USTA* because we believe that the decision denied the Commission the deference and flexibility to which it was entitled in making network element unbundling determinations, and because that decision is in tension with the reasoning of the Supreme Court's analysis upholding our network element pricing rules in *Verizon Communications Inc.* v. *FCC*, 535 U.S. 467 (2002) and *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999).

In December 2002, WorldCom, AT&T and Covad filed a petition for *certiorari*, challenging the *USTA* decision in the Supreme Court.

In February 2003, the U.S. Department of Justice, on behalf of both the Commission and the United States, filed a brief in response to the *certiorari* petition of WorldCom, AT&T and Covad (attached hereto at Appendix 2).* In that brief, the government explained the reasons that it had not sought *certiorari* and why review, at this time, was not necessary. First, although noting that *USTA* was erroneously decided, the Government explained that the Commission's ongoing *Triennial Review* would address many of the same issues raised by the court of appeals. Second, even before the court's decision, the Commission had determined as a matter of discretion to engage in much of the same analysis that the court directed, including whether to adopt a more "granular" approach to unbundling. Third, in light of these circumstances, the government concluded that a review of the court of appeal's decision would not be an efficient use of judicial or agency resources.

At our January 14, 2003 hearing at which you appeared, Chairman Powell stated that the Commission's *UNE Triennial Review* must include as a "core component" an analysis of "the proper role of state commissions in the implementation of our unbundling rules." Commissioner Martin likewise confirmed his belief that the Commission's rules should "allow for state cooperation and input, especially regarding

* The information referred to has been retained in Committee files.

highly fact intensive and local determinations" in recognition of the fact that "[a]ssessments of whether access to a [unbundled network] element is necessary to provide service may vary significantly among different markets, states and regions." Commissioner Adelstein characterized the states as "our partners in implementing the Act," Commissioner Copps noted that "[t]he path to success is not through preemption of the role of the states."

Question 6. How will the Commission ensure that its order in the *UNE Triennial Review* preserves the meaningful participation of the states in the development of local competition as Congress intended?

Answer. I note that the Commission cannot diminish the states' broad authority over retail rates for local exchange services and the rates charged by incumbents for access to unbundled network elements. Nothing in the *Triennial Review* will alter that authority. Thus, it is inaccurate to say that any decision the Commission could make would somehow exclude the states from any significant role in implementing local competition.

This is particularly the case with regard to the *Triennial Review*, which focuses on a specific subset of local competition issues: the rules under which network elements are to be unbundled by ILECs. Congress established the role of the states in section 251(d). Section 251(d)(2) makes clear that Congress intended the *Commission* to determine what network elements will be unbundled. Section 251(d)(3) preserves state access regulations that are consistent with the 1996 Act's unbundling requirements and that do not substantially prevent the implementation of these requirements. It is useful to quote the opinion of the Supreme Court in *Iowa Utils. Bd.* on the role of the states in implementing local competition:

> "[T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the states. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any 'presumption' applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange . . . This is, at bottom, a debate not about whether the states will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. . . . To be sure, the FCC's lines can be even more restrictive than those drawn by the courts—but it is hard to spark a passionate 'states rights' debate over that detail."
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> *AT&T Corp.* v. *Iowa Utils. Bd.,* 525 U.S. 366, 378 n.6 (1999).

It was my hope that the *Triennial Review* would faithfully implement the Congressional "division of labor" that was so clearly confirmed by the Supreme Court. Unfortunately, I believe we have only been partially successful. The *Triennial Review's* decision with regard to transport and high-capacity loops will create what I believe is an appropriate role for the states. The decision considers several different types of transport, and makes a clear finding regarding impairment for each type. It then sets out the specific conditions under which state commissions may remove certain types of transport and high-capacity loops based on the number of competitive providers along certain transport routes. Here, the state commissions can play the valuable role of ensuring that the federal standard is implemented efficiently and accurately. This stands in marked contrast to the decision of the majority of the Commission with regard to switching. There, the majority has decided that it can only make "presumptive findings," and has left to the states the ultimate decision of whether competitors are or are not impaired without access to the switch with little more guidance than a general, non-exclusive laundry list of economic and operational factors. Moreover, they have decided to do so without any right of appeal back to this Commission. Even assuming Congress intended to grant states some measure of "meaningful participation" beyond what the explicit words of the 1996 Act require, Congress could not have intended such a result.

Question 6a. Does the D.C. circuit decision's emphasis on a need for a more granular review of the need for UNEs suggest that the FCC must grant a strong oversight role to the states given that they are undeniably better equipped to gauge market conditions, competition, and compliance with the law on a market by market basis than is the FCC?

Answer. No. Many parties, including representatives of state commissions, have chosen to give the D.C. Circuit's *USTA* decision this reading, but I do not believe the decision can be fairly read in this way. Far from mandating a state-by-state decision-making process, the D.C. Circuit instead criticized the Commission itself for

establishing broad rules of nationwide applicability without engaging in any kind of detailed analysis to determine if its decisions were valid in different service or geographic markets. *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002), *petition for writ of cert. pending, WorldCom, Inc.* v. *United States Telecom Ass'n*, No. 02–858 (filed Dec. 3, 2002). Certainly, the Commission is capable of conducting market analyses to some degree of granularity. For example, the Commission makes market-by-market decisions in the area of pricing flexibility, to determine whether ILECs should be subject to a lesser amount of regulation with regard to the prices they charge for special access services. *See, e.g.*, *Access Charge Reform*, CC Docket No. 96–262, Fifth Report and Order, 14 FCC Rcd 14221 (1999), *aff'd*, *WorldCom, Inc.* v. *FCC,* 238 F.3d 449 (D.C. Cir. 2001); *Bell South Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion & Order, WCB/Pricing No. 02–24, 17 FCC Rcd 23,725 (released Nov. 22, 2002).

Of course, states should have a role in the process of making more granular market determinations. But Congress entrusted *this Commission* with making determinations about the availability of unbundled network elements. Accordingly, any delegation to the states should not rely on a simple and broad assumption that the states are inherently better equipped to make all determinations, but rather on some reasonable relationship between the facts that need to be determined and the ability of the states to determine these facts.

With regard to unbundled switching, I do not believe the majority has established this relationship. They have instead chosen to rely on a broad and unsupported assumption that the states are better placed, in all instances and for all possible economic and operational criteria, to make impairment decisions. I believe the majority goes well beyond what Congress or the D.C. Circuit intended.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. MICHAEL K. POWELL

Question. Many products such as media applications and computer games have been designed for the Internet, and more of those are being designed with broadband in mind. A large majority of developers are assuming that they will be able to have their customers attach devices they create to broadband connections just as freely as devices are now attached to the telephone network. On the dial-up network the FCC has established rules or common carriage and rules to ensure that consumers can attach any device as long as they do not harm the network. This has generated tremendous innovation as it has led to consumers attaching fax machines, computers and satellite boxes to the existing network. At the present time, the FCC has tentatively concluded to deregulate wireline broadband by reclassifying it as an information service. As part of your deliberations regarding this proceeding, how is the FCC evaluating what such a change could have on consumers' ability to use the applications and devices of their choice in a deregulated broadband environment? Or, the impact such a change could have on innovation if the tentative conclusion is adopted?

Answer. As a core principle of our broadband policy, the Commission seeks to empower Americans with access to multiple, competing broadband networks that they can use to access an ever expanding array of diverse content and computer applications. I share your concern, in that it is my firm belief that consumers must continue to have unfettered access to the legal content and applications of their choosing over the Internet and should enjoy the use of broadband devices to the extent that they do not unlawfully or unduly harm the network. In our evaluation of our ongoing broadband proceedings we are cognizant of this issue and continue to explore whether there is or will be actual harm to consumers absent government intervention. To the extent that such harm exists, we will consider an appropriate regulatory response. The options for such a response need not, however, be limited to the application of traditional and heavy handed common carriage regulation that permeates the traditional one-wire telephone world. That said, by continuing our tireless efforts to bring broadband capable infrastructure to all Americans via multiple, competing broadband networks, competitive forces may prevent the realization of these harms to consumers. I assure you that we are actively monitoring the situation and will take any action the Commission deems necessary to promote the public interest in this area.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BARBARA BOXER TO HON. MICHAEL K. POWELL

Local Telephone Service Competition

Question 1. Competing companies generally offer service to consumers at prices 10–50 percent less than the Bells. If the FCC terminates the requirement for traditional phone companies to offer parts of their infrastructure for lease to competitors, wouldn't that leave the vast majority of California customers without a choice for local phone service and drive up rates for consumers?

Answer. No. At no time has the Commission ever considered a blanket "termination" of section 251's requirement that incumbent LECs provide unbundled access to their networks. The Commission could not terminate this requirement consistent with the 1996 Act. Rather, much of the controversy in the Commission's *Triennial Review* proceeding stemmed from the Commission's review of unbundling requirements as applied to switches. Even if the Commission had decided that switching should not be unbundled, competitors would still have had unbundled access to significant parts of the incumbent's network, such as loops and interoffice transport. In addition, competitors will always have the option of reselling an incumbent's telecommunications service as mandated by Congress in section 251.

Furthermore, Californians, like millions of other Americans, today experience the benefits of competitive alternatives to complete network sharing, specifically, facilities-based competition. Indeed, the benefits to the citizens of California from full facilities-based competition as reported recently by the *Los Angeles Times*, are exactly the types of benefits that I believe all of our Nation's citizens should continue to enjoy and that government policy should strive to achieve. The *Times* discusses how Cox Communications is using cable telephony as an alternative to SBC's local service. The savings for consumers are over 50 percent as basic service with several features and including taxes and other charges costs a Cox subscriber $25.18/month versus the $51.59/month an SBC subscriber pays. *See* James S. Granelli, *Expanding Cable Telephony is New Kid on SBC's Block*, *LA Times,* Jan. 21, 2003, at C1.

Broadband DSL Competition

Question 2. According to the California PUC, half of my state has no access to cable broadband service and the speeds available over satellite are not competitive with DSL. If you do not continue to allow competition in DSL broadband service, will not consumers in my state be at the mercy of a DSL broadband monopoly?

Answer. As you may be aware, many consumers currently have DSL service available to them from providers other than the incumbent local exchange carrier ("ILEC") via an arrangement called "line sharing." Line sharing enables new entrants such as Covad to provide DSL over the high frequency portion of each customer's copper phone line at the same time the incumbent provides local voice service to the customer over the same line. This enables facilities-based competitors to provide competitive DSL to consumers with essentially all the same advantages that the incumbent enjoys. Unfortunately, a majority of my colleagues at the Commission (over my objection) determined that our line sharing requirements should be eliminated, thus depriving consumers of a valuable competitive choice in broadband. My view is that this constitutes bad policy and is inconsistent with the Commission's overall finding that competitors are impaired without access to copper phone lines, with no corresponding benefit to consumers in the form of greater incentives for companies to invest in the most advanced broadband technologies.

I would note, however, that where competitors rely entirely on access to an incumbent monopoly's facilities to reach the consumer, availability of broadband to those areas that currently have no access is held hostage to the monopolist constructing and advancing facilities to these new areas. For this reason, the Commission is continuing to provide incentives for all broadband providers to invest in broadband capable infrastructure over any and all platforms, from DSL, to cable facilities, to powerline facilities, to wireless platforms (mobile, fixed, unlicensed, and satellite).

Question 3. If I understand correctly, regulation of broadband delivered over telephone lines is dependent on whether or not the Commission chooses to define DSL broadband as a "telecommunications" service, and as a result is regulated, or an "information" service, which would result in an unregulated environment. Can any of you explain how a voice conversation carried over phone lines could be declared a telecommunications service while an e-mail conversation carried over phone lines is not?

Answer. Congress provides the Commission with the definitions it must apply in determining whether and how any given communications by wire or radio are regulated under the 1996 Act. The 1996 Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's

choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). In turn, the 1996 Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). The 1996 Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

The 1996 Act contemplates that the telephone network may be used to provide telecommunications, telecommunications services, or information services. Nevertheless, the statute imposes traditional common carrier regulation only on telecommunications services, leaving other capabilities such as information services largely unregulated unless the Commission can properly exercise its ancillary jurisdiction pursuant to Title I of the 1996 Act. Title I does not itself, however, include specific regulatory requirements. It is important to remember that our current proceedings are determining only the proper statutory classification of wireline broadband Internet access. We have not, for instance, yet considered whether Voice Over Internet Protocol will be regulated as a common carrier telecommunications service.

With this background, a voice conversation is appropriately treated differently from e-mail under the 1996 Act. A voice conversation carried over phone lines is perhaps the paradigmatic example of what the 1996 Act defines as a telecommunications service: the user makes a call to a specific point or points, speaks, and the network then transmits this information without any change in form or content.

By contrast, e-mail is more appropriately viewed as an information service. The Commission discussed this classification in detail in its 1998 Report to Congress regarding the universal service system (generally referred to as the "Stevens Report" after Senator Ted Stevens). *In re Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96–45, 13 FCC Rcd 11501 (1998). In this Report, the Commission concluded that Internet access generally, and e-mail specifically, were most appropriately considered "information services" under the 1996 Act. Specific to e-mail, the Commission concluded that "an electronic mail message is stored on an Internet service provider's computers in digital form," offering the subscriber "extensive capabilities for manipulation of the underlying data." *Id*. at 11539. Moreover, the user's "Internet service provider does not send that message directly to the recipient" but instead sends it to a "'mail server' computer owned by the recipient's Internet service provider, which stores the message until the recipient chooses to access it. The recipient may then use the Internet service provider's facilities to continue to store all or part of the original message, to rewrite it, to forward all or part of it to third parties, or otherwise process its contents. . . . The service thus provides more than a simple transmission path." *Id.* Instead, the Commission concluded that it offers users the "capability for . . . acquiring, storing, transforming, processing, retrieving, utilizing, or making available information" and was thus more accurately classified as an information service under the 1996 Act. *Id.* The Commission has not acted to disturb that conclusion.

These conclusions are entirely consistent with the general treatment of e-mail by this Commission and the courts in decisions predating the 1996 Act's definitions. Under these earlier decisions, e-mail has always been treated as an information or enhanced service and thus not subject to regulation by the Commission as a common carrier service. *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 FCC 2d 384 (1980) (distinguishing between basic transmission services consisting of a communications path for the movement of information, and enhanced services consisting primarily of data processing); *United States* v. *Western Elec. Co.*, 714 F. Supp. 1, 11, 19 n.73 (D.D.C. 1988), *rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990) (amending the Modified Final Judgment ("MFJ") to allow Bell Operating Companies to provide services including electronic mail services notwithstanding their classification as "information services" under the MFJ).

Wi-Fi and the Jumpstart Broadband Act

Question 4. Commissioners, my staff has made the "Jumpstart Broadband Act" available to your offices. Have you had time to review the legislation and could you provide feedback on it?

Answer. The Jumpstart Broadband Act calls for the FCC to allocate not less than 255 MHz of contiguous spectrum in the 5 gigahertz band for unlicensed use by wireless broadband devices while ensuring that Department of Defense devices and sys-

tems are not compromised. As you know, unlicensed wireless broadband devices have been enjoying great success using spectrum that is currently available in the 2.4 GHz and 5 GHz bands. I strongly support the unlicensed spectrum model as a key component of our overall spectrum and broadband policies, and I share your belief that unlocking the potential of high-speed broadband will bring numerous benefits to the American public.

The Commission is very supportive of initiatives to identify additional spectrum to continue to fuel the future growth in unlicensed deployment, and has been working aggressively in this area. I am pleased that the National Telecommunications and Information Administration, the U.S. Department of Defense and the Federal Communications Commission have reached agreement on a plan that would allocate an additional 255 MHz of contiguous spectrum in the 5 GHz region for unlicensed wireless devices. These negotiations were first sparked both by a petition for rulemaking filed by the Wireless Ethernet Compatibility Alliance and preparation for the upcoming 2003 World Radio Conference which will consider changes to the frequency allocations in the 5 GHz region.

The agreement includes technical specifications for the unlicensed wireless devices that would protect Department of Defense systems against interference. This agreement is consistent with the objectives of the Jumpstart Broadband Act, and the Commission plans to initiate a *Notice of Proposed Rulemaking* this Spring that will begin the process of implementing the agreement and positioning us for the upcoming WRC.

Question 5. Commissioners, innovation has flourished in the current unlicensed spectrum bands. What do you believe the potential is for increased innovation and do you agree that more spectrum should be allocated to encourage this innovation?

Answer. Unlicensed spectrum services have been a great success story. Just as wireless phones have transformed the voice communications market, and direct broadcast satellite ("DBS") has changed the competitive landscape for cable, I am optimistic about the impact of spectrum-based services on the provision of broadband. The innovation and growth of unlicensed spectrum use in recent years adds fuel to my optimism. In creating a regulatory environment that has facilitated this success, the Commission has crafted rules to control radio frequency interference without limiting the types of devices that might be developed. We are reaping the benefits of this approach with a wide array of useful innovative products based on the Wi-Fi and Bluetooth standards that industry developed within the broad framework of our rules. We agree that more spectrum would prompt further development of unlicensed wireless products to the benefit of industry, businesses and consumers, and are taking significant steps in that direction.

Question 6. Commissioners, would you agree that additional unlicensed spectrum could help spur new broadband services and would be a good idea regardless of how you proceed on the broadband proceedings before you?

Answer. Yes. Consistent with that view, the Spectrum Policy Task Force recently recommended that the Commission attempt to identify additional spectral resources for unlicensed use. I have attached a copy of their Report for your reference (attached hereto at Appendix 3).* That is why the Commission plans, as noted above, to initiate a rulemaking to provide additional spectrum for unlicensed devices in the 5 GHz region. Further, the Commission adopted a *Notice of Inquiry* in December 2002 to identify additional spectrum for unlicensed devices and specifically invited comment on potential sharing of previously licensed spectrum in the TV broadcast band and in the 3.6 GHz region. Advances in technology may now allow unlicensed devices to share spectrum with certain radio services where this was not feasible in the past.

Question 7. Experts in technology we have talked with say that the technology clearly exists that would allow unlicensed devices to keep from harming incumbent systems. Do your experts tell you the same thing?

Answer. Yes. As an initial matter, this technological advancement was central to portions of the Spectrum Policy Task Force Report. Moreover, the agreement reached among the National Telecommunications and Information Administration, the U.S. Department of Defense, and the Federal Communications Commission will provide access to additional 5 GHz spectrum for unlicensed devices without harming incumbent systems. As noted above, the Commission has also initiated a rulemaking to look into sharing certain licensed spectrum with unlicensed devices, and expects to learn even more about advanced enabling technology in that proceeding.

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*The information referred to has been retained in Committee files.

Digital Copyright Issues

Question 8. Commissioners, consumers are excited about the potential that digital television and HDTV have to increase dramatically the quality of their viewing experience. At the same time, those who make movies and shows are concerned that those shows and films distributed in digital format will be copied and distributed at a huge loss to them. Does it not seem to you that some form of protection for content carried over the air and over cable to these fantastic new TVs is necessary and fair?

Answer. As your question suggests, compelling digital content is critical to the success of the digital television transition. I recognize that content producers are deeply concerned about the unauthorized redistribution of their product, especially over the Internet, and that some say they are reluctant to release high-value content without adequate protection from piracy.

The Commission is examining these issues in two rulemaking proceedings. First, on August 8, 2002, we adopted a *Notice of Proposed Rulemaking* seeking public comment on whether the Commission can and should mandate copy protection technology for digital broadcast television content. The *Notice* specifically sought comment on the implementation of a "broadcast flag" technology that proponents assert would protect digital broadcast content from Internet redistribution while, at the same time, respect consumers' ability to make copies for their personal use. The record in this proceeding recently closed and the Commission staff is currently reviewing the more than 6,000 public comments that were filed.

Second, on January 10, 2003, the Commission issued a *Notice of Proposed Rulemaking* seeking comment on an agreement regarding one-way "plug and play" digital television receivers negotiated between several large cable television operators and consumer electronics ("CE") manufacturers. Among other things, the cable/CE agreement asks the Commission to adopt certain "encoding rules" that the cable television and consumer electronics industries indicate are modeled generally on section 1201(k) of the Digital Millennium Copyright Act of 1998 and the existing license for "DTCP" technology. The comment period in this proceeding is schedule to close on April 28, 2003.

Question 9. Chairman Powell, as you know, major films such as "Spiderman" and "Star Wars II" were available on the Internet for illegal download even before they were released in theaters. How do these films get on the Internet for illegal distribution and what would you recommend we do about this kind of piracy?

Answer. I am not aware of any specific information the Commission may have as to how films such as the ones identified become available on the Internet prior to their theatrical release. I would submit, however, that if the films are on the Internet prior to theatrical release, it is likely that the initial act of piracy involved someone within the private distribution chain.

Further, the Commission does not have any specific policy recommendations for addressing piracy that occurs before theatrical release. Our focus remains on evaluating the broadcast flag and other copy protection systems for the purpose of helping combat illegal distribution of digital broadcast content over the Internet. We have yet to conclude that we have the authority to address such copy protection systems for over-the-air broadcast content. Thus, I would hesitate to comment or recommend specific Commission actions for the type of piracy outlined in your question.

Media Concentration

After the elimination of radio consolidation protections in the 1990s, in California alone, one company, Clear Channel, owns a stunning 102 radio stations. In some towns that means every station is controlled by the same corporation. Now I hear that the FCC is considering eliminating the concentration protections for TV, cable, and newspapers.

Question 10. If you eliminate the current rules altogether, then could TV and cable in California experience similar concentration as radio?

Answer. Let me assure you that I do not favor the Commission eliminating all broadcast ownership regulation. Indeed, I am confident there will be meaningful media rules after the Commission finishes with its current Biennial Review.

As you know, in the Telecommunications Act of 1996, Congress removed these national limits on radio ownership and also increased the number of stations any one company could own in local markets. This has resulted in a number of companies acquiring a larger share of local and national radio markets. As these transactions have occurred, some have argued that the Commission's methodology of measuring markets may, in some cases, result in anomalies where one company owns an inordinate share of the radio stations serving a particular market. In light of these concerns, the Commission, as part of the ongoing biennial review of its broadcast own-

ership rules, is now actively considering whether its market definition should be revised.

You also ask about the consequences for broadcast television and cable television in California if the Commission "eliminate[s] the current rules altogether." The Commission has developed an extensive record in its pending media ownership proceedings. It is premature, however, to draw any specific conclusions about what decisions the Commission ultimately will make in these proceedings. I would suggest, however, that complete elimination of our current rules is not a probable outcome. My goal is to ensure that the rules we do adopt will better reflect the reality of today's media marketplace which, by any measure, is far more diverse and competitive than when our rules were first implemented. The Commission's failure to account adequately for dramatic growth and change in the media market over the years would be an open invitation for the courts to strike down our next set of ownership rules just as it has done in the recent past when our ownership rules have been challenged in court. Rejection by the courts would be harmful for consumers, who depend on a diverse marketplace of ideas, and for media companies that need regulatory certainty for planning and investment purposes. Consequently, I am committed to developing ownership policies that preserve and promote diversity, competition, and localism in today's media market and are judicially sustainable.

Miscellaneous

Question 11. Do you foresee an overlay strategy for the 310 area code that would prevent a split but only change digital cell phones prospectively, therefore eliminating the inconvenience to individuals who presently own cell phones and assuring that purchasers of analog cell phones would not have to change their code?

Answer. The California Commission has proposed to the Commission to place all wireless customers in a new area code, including existing wireless customers, which would require current wireless customers to change their area codes but retain their seven-digit telephone number. The California Commission could modify its request and propose a specialized overlay in the 310 area code that would require only new wireless subscribers to be assigned to the new area code.

The California Commission could also implement an all-services overlay that would be available to all new services and, therefore, would not require existing wireless customers to change their area codes or phone numbers. The California Commission may take such action without seeking additional authority from the Commission.

On the HERO Act (public safety spectrum): The FCC has an open rulemaking on digital television. One of the areas of concern to me is that critical spectrum for public safety—spectrum that will help first responders coordinate effectively in the event of a terrorist attack such as 9/11—is being held pending the broadcasters' transition to digital television. Congresswoman Harman, who is now Ranking Member on the House Intelligence Committee, has introduced a bill, the HERO Act, to have the public safety spectrum in issue turned over by a date certain at the end of 2006, precisely to get at a problem first responders had in coordinating during and immediately after the 9/11 attacks.

Question 12. What has the FCC done, and what can it still do, to speed up the broadcasters' conversion and to get the public to participate in the transition as well?

Answer. In the last two years, the Commission has taken an aggressive leadership role in trying to bring the digital television ("DTV") transition to a successful conclusion. We have been using all of the tools at our disposal, both formal and informal, to facilitate the DTV transition. For example, in October 2001, I established the Digital Television Task Force to coordinate and prioritize the Commission's efforts in this important area. We also have redoubled our efforts to work with all of the parties involved in the DTV transition in order to re-energize and focus the dialog around solutions that would accelerate the transition and benefit consumers.

Last April, for instance, we challenged all of the industries involved in the DTV transition—broadcasters, networks, cable and satellite television operators, and consumer electronics manufacturers—to take specific voluntary steps that would encourage consumer adoption of DTV technology and further accelerate the transition. I am pleased to report that, by and large, each industry has responded favorably to our call to action.

The Commission also has been actively and aggressively engaged in other matters involving the DTV transition, including equipment compatibility, copyright protection, and digital carriage obligations, just to name a few. In some cases we have used our authority to mandate change when an industry could not—or would not—come to a solution. For example, last summer the Commission amended its rules

to require that broadcast television receivers incorporate the capability to receive DTV signals.

The Commission will continue to act to keep the DTV transition moving forward. We will be guided by pragmatism, but it will be backed up by regulatory action that we will not hesitate to employ where necessary.

Question 13. On area code relief: My state, California, is a great market, particularly for high tech and new telecommunications services. One drawback to this impressive growth is that these new telecommunications services use telephone numbers. Senior citizens, residents and small businesses, particularly in urban areas, have had to endure many successive area code changes. The state of California has a petition pending to try some new avenues of relief. For example, the state wants to overlay a new code for devices that don't require human interaction—like credit card verification devices—so that real people are not burdened or confused. The state has other innovative ideas, and these have included requiring wireless carriers to offer local number portability and ordering a wireless overlay in the Los Angeles area code 310 and 909 region. What is your position?

Answer. The Commission also seeks to minimize the burdens of frequent area code changes on telephone service consumers, but these burdens must be weighed against the increasing demand for telephone numbers by new or improved telecommunications services. The Commission has and will continue to explore measures that will promote more efficient use of numbers. Placing services that do not require human interaction in a separate area code may be one such measure, but only if the numbers used for these services are readily identifiable, and if enough of these numbers exist to justify a separate area code. The Commission also believes that participation by wireless carriers in thousands block number pooling will result in more efficient number utilization.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV TO HON. KEVIN J. MARTIN

Universal Service

The E-Rate has made it possible for us to expedite the integration of technology into our education system by wiring tens of thousands of schools and libraries across the country. I think it is extremely important for the Commission to pursue Universal Service reforms that will ensure the long-term viability of *all* aspects of the program—including the E-Rate.

Question 1. Please update me about the status of the Commission's efforts to strengthen the Universal Service program. I am interested in what reforms are needed to enable us to serve the needs of low-income and rural Americans in the long-term AND continue the progress we've made in wiring schools and libraries.

Answer. The Commission's efforts in this area are multifaceted. With regard to the low-income program, the Commission has asked the Federal-State Joint Board on Universal Service to review the Lifeline and Link-Up programs for all low-income consumers. In the context of this review, the Joint Board is examining the effectiveness of the current rules, possible modifications to the programs, and outreach efforts.

The Commission's high cost support program is designed to ensure that consumers in high cost and rural areas have access to telecommunications services that are reasonably comparable to those provided in urban areas at reasonably comparable rates. We, at the Commission, are fully committed to supporting telephone service in high cost, rural areas and ensuring that all Americans have access to affordable, quality telecommunications services. Due to our implementation of ongoing reforms to various aspects of the high cost program, total high cost support has grown from approximately $1.7 billion in 1998 to a projected $3.3 billion in 2003.

The Commission has an ongoing rulemaking which is directed at strengthening the Schools and Libraries ("E-Rate") program. The Commission's goals in undertaking this proceeding, consistent with the statute, are three-fold: (1) to consider changes that would fine-tune our rules to improve program operation; (2) to ensure that the benefits of this universal service support mechanism for schools and libraries are distributed in a manner that is fair and equitable; and (3) to improve our oversight over this program to ensure that the goals of section 254 are met without waste, fraud or abuse.

Also, in May 2003, the Commission will host a forum, facilitated by Commissioner Kathleen Q. Abernathy, regarding the E-Rate program. This forum will convene a group of school administrators, service providers, equipment vendors, and other key

parties to explore new means of ensuring that funds are disbursed in a fair, efficient and cost-effective manner.

Effect of Broadband Deregulation on Universal Service

The Commission is considering changing the way certain broadband services are regulated by re-classifying them as "information services."

Question 2. What impact would these changes have on the way contributions are collected for the Universal Service program? At a time when we are searching for ways to strengthen Universal Service, do you think it is wise to pursue actions that may threaten *existing* funding resources?

Answer. I am committed to preserving and advancing Universal Service as well as ensuring that Universal Service has sufficient funding. The Commission sought comment in the *Wireline Broadband Internet Access* proceeding on what implications, if any, adopting the Commission's tentative conclusion might have for funding Universal Service. Should the Commission adopt its tentative conclusion, section 254(d) of the Telecommunications Act of 1996 ("1996 Act") would still allow the Commission to require broadband Internet access providers to contribute to universal service if the public interest so required. I am carefully considering the record developed in response to this proceeding as I make my decision in this matter.

Broadband and Competition

I believe that stimulating investment in high-speed Internet services will help our economy and provide a variety of other benefits as well (telemedicine, distance learning, etc.)

Question 3. What do you think the best strategies are for speeding-up the deployment of broadband without threatening competition in local telephone markets?

Answer. I share your enthusiasm for the promise of broadband and what it can bring to the American public. As a result, the Commission has made the deployment of broadband-capable infrastructure the Commission's top priority. To my mind, the biggest challenge to broadband deployment is the enormous capital investment needed—the vast majority of which must come from the private sector—to either upgrade existing networks or build entirely new broadband-capable networks. I believe the best strategy for speeding up the deployment of broadband is to provide the proper incentives for that capital to flow into these broadband construction projects.

At the Commission, we are achieving this objective through three primary avenues. First, we are reducing unnecessary barriers to broadband deployment so as to align the incentives to invest with the risks associated with that investment. Second, where possible, we are clarifying the regulatory landscape for the provision of broadband Internet access service to lower the administrative costs of regulatory uncertainty. Third, and possibly most important, we are providing incentives for the development and deployment of new broadband-capable networks from wireless platforms, such as 3G, Wi-Fi, mesh networks, other fixed wireless networks and satellite to wireline platforms such as cable modem, DSL, powerline, and fiber-to-the-home. Examples of these actions can be found in our recent *Triennial Review Order*, our implementation of some of the recent recommendations by the Commission's Spectrum Policy Task Force, our cable modem and DSL definitional proceedings, our providing for more spectrum for 3G and other unlicensed spectrum, and an upcoming proceeding on powerline broadband to name just a few.

This strategy will not threaten sustainable competition in local telephone markets and, in fact, will over time enhance that competition. Currently, facilities-based voice competitors, most notably in the cable and wireless space, are making great inroads and providing consumers with a competitive differentiated local telephony product. In addition, competitive local exchange carriers will continue to have access to significant portions of incumbents' networks for the provision of voice services. Finally, by promoting facilities-based broadband networks we are seeing that local and long distance voice is an inexpensive application that is offered to broadband subscribers. Whether it is a Voice over Internet Protocol ("VoIP") product being offered by Vonage at a competitive rate to broadband consumer or voice applications provided by the likes of Microsoft through their broadband XBOX gaming console the lesson is clear—bring a broadband pipe to the American public and you necessarily bring local voice competition.

Local Competition

According to recent reports in the *Wall Street Journal,* the Commission may be preparing to scale back competitors' access to local networks by changing the rules relating to the unbundled network element platform. According to recent FCC statistics, competition in local telephone markets is just now starting to take hold in a meaningful way.

Question 4. If the unbundled network element platform were to no longer be an available method for competitors to access Bell networks, what would it mean for the future of local competition—particularly in rural areas and regions with challenging topography where the cost of deploying facilities is particularly high?

Answer. In large measure, a majority of Commissioners in the *Triennial Review* proceeding ensured that the unbundled network element platform ("UNE–P") framework will remain intact by giving state commissions the ultimate responsibility to determine whether there is impairment with regard to access to unbundled switching. To my mind, the Commission abdicated its statutory responsibility to determine whether switching should be unbundled to state regulators. I dissented from this decision because unlimited UNE–P will not lead to sustainable competition and does not provide nearly as many benefits to consumers as does competition from providers that control all or nearly all of their own facilities. It is worth expressing that to the extent the Commission established a transition away from UNE–P, competitors would continue to enjoy access to unbundled loops for local services. Thus, even in the absence of UNE–P, competitors would continue to have access to significant portions of the incumbents' network.

With regard to rural areas specifically, our record in the *Triennial Review* proceeding indicates that because the rate for unbundled loops is, as a general matter, much higher in rural areas than in more dense urban areas, the resulting rate for UNE–P is not as advantageous to competitors as buying services for resale. Accordingly, if the Commission had established a transition away from UNE–P in the *Triennial Review*, I do not believe there would have been any significant reduction of competition in rural areas. Conversely, the majority's decision to retain UNE–P will not, in my opinion, result in any significant benefits for rural consumers. The answer to the challenge of bringing competition to rural areas is not to create an artificial entry mode for competitors: the answer is to create the kind of regulatory environment that incents robust competitors to innovate so they can more easily provide a real alternative to the incumbent in these areas.

Interplay Between State Regulators and the FCC

In a recent letter to all five of the Commissioners, several representatives of the National Association of Regulatory Utility Commissioners wrote, "State flexibility to maintain UNE–P as well as the ability to add to any national UNE list is critical to keeping competition 'on track.'"

Question 5. What is your vision for the appropriate interplay between state regulators and the FCC in implementing the 1996 Act and promoting a competitive telecommunications market that benefits consumers?

Answer. As I stated in my response to Senator Hollings' sixth question, quite aside from anything the Commission has done in the *Triennial Review*, the states play a substantial role in ensuring that the 1996 Act is fully and faithfully implemented and is promoting competition. The states have broad authority over retail rates for local exchange services and the rates charged by incumbents for access to unbundled network elements. Moreover, section 252 gives them a central role in arbitrating and approving interconnection agreements. With regard to unbundled network elements, Congress established the role of the states in section 251(d). Section 251(d)(2) make clear that Congress intended the *Commission* to determine what network elements will be unbundled. Section 251(d)(3) preserves state access regulations that are consistent with the Act's unbundling requirements and that do not substantially prevent the implementation of those requirements.

My vision for the appropriate interplay between state regulators and the Commission is in accord with this basic division of labor established by Congress. The states must continue to play their substantial role in regulating the local exchange market. But the requirements of the 1996 Act are, at the end of the day, a Federal program to introduce competition into the local exchange markets, and one that this Commission has been given substantial responsibility for implementing. Congress entrusted *this Commission* with determining the availability of unbundled network elements. Accordingly, any delegation to the states should not rely on a simple and broad assumption that the states are inherently better equipped to make all determinations, but rather on some reasonable relationship between the facts that need to be determined and the ability of the states to determine these facts.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ERNEST F. HOLLINGS TO HON. KEVIN J. MARTIN

The D.C. Circuit's decision in *USTA* v. *FCC,* remanding the Commission's unbundling and line sharing rules, was inconsistent with the Supreme Court's hold-

ing in *Verizon.* However, the FCC's pending proposals to reduce competitors' access to network elements seem based on a similar predicate to the Court's suggestion that competitors using UNEs do not offer "real" competition to the incumbents.

Question 1. Do you believe that UNE–P competition is not real competition?

If so, why? If not, why would the FCC seek to curtail such competition?

Question 1a. Do you believe, as the FCC stated in its petition for rehearing, that the "limitations that the panel's decision can be read to impose have no basis in the statutory text and appear to be inconsistent with several provisions of the 1996 Act"?

Answer. The Commission has examined competition in the 271 Application process. Section 271 allows the BOCs into the in-region interLATA market upon showing that their in-region local markets are open to competition and other statutory requirements are met. One of the statutory tests requires the BOCs to demonstrate the presence of a facilities-based competitor. Under this test, contained in section 271(c)(1)(A) (entitled "Presence of a Facilities-Based Competitor"), the BOC must demonstrate that a competing provider offers telephone service "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."

In its 1997 271 application for the State of Michigan, Ameritech argued that competitors using UNEs satisfied the "Presence of a Facilities Based Competitor" prong.[1] Specifically it stated that "facilities-based" competition included competition using UNEs. Moreover, it asserted that "own telephone exchange service facilities" includes both facilities to which a carrier has title and unbundled elements obtained from a BOC."[2] Ameritech further argued "that unbundled network elements are a carrier's own facilities because resellers do not have control over the facilities they use to provide service, whereas carriers have control over facilities they construct and over unbundled network elements they purchase."

In that same proceeding, BellSouth and SBC also argued that competitors using UNEs satisfied the "presence of a Facilities-Based Competitor" test. BellSouth and SBC argued "that Congress intended to treat unbundled network elements as a competing provider's own facilities in order to give the BOC the incentive to make all checklist items available and provide competing providers with the flexibility to choose whether to build a particular facility or purchase unbundled network elements from the BOC."[3]

The Commission agreed that competitors using UNEs satisfied the test that required the "presence of a Facilities-Based Competitor." The Commission interpreted the phrase "own telephone exchange service facilities," in section 271(c)(1)(A), to include "unbundled network elements that a competing provider has obtained from a BOC." In making this interpretation the Commission rejected the argument that "providers can offer unique services and provide consumers with genuine competitive choices only when they build facilities." Instead the Commission concluded that "many of the benefits that consumers would realize if competing providers build facilities can also be realized through the use of unbundled network elements."

Since that decision the Commission has granted 35 long distance applications and has reaffirmed this policy in several applications. In granting 271 applications, the Commission has repeatedly concluded that incumbent carriers have satisfied the requirements of Track A based on "the numerous [competitive] carriers providing facilities-based service to residential and business customers in [the] market" and based on record evidence that "each of these carriers serve more than a *de minimis* number of residential and business customers via UNE–P or full-facilities lines."

At our January 14, 2003 hearing at which you appeared, Chairman Powell stated that the Commission's *UNE Triennial Review* must include as a "core component" an analysis of "the proper role of state commissions in the implementation of our unbundling rules." Commissioner Martin likewise confirmed his belief that the Commission's rules should "allow for state cooperation and input, especially regarding highly fact intensive and local determinations" in recognition of the fact that "[a]ssessments of whether access to a [unbundled network] element is necessary to provide service may vary significantly among different markets, states and regions." Commissioner Adelstein characterized the states as "our partners in implementing the Act," Commissioner Copps noted that "[t]he path to success is not through preemption of the role of the states."

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[1] Application of Ameritech Michigan Pursuant to section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, FCC 97–298, para.87 (rd. August 19, 1997).

[2] *Id.*

[3] *Id.* at para. 88.

Question 2. How will the Commission ensure that its order in the *UNE Triennial Review* preserves the meaningful participation of the states in the development of local competition as Congress intended?

Question 2a. Does the D.C. circuit decision's emphasis on a need for a more granular review of the need for UNEs suggest that the FCC must grant a strong oversight role to the states given that they are undeniably better equipped to gauge market conditions, competition, and compliance with the law on a market by market basis than is the FCC?

Answer. During my tenure at the Commission, I have witnessed first hand the helpful role that the states have played in our mutual goal of implementing the requirements of the 1996 Act.

Our decision in the Triennial Proceeding sets forth a market-specific impairment analysis for unbundling network elements that provides an important role for the states. As I have stated before, I believe the states are in a better position to be able to make fact-specific determinations about particular geographic markets.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BARBARA BOXER TO HON. KEVIN J. MARTIN

Local Telephone Service Competition

Question 1. Competing companies generally offer service to consumers at prices 10–50 percent less than the Bells. If the FCC terminates the requirement for traditional phone companies to offer parts of their infrastructure for lease to competitors, wouldn't that leave the vast majority of California customers without a choice for local phone service and drive up rates for consumers?

Answer. Competition for local service has enabled millions of consumers to benefit from lower telephone rates.

The Telecommunications Act requires that competitors have access to portions of the incumbents' networks when they are "impaired" in their ability to provide service. The Commission's decision in the Triennial review proceeding sets forth a framework to determine impairment based on a fact-specific granular analysis which recognizes that competitors face different operational and economic barriers in different markets.

Broadband DSL Competition

Question 2. According to the California PUC, half of my state has no access to cable broadband service and the speeds available over satellite are not competitive with DSL. If you do not continue to allow competition in DSL broadband service, will not consumers in my state be at the mercy of a DSL broadband monopoly?

Answer. Under the Commission's decision, competitive DSL service providers can continue to access an incumbents' local loop to provide DSL service to consumers. Moreover, competitive service providers may also continue to take advantage of the Commission's "line-splitting" rules—that currently enable competitive DSL service providers to reach CLEC end user customers by negotiating for access to the loop provided by a CLEC offering voice service.

Question 3. If I understand correctly, regulation of broadband delivered over telephone lines is dependent on whether or not the Commission chooses to define DSL broadband as a "telecommunications" service, and as a result is regulated, or an "information" service, which would result in an unregulated environment. Can any of you explain how a voice conversation carried over phone lines could be declared a telecommunications service while an e-mail conversation carried over phone lines is not?

Answer. The terms "telecommunications service" and "information service" are defined in the Communications Act of 1934, as amended by the 1996 Act. The Act defines "Information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." The Act defines "Telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of facilities used."

The Commission has stated that under this definition, "an entity *provides* telecommunications only when it both provides a transparent transmission path *and* it does not change the form or content of the information." If this offering is made directly to the public for a fee, it is deemed a "telecommunications service." On the other hand, "[w]hen an entity offers subscribers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available

information *via telecommunications,'* it does not provide telecommunications, it is *using* telecommunications."

In the Wireline Broadband Proceeding, the Commission tentatively concluded that providers of wireline broadband Internet access service "offer more than a transparent transmission path to end-users and offer enhanced capabilities." The Commission tentatively concluded that this service is "an 'information service' under section 3 of the Act" because providers of wireline broadband Internet access "provide subscribers with the ability to run a variety of applications that fit under the characteristics stated in the information service definition."

In the order approving the AOL-Time Warner merger, the Commission concluded that it "has Title I jurisdiction over instant messaging services . . ." and that the FCC "need not classify instant messaging services . . . as information services, cable services or telecommunications services . . ."

Wi-Fi and the Jumpstart Broadband Act

Question 4. Commissioners, my staff has made the "Jumpstart Broadband Act" available to your offices. Have you had time to review the legislation and could you provide feedback on it?

Answer. Thank you for providing the Commission with your legislation. I generally support making more spectrum available for unlicensed devices. Unlicensed devices have been a huge success story, from cordless phones to wireless broadband connections, such as 802.11b and Bluetooth. Accordingly, I think the Commission should make more spectrum available for unlicensed devices, particularly for broadband, and I support efforts to movie quickly to do so.

As the Jumpstart Broadband Act recognizes, providing additional unlicensed spectrum in the 5 GHz band raises the question of interference to important U.S. Government applications. The legislation thus requires protections for Department of Defense systems now operating in that spectrum. Indeed, industry and government officials have recently agreed on such protections.

Question 5. Commissioners, innovation has flourished in the current unlicensed spectrum bands. What do you believe the potential is for increased innovation and do you agree that more spectrum should be allocated to encourage this innovation?

Answer. I believe there is significant potential for increased innovation in unlicensed spectrum. While there are numerous possibilities for new products and services, one of the most exciting potential innovations is a last-mile application to connect people's homes to the Internet. Such a service would offer a real alternative to telephone wires, cable, and satellite connections. For example, one company can purportedly send Wi-Fi transmissions up to seven kilometers away. I think it is imperative that we encourage these kinds of innovations and ensure they have sufficient spectrum to flourish. I thus agree that more spectrum should be made available for unlicensed devices and support efforts to more quickly do so.

Question 6. Commissioners, would you agree that additional unlicensed spectrum could help spur new broadband services and would be a good idea regardless of how you proceed on the broadband proceedings before you?

Answer. I believe that additional spectrum could spur new broadband services. As mentioned, I am hopeful that unlicensed operations could provide a last-mile application to connect people's homes to the Internet. Regardless of the development of broadband through telephone wires and cable systems, additional broadband technologies are always beneficial.

Question 7. Experts in technology we have talked with say that the technology clearly exists that would allow unlicensed devices to keep from harming incumbent systems. Do your experts tell you the same thing?

Answer. I have heard different things from different experts. The Commission's Office of Engineering and Technology states that the agreement reached among the National Telecommunications and Information Administration, the Department of Defense, and the Federal Communications Commission will provide access to additional 5 GHz spectrum for unlicensed devices without harming incumbent systems.

Digital Copyright Issues

Question 8. Commissioners, consumers are excited about the potential that digital television and HDTV have to increase dramatically the quality of their viewing experience. At the same time, those who make movies and shows are concerned that those shows and films distributed in digital format will be copied and distributed at a huge loss to them. Does it not seem to you that some form of protection for content carried over the air and over cable to these fantastic new TVs is necessary and fair?

Answer. Digital television offers many benefits to consumers—a markedly sharper picture resolution and better sound; an astounding choice of video programming, in-

cluding niche programs and movies on demand; CD-quality music channels of all genres; interactivity; sophisticated program guides with parental control capabilities; and innovative services such as high speed Internet service. Many people believe that digital content will remain limited until copy protection issues are resolved. Therefore, resolving this issue could be important to the DTV transition.

Our jurisdiction in this area is unclear. We have a pending proceeding asking whether we have the jurisdiction to require implementation of a digital broadcast content protection mechanism, known as the "broadcast flag." The record is still open and I have not come to a conclusion on this point.

I am still hopeful that there may be technological solutions that will both prevent the commercial distribution that concerns content owners, and yet preserve the home recording rights that consumers have come to expect.

Media Concentration

After the elimination of radio consolidation protections in the 1990s, in California alone, one company, Clear Channel, owns a stunning 102 radio stations. In some towns that means every station is controlled by the same corporation. Now I hear that the FCC is considering eliminating the concentration protections for TV, cable, and newspapers.

Question 9. If you eliminate the current rules altogether, then could TV and cable in California experience similar concentration as radio?

I also hear from the Writers Guild, local broadcasters, independent film makers, Consumers Union, and others that the FCC is rushing to judgment on whether to eliminate or drastically change its media concentration protections.

Answer. The existing media ownership rules were crafted to promote three principles: competition, diversity, and localism. While the media marketplace may have changed since those rules were first adopted, our need to promote these core values has not.

I recognize, however, that we have a statutory mandate to review our media ownership rules every two years to make sure they are still necessary. As we debate these rules, we must be mindful of recent court action. The courts have been looking at our decisions with increasing scrutiny, striking the rules down when the Commission has not adequately justified their retention. In fact, the D.C. Circuit has struck down the last five media ownership rules it has reviewed. In most of these cases, the court expressly chastised the Commission for failing to consider the plethora of new voices present in the marketplace today.

Thus, our ownership rules should protect competition, diversity, and localism, but do so in a manner reflective of today's media environment.

Miscellaneous

Question 10. Do you foresee an overlay strategy for the 310 area code that would prevent a split but only change digital cell phones prospectively, therefore eliminating the inconvenience to individuals who presently own cell phones and assuring that purchasers of analog cell phones would not have to change their code?

Answer. The FCC could grant the California Commission authority to implement a specialized overlay to which only new wireless subscribers would be assigned. This would avoid a split and allow current wireless customers to keep their cell phone numbers. I have previously supported efforts to provide states additional flexibility they require to address numbering issues, such as implementing technology specific overlays.

On the HERO Act (public safety spectrum): The FCC has an open rulemaking on digital television. One of the areas of concern to me is that critical spectrum for public safety—spectrum that will help first responders coordinate effectively in the event of a terrorist attack such as 9/11—is being held pending the broadcasters' transition to digital television. Congresswoman Harman, who is now Ranking Member on the House Intelligence Committee, has introduced a bill, the HERO Act, to have the public safety spectrum in issue turned over by a date certain at the end of 2006, precisely to get at a problem first responders had in coordinating during and immediately after, the 9/11 attacks.

Question 11. What has the FCC done, and what can it still do, to speed up the broadcasters' conversion and to get the public to participate in the transition as well?

Answer. Last May, the Commission proposed a set of graduated sanctions for those broadcasters that fail to meet their build-out deadlines, beginning with admonishment and reporting requirements and culminating in the rescission of the station's DTV authorization. The Bureau has been following this practice in acting upon licensees' extension requests.

Last August, the Commission required that all TV sets of a certain size include a broadcast tuner. Also last August, the Commission issued a notice of proposed rulemaking regarding whether we have authority over copy protection of digital broadcast content, and if so, whether we should use that authority to mandate a digital broadcast copy protection mechanism.

Finally, in January of this year we released a notice of proposed rulemaking on the recent agreement between the consumer electronics industry and the cable industry to allow for the creation of cable-ready digital television sets.

There is still, however, much for the Commission to do. For example, in addition to those issues outlined above, we also have a proceeding pending relating to broadcasters' digital cable carriage rights.

Question 12. On area code relief: My state, California, is a great market, particularly for high tech and new telecommunications services. One drawback to this impressive growth is that these new telecommunications services use telephone numbers. Senior citizens, residents and small businesses, particularly in urban areas, have had to endure many successive area code changes. The state of California has a petition pending to try some new avenues of relief. For example, the state wants to overlay a new code for devices that don't require human interaction—like credit card verification devices,—so that real people are not burdened or confused. The state has other innovative ideas, and these have included requiring wireless carriers to offer local number portability and ordering a wireless overlay in the Los Angeles area code 310 and 909 region. What is your position?

Answer. I have previously supported efforts to provide states additional flexibility they require to address numbering issues, such as implementing technology specific overlays. I understand that state commissions often bear the brunt of consumer complaints. State commissions, not the FCC, feel the outcry from consumers when number conservation measures are adopted. The Commission is currently considering the issues raised in the California Public Service Commission's petition. I plan to give the issues raised in the California PUC petition full consideration.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ERNEST F. HOLLINGS TO HON. KATHLEEN Q. ABERNATHY

The D.C. Circuit's decision in *USTA* v. *FCC,* remanding the Commission's unbundling and line sharing rules, was inconsistent with the Supreme Court's holding in *Verizon.* However, the FCC's pending proposals to reduce competitors' access to network elements seem based on a similar predicate to the Court's suggestion that competitors using UNEs do not offer "real" competition to the incumbents.

Question 1. Do you believe that UNE–P competition is not real competition? If so, why? If not, why would the FCC seek to curtail such competition?

Answer. UNE–P competition is "real" competition. Carriers entering the market using the UNE platform have offered consumers additional choice, new service packages, and lower prices. Such entry has spurred new offerings from incumbent LECs. At the same time, the Commission must consider whether all the elements that make up the UNE platform may be unbundled in all markets consistent with section 251(d)(2) of the Act, and also whether such competition will be economically efficient and sustainable in the long term.

I do not believe that the FCC is seeking to curtail UNE–P competition. Rather, the focal point of the Commission's inquiry in the *Triennial Review* proceeding is determining which elements must be unbundled pursuant to sections 251(c) and 251(d)(2), as construed by the Supreme Court and the D.C. Circuit Court of Appeals. Because the D.C. Circuit reversed the FCC's previous order establishing unbundling requirements, the Commission must adopt new requirements. In doing so, according to the D.C. Circuit's mandate, the Commission must conduct a granular analysis of "impairment"—that is, the Commission must ascertain whether each element "is one for which multiple, competitive supply is unsuitable." *USTA* v. *FCC,* 290 F.3d 415, 427 (2002). If this analysis results in a finding that there is no impairment caused by a lack of access to a component of the UNE platform in a particular market, then the platform would not be available in that market (although other elements for which impairment is found *would* remain available on an unbundled basis, and total service resale would remain an option). This outcome, however, would result from the Commission's implementation of the Act consistent with direction from the court of appeals, rather than from an affirmative effort to curtail a particular entry strategy.

Question 1a. Do you believe, as the FCC stated in its petition for rehearing, that the "limitations that the panel's decision can be read to impose have no basis in the

statutory text and appear to be inconsistent with several provisions of the 1996 Act'"?

Answer. I agree that the D.C. Circuit's analysis did not defer sufficiently to the FCC's judgment and that the court went beyond the point necessary to reverse the Commission's rules as overbroad. The court's interpretation of the impairment standard, in my view, is not the only permissible reading of the statutory text. Nevertheless, as a Commissioner I am bound to follow the law as it is interpreted by the court of appeals.

At our January 14, 2003 hearing at which you appeared, Chairman Powell stated that the Commission's *UNE Triennial Review* must include as a "core component" an analysis of "the proper role of state commissions in the implementation of our unbundling rules." Commissioner Martin likewise confirmed his belief that the Commission's rules should "allow for state cooperation and input, especially regarding highly fact intensive and local determinations" in recognition of the fact that "[a]ssessments of whether access to a [unbundled network] element is necessary to provide service may vary significantly among different markets, states and regions." Commissioner Adelstein characterized the states as "our partners in implementing the Act," Commissioner Copps noted that "[t]he path to success is not through preemption of the role of the states."

Question 2. How will the Commission ensure that its order in the *UNE Triennial Review* preserves the meaningful participation of the states in the development of local competition as Congress intended?

Answer. I have no doubt that the state commissions will play a pivotal role in carrying out the market-opening provisions in section 251 of the Act. As an initial matter, the statute assigns the states key responsibilities in approving interconnection agreements, mediating and arbitrating disputes, and setting rates for unbundled network elements, among other things. *See* 47 U.S.C. § 252. In addition, states have taken the lead in developing performance standards concerning the ordering, provisioning, and maintenance and repair of unbundled network elements. States will continue to supervise the negotiation process, establish network element prices, and monitor incumbents' performance in carrying out the standards adopted in the Triennial Review proceeding. In addition, where the FCC is unable to make granular impairment findings based on limitations in the record, the Commission is likely to delegate authority to state commissions to make factual findings that will determine the outcome of the impairment analysis. Finally, states retain authority to regulate local competition pursuant to state law, provided such state regulation "is consistent with the requirements of [section 251] and does not substantially prevent implementation of the requirements of [section 251] and the purposes of [Part II of Title II of the Act]." 47 U.S.C. § 251(d)(3)(B&C),

Question 2a. Does the D.C. circuit decision's emphasis on a need for a more granular review of the need for UNEs suggest that the FCC must grant a strong oversight role to the states given that they are undeniably better equipped to gauge market conditions, competition, and compliance with the law on a market by market basis than is the FCC?

Answer. As noted above, where the FCC is unable to make sufficiently granular impairment findings, it is likely to enlist the states in performing the granular analysis mandated by the court of appeals. I also agree that states are particularly well equipped to perform an oversight role in ensuring that incumbent LECs comply with the Act and the FCC's rules. For example, states have established detailed performance measurements for "hot cuts" (the process of connecting a loop to a competitor's switch), and I expect that states will play the primary role in monitoring that process on a localized basis.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV TO HON. KATHLEEN Q. ABERNATHY

Universal Service

The E-Rate has made it possible for us to expedite the integration of technology into our education system by wiring tens of thousands of schools and libraries across the country. I think it is extremely important for the Commission to pursue Universal Service reforms that will ensure the long-term viability of *all* aspects of the program—including the E-rate.

Question 1. Please update me about the status of the Commission's efforts to strengthen the Universal Service program. I am interested in what reforms are needed to enable us to serve the needs of low-income and rural Americans in the long-term AND continue the progress we've made in wiring schools and libraries.

Answer. The Commission has launched several proceedings to ensure the continuing vitality of the Universal Service program. As described below, these proceedings aim to improve and strengthen *all* of our support mechanisms, and therefore will benefit consumers in high-cost areas, families with low income, and patrons of schools, libraries, and rural health care facilities. As Chair of the Federal-State Joint Board on Universal Service, I make it a top priority to ensure that these programs deliver the intended benefits in a fair, efficient, and effective manner.

- **Schools, Libraries, and Rural Health Clinics.** The Commission has a pending rulemaking that seeks to improve the efficiency and effectiveness of the support mechanism for schools and libraries. In connection with this rulemaking, I recently announced that I am organizing a public forum on May 8 focusing on proposals to improve our oversight over the program, including means of combating waste, fraud, and abuse. I hope to develop consensus at the Commission on ways of avoiding wasteful expenditures and preventing gaming of the system so that deserving school children and library patrons continue to have access to critical services. The Commission also has a pending rulemaking on how to improve the administration of the support mechanism for rural health care facilities. This mechanism appears to be underutilized, so the Commission is exploring how to remove obstacles to rural health clinics' obtaining support.
- **Contribution Methodology.** In December 2002 the Commission adopted a number of measures to stabilize the Universal Service contribution factor in an effort to mitigate the growing funding burden on consumers. For example, the Commission increased the contributions of most wireless carriers, eliminated the lag between the reporting of revenues and the recovery of contribution costs, and prohibited mark-ups of contribution costs on customers' bills. While these were important steps, I believe that more fundamental reform may be necessary to ensure the sustainability of Universal Service funding in the long term. As bundled service offerings that include local and long-distance voice services and broadband Internet services become ever more prevalent, it is increasingly difficult to isolate revenues from interstate telecommunications services. Accordingly, I believe that a contribution methodology incorporating a component based on end-user connections (or some other surrogate), in addition to or in lieu of our revenue-based methodology, may create a more sustainable model for funding Universal Service in the future. The Commission has sought comment on several proposals and will consider additional reforms based on the record now being developed.
- **High-Cost Support.** The Commission has several proceedings underway that focus on the distribution of support to high-cost areas. First, with respect to our non-rural support mechanism, we are considering a Recommended Decision from the Federal-State Joint Board on Universal Service responding to a remand by the Tenth Circuit Court of Appeals. This proceeding focuses on how to ensure that funding is sufficient for non-rural carriers serving high-cost areas. Second, the Commission is considering another Joint Board Recommended Decision regarding the definition of services that are eligible for Universal Service support (the Joint Board recommended preserving the status quo). Third, the Commission recently referred a proceeding to the Joint Board concerning the intersection of competition and Universal Service in rural areas. This proceeding will address the so-called "portability" of support—i.e., the manner in which competitive ETCs are funded—as well as questions concerning support for multiple lines, among other issues.
- **Low-Income Support.** Finally, the Joint Board will soon release a Recommended Decision on various proposals to improve the effectiveness of the Lifeline and LinkUp programs for low-income consumers. This Recommended Decision will suggest new ways for low-income consumers to qualify for support and also address questions regarding verification of eligibility and outreach efforts.

Effect of broadband deregulation on Universal Service

The Commission is considering changing the way certain broadband services are regulated by re-classifying them as "information services."

Question 2. What impact would these changes have on the way contributions are collected for the Universal Service program? At a time when we are searching for ways to strengthen Universal Service, do you think it is wise to pursue actions that may threaten *existing* funding sources?

Answer. The Commission's ongoing analysis of the appropriate classification of broadband Internet access services should not affect the Commission's authority to

assess contributions on service providers. Section 254(d) authorizes the Commission to assess contributions on carriers that provide "telecommunications services," as well as on providers of "telecommunications." Thus, if the Commission were to rule that an incumbent LEC's self-provisioned DSL transmission is an information service, the Commission also could impose a Universal Service contribution obligation on the "telecommunications" portion of that information service. The Commission's *Wireline Broadband NPRM* sought comment on whether to extend contribution obligations in this manner in the event that the Commission rules that broadband Internet access services do not include any separate telecommunications services. Therefore, I do not believe that the regulatory classification of broadband Internet access services threatens the Universal Service contribution base—regardless of the classification, the Commission must make a *policy* judgment whether providers should make separate contributions for broadband services.

Broadband and Competition

I believe that stimulating investment in high-speed Internet services will help our economy and provide a variety of other benefits as well (telemedicine, distance learning, etc.).

Question 3. What do you think the best strategies are for speeding-up the deployment of broadband without threatening competition in local telephone markets?

Answer. Section 706 of the Telecommunications Act of 1996 provides one of the Commission's most important responsibilities—promoting broadband deployment. Congress directed the Commission to facilitate broadband deployment through various means, including the elimination of regulatory barriers to infrastructure investment. Our recent Triennial Review decision took significant steps to accomplish this goal. For example, the Commission ruled that packetized channels over fiber loops and subloops would not be subject to unbundling at TELRIC rates, thus creating a powerful incentive for carriers to deploy new fiber facilities. At the same time, the Commission required the continued unbundling of high-capacity loops (e.g., T–1 lines) to preserve competition in the small and medium enterprise market.

I am disappointed, however, that a majority of the Commission decided to eliminate the line-sharing obligation. Had the Commission freed incumbents from unbundling obligations over newly deployed fiber but maintained the obligation to unbundle a broadband channel over existing copper, the Commission could have promoted both competition *and* investment. Nevertheless, even though I believe the Commission was unwise to eliminate line sharing, on balance the broadband portions of the Triennial Review decision are likely to help accelerate the rollout of broadband services to all Americans.

Local Competition

According to recent reports in the *Wall Street Journal*, the Commission may be preparing to scale back competitors' access to local networks by changing the rules relating to the unbundled network element platform. According to recent FCC statistics, competition in local telephone markets is just now starting to take hold in a meaningful way.

Question 4. If the unbundled network element platform were to no longer be an available method for competitors' to access Bell networks, what would it mean for the future of local competition—particularly in rural areas and regions with challenging topography where the cost of deploying facilities is particularly high?

Answer. I believe that making significant changes to the availability of the unbundled network element platform (UNE–P) would have promoted competition in the long term by giving carriers incentives to deploy their own facilities. There is no doubt that facilities-based competition will promote consumer welfare more effectively than a resale-type model such as UNE–P, which provides access to the incumbent's network at superefficient TELRIC prices. Unfortunately, a majority of the Commission adopted a framework under which states have discretion to preserve UNE–P in all markets indefinitely. That framework is unlikely to create significant incentives for competitors to deploy facilities of their own, and therefore is unlikely to promote sustainable competition. Moreover, the majority's framework is likely to engender litigation in each of the 50 states, thereby plunging the industry into uncertainty for years to come. I believe that the FCC should have adopted a *national* framework that eliminated the obligation to unbundle circuit switches in markets where there is clear evidence of switch deployment by competitors and where operational impairments have been addressed. Such an approach could have preserved unbundling obligations in rural markets where the cost characteristics create an insurmountable barrier to entry.

Interplay Between State Regulators and the FCC

In a recent letter to all five of the Commissioners, several representatives of the National Association of Regulatory Utility Commissioners wrote, "State flexibility to maintain UNE–P as well as the ability to add to any national UNE list is critical to keeping competition 'on track'".

Question 5. What is your vision for the appropriate interplay between state regulators and the FCC in implementing the 1996 Act and promoting a competitive telecommunications market that benefits consumers?

Answer. The FCC and state commissioners both play an important role in promoting local competition, and the Act spells out the terms of their partnership. Section 251(d) of the Act directs the FCC to decide which network elements should be made available at cost-based rates. Where the FCC lacks sufficient information, it may be appropriate to rely on state commissions for fact-finding purposes, although I believe that the FCC must retain the ultimate authority over the availability of network elements. For example, under the FCC's new framework for unbundled transport, the Commission adopted a binding objective trigger that determines where impairment is present, and the states will make findings to determine where the trigger has been met. I believe this is the appropriate model for federal-state cooperation. By contrast, the majority's switching decision abdicates our federal responsibility by leaving it to individual states to determine where unbundled switching should be available. While Congress gave the FCC responsibility for deciding which network elements to unbundle, section 252 gives states important roles in setting prices for interconnection and unbundled network elements, approving interconnection agreements, and mediating and arbitrating disputes. Moreover, section 251(d)(3) preserves state authority to adopt regulations that are consistent with the requirements of section 251 and do not substantially prevent implementation of the federal regime.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV TO HON. JONATHAN S. ADELSTEIN

Universal Service

The E-Rate has made it possible for us to expedite the integration of technology into our education system by wiring tens of thousands of schools and libraries across the country. I think it is extremely important for the Commission to pursue Universal Service reforms that will ensure the long-term viability of *all aspects* of the program—including the E-rate.

Question 1. Please update me about the status of the Commission's efforts to strengthen the Universal Service program. I am interested in what reforms are needed to enable us to serve the needs of low-income and rural Americans in the long-term AND continue the progress we've made in wiring schools and libraries.

Answer. I strongly support maintaining a strong and sound Universal Service mechanism, including the E-rate. I recently had the privilege of being made a member of the Federal-State Joint Board on Universal Service. Because only one Democrat can serve on the Joint Board, Commissioner Copps and I established a rotation schedule which would allow me to begin serving this year. He intends to return some time in 2004. We plan to confer closely.

The FCC and the Federal-State Joint Board are actively reviewing many issues that go to the heart of your question regarding our efforts to strengthen the program. The Joint Board will soon make a recommendation to the FCC regarding Lifeline and Link-Up to ensure that people who need access to these programs know about them and can participate more readily. We are looking at the question of the portability of funding and the best manner in which to do that.

The FCC also is looking at which services should be included in the definition of universal services and thus eligible for funding. We are also addressing the contribution methodology to ensure that the funding mechanism is specific, predictable and sufficient, as Congress directed.

Currently, the administration of the Schools and Libraries program is experiencing significant criticism. We are working on ways to address some of the concerns that have been raised by various interested entities. We also plan to hold an open forum on May 8, 2003 to better understand some of the issues and potential solutions.

My goal is to ensure that universal service funding, for high cost areas, schools and libraries, rural health care facilities and low income consumers works as Congress intended.

Effect of Broadband Deregulation on Universal Service

The Commission is considering changing the way certain broadband services are regulated by re-classifying them as "information services."

Question 2. What impact would these changes have on the way contributions are collected for Universal Service program? At a time when we are searching for ways to strengthen Universal Service, do you think it is wise to pursue action that may threaten existing funding sources?

Answer. I share the concern about the potential effect that the Title I reclassification may have on our ability to support Universal Service funds. It potentially creates a problem in the area of not only contribution to the fund, but also in revenue recovery by the small and rural ILECs that have made the investment to bring broadband services to their customers. Such an action potentially could eviscerate efforts to bring advanced services to rural America.

So the question is should the FCC treat broadband offered by incumbent local exchange carriers—usually DSL—as a telecommunications service regulated under Title II of the Communications Act—which is the Common Carrier portion of the Act—or as an information service under Title I—the general provisions of the Act. This seemingly simple difference can have huge ramifications for universal service. If these broadband services are classified as information services, the FCC loses much of the oversight that comes with Title II. And information service providers don't now contribute to Universal Service. This raises a lot of questions. Does it mean, for example, that revenues from these services can't contribute toward Universal Service? We've got to think hard about this at a time when the demands on the fund are increasing and contributions are decreasing.

Broadband and Competition

I believe that stimulating investment in high-speed Internet services will help our economy and provide a variety of other benefits as well (telemedicine, distance learning, etc.)

Question 3. What do you think the best strategies are for speeding up the deployment of broadband without threatening competition in local telephone markets?

Answer. I believe that Congress has many tools with which it can work to speed the deployment of broadband. Some of these would be loan and grant programs, and another way would be through tax credits.

Although universal service doesn't directly support advanced services, it's a vital mechanism that lays the groundwork for the creation of the broadband networks of the future. The high-bandwidth applications, like video services, that will drive revenues and expand opportunities will ride on these networks. And thus universal service will play a key role in bringing them to everyone in America.

Competition has historically functioned as a major force in spurring broadband deployment. The Commission can choose to deregulate where competition has already steadfastly taken hold. Under the Act, deregulation must follow competition, and not vice versa.

Local Competition

According to recent reports in the *Wall Street Journal,* the Commission may be preparing to scale back competitors' access to local networks by changing the rules relating to the unbundled network element platform. According to recent FCC statistics, competition in local telephone markets is just now starting to take hold in a meaningful way.

Question 4. If the unbundled network platforms were to no longer be an available method for competitors' to access Bell networks, what would it mean for the future of local competition—particularly in rural areas and regions with challenging topography where the cost of deploying facilities is particularly high?

Answer. Congress intended competition to take shape in many forms. One is facilities-based, another is through resale, and another is through interconnection. Although I believe that facilities-based competition is the most stable, I do believe that Congress intended it to take many shapes.

That being said, I believe that the Commission's record supported a finding of impairment to competitors without access to UNE–P in at least the mass market. Approximately 10 million customers are served through UNE–P and the Commission itself has found it to be appropriate to base Track A approval in the 271 process on the presence of UNE–P competition. Had we eradicated access to UNE–P, we may have done away with a great deal of competitive choice that customers now have.

Interplay Between State Regulators and the FCC

In a recent letter to all five of the Commissioners, several representatives of the National Association of Regulatory Utility Commissioners wrote, "State flexibility to maintain UNE–P as well as the ability to add to any national UNE list is critical to keeping competition 'on track'."

Question 5. What is your vision for the appropriate interplay between state regulators and the FCC in implementing the 1996 Act and promoting a competition telecommunications market that benefits consumers?

Answer. As I stated in my testimony, I perceive that Congress made the state Commissions our partners in both the areas of competition and Universal Service.

In some areas, Congress explicitly granted us the jurisdiction, and in others, Congress granted the state Commissions the jurisdiction. One such example is in the establishment and pricing of UNEs. We establish the "menu" of UNE's and the state Commissions price them through their ratemaking authority.

In the Triennial Review Order I believe that we have maintained the appropriate balance with the state Commissions in our efforts to promote a telecommunications market that benefits consumers.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ERNEST F. HOLLINGS TO HON. JONATHAN S. ADELSTEIN

The D.C. Circuit's decision in *USTA* v. *FCC*, remanding the Commission's unbundling and line sharing rules, was inconsistent with the Supreme Court's holding in *Verizon.* However, the FCC's pending proposals to reduce competitors' access to network elements seem based on a similar predicate to the Court's suggestion that competitors using UNEs do not offer "real" competition to the incumbents.

Question 1. Do you believe that UNE–P competition is not real competition? If so, why? If not, why would the FCC seek to curtail such competition?

Question 1a. Do you believe, as the FCC stated in its petition for rehearing, that the "limitations that the panel's decision can be read to impose have no basis in the statutory text and appear to be inconsistent with several provisions of the 1996 Act"?

Answer. The Telecommunications Act of 1996 envisioned competition coming in many forms. These modes are resale, interconnection and facilities-based competition, separately and in combination with each other. As a Member of the Federal Communications Commission, it is incumbent upon me to honor Congress' vision of how it intended to bring competition to the local loop. My position is to implement the law, not impose my policy views upon it. Legislation is rightly in the hands of Congress. Although never specifically mentioned as a specific "element," "UNE–P" is competition that finds its roots in the interconnection-based provisions of the Act. We determine which of our unbundled network elements (UNEs) must be made available to competitors through the filter of section 252(d)(2) Access Standards, commonly known as the necessary and impair standard. We must apply this standard to the individual UNEs and determine if a competitor would be impaired in its efforts to provide the service it seeks to offer without access to that particular UNE. If we find that there is no impairment, then we will move UNE–P from our list of UNE's that are available; if a legal impairment still exists, then UNE–P will continue to be available. Since this language requires that we only consider whether unbundled network elements are necessary and if a carrier will be impaired without access to them "at a *minimum,*" the statute allows us to look at other considerations such as the effect on competition and the deployment of broadband under section 706.

At our January 14, 2003 hearing at which you appeared, Chairman Powell stated that the Commission's *UNE Triennial Review* must include as a "core component" an analysis of "the proper role of state commissions in the implementation of our unbundling rules." Commissioner Martin likewise confirmed his belief that the Commission's rules should "allow for state cooperation and input, especially regarding highly fact intensive and local determinations" in recognition of the fact that "[a]ssessments of whether access to a [unbundled network] element is necessary to provide service may vary significantly among different markets, states and regions." Commissioner Adelstein characterized the states as "our partners in implementing the Act," Commissioner Copps noted that "[t]he path to success is not through preemption of the role of the states."

Question 2. How will the Commission ensure that its order in the *UNE Triennial Review* preserves the meaningful participation of the states in the development of local competition as Congress intended?

Question 2a. Does the D.C. circuit decision's emphasis on a need for a more granular review of the need for UNEs suggest that the FCC must grant a strong oversight role to the states given that they are undeniably better equipped to gauge market conditions, competition, and compliance with the law on a market by market basis than is the FCC?

Answer. I believe that Congress intended for the Federal Communications Commission and the state Commissions to be partners in the implementation of both pillars of the Communications Act of 1996, Universal Service, and competition and any corresponding subsequent deregulation. Section 251(d)(3) is entitled "Preservation of State Access Regulations." To paraphrase the provision, the Commission cannot preclude the enforcement of any regulation, order, or policy of a state commission that establishes access and interconnection obligations of local exchange carriers; is consistent with the requirements of the interconnection section of the Act; and does not substantially prevent implementation of the requirements of this section and the purposes of the common carrier regulation portion of the Act. I view this particular provision as ensuring that we cannot scuttle the state Commissions' efforts to respond to the competitive initiatives in the Act unless the state's efforts would serve to substantially impair the Commission's ability to carry out the requirements that the Act places on the Federal Communications Commission. I believe that the states must be given a significant role in this process just as they have been given significant roles, in among others, the section 251 arbitration proceedings, the Section 271 process, and under section 254, the designation of Eligible Telecommunications Carrier status. The state commissions are closer to the ground in the implementation process. That is one of the reasons for which the Congress chose to make them an integral part of the team to implement the 1996 Act. I believe that the states must participate in determining if access to a particular UNE is necessary and that if that carrier doesn't have access to it, it will be impaired in the provision of that service. I believe that the appropriate role of the state is fluid depending upon the particular UNE under discussion. If a particular UNE lends itself to a national statement of impairment or no impairment, then we have satisfied the USTA court's direction of granularity. With other UNE's, a national determination may not be possible, and thus the states are best suited, with guidance, to make that determination.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BARBARA BOXER TO HON. JONATHAN S. ADELSTEIN

Local Telephone Service Competition

Question 1. Competing companies generally offer service to consumers at prices 10–50 percent less than the Bells. If the FCC terminates the requirement for traditional phone companies to offer parts of their infrastructure for lease to competitors, wouldn't that leave the vast majority of California customers without a choice for local phone service and drive up rates for consumers?

Answer. Yes, wholesale relief from the UNE requirements could possibly leave a vast majority of customers without access to competitive choices and the benefits, of lower prices and better service, that flow from competition. However, such comprehensive relief from these requirements is not being contemplated at this time.

Question 2. Commissioners Copps and Adelstein, you issued a joint concurring statement in SBC's petition for forbearance in its application for dominant carrier status. In that statement, you stated that you voted for the proceeding not because it was the "optimal outcome, or even a good one," but because it was better than no decision at all. If the Commission had failed to act, there would have been an automatic grant of SBC's request. I am concerned that you would oppose the order but vote for it anyway because it was better than doing nothing. In your pending review on local phone competition, the Commission faces another deadline of February 20. Will you face a similar dilemma there?

Answer. No, we do not face a similar dilemma here. First, we expect to complete this process by the District Court imposed deadline. Second, in the proceeding entitled *section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, the situation was such that without any Commission action, all of our regulatory oversight over SBC's affiliate would have lapsed completely on a date certain. In section 272, Congress required Bell companies to provide long-distance and manufacturing services through a separate affiliate. In implementing these requirements, the Commission concluded that Congress adopted these safeguards because it recognized that Bell companies may still exercise market power at the time they enter long-distance markets. Congress provided that these requirements would continue for three years, but could be extended by the Commission by rule or order. Thus,

no Commission decision would have meant no remaining oversight or control. I chose to concur in that item because, although I was pleased with neither our lack of analysis, nor the ultimate decision, we were able to include some safeguards to make it less likely that the SBC affiliate could engage in discriminatory treatment because of SBC's dominance in the market. The interconnection rules in the Act call for negotiation, and if necessary, State commission arbitration, in order to breathe life into the interconnection process. These relationships are contractual in nature. As such, even if we had not been able to reach a decision by February 20, 2003, the contracts would remain in force and effect and there would not be unbridled chaos as some have suggested.

Broadband DSL Competition

Question 3. According to the California PUC, half of my state has no access to cable broadband service and the speeds available over satellite are not competitive with DSL. If you do not continue to allow competition in DSL broadband service, will not consumers in my state be at the mercy of a DSL broadband monopoly?

Answer. Yes, if there were no requirements placed on the Bell companies to unbundle their networks, then it is possible that the incumbent LEC would be the only provider of DSL or any other form of broadband competition in particular markets. As you are aware, the access to loops, switching and transport is a different issue than the *pricing* for that access. If not priced as UNE's under total element long run incremental costs (TELRIC), the RBOCs might price these features and functionalities at just and reasonable rates. And although line sharing gives competitive carriers access at TELRIC rates or zero, they could possibly access the higher frequency bandwidth portion of the line at just and reasonable rates under these provisions. Moreover, competitors would still have access to the entire loop.

Question 4. If I understand correctly, regulation of broadband delivered over telephone lines is dependent on whether or not the Commission chooses to define DSL broadband as a "telecommunications" service, and as a result is regulated, or an "information" service, which would result in an unregulated environment. Can any of you explain how a voice conversation carried over phone lines could be declared a telecommunications service while an e-mail conversation carried over phone lines is not?

Answer. That is just one of the challenges faced in determining whether these services should be treated as information services under Title I of the Act, or as telecommunications services under Title II of the Act. Both allow us to regulate it, but in completely different ways and to very different ends. Your example is a good one in terms of demonstrating how difficult it is to classify these services.

Wi-Fi and the Jumpstart Broadband Act

Question 5. Commissioners, my staff has made the "Jumpstart Broadband Act" available to your offices. Have you had time to review the legislation and could you provide feedback on it?

Answer. I commend your efforts and the efforts of Senator Allen in encouraging the deployment of additional unlicensed services in the 5 GHz band. The Jumpstart Broadband Act provides a solid framework for a Commission allocation for unlicensed use by wireless broadband devices and appropriately recognizes the important need for interference protection standards to protect incumbent Federal Government agency users of 5 GHz spectrum.

Question 6. Commissioners, innovation has flourished in the current unlicensed spectrum bands. What do you believe the potential is for increased innovation and do you agree that more spectrum should be allocated to encourage this innovation?

Answer. I do agree that more spectrum should be allocated for unlicensed services. Unlicensed operations are one of the few communications success stories over the past couple of years, and I think the Commission should continue to promote the development and deployment of more advanced unlicensed broadband devices and services. In doing so, though, we must continue to be mindful of interference to existing licensed users. I look forward to addressing some of these issues at the Commission over the next several months.

Question 7. Commissioners, would you agree that additional unlicensed spectrum could help spur new broadband services and would be a good idea regardless of how you proceed on the broadband proceedings before you?

Answer. I am very excited about the promise of unlicensed wireless technologies, and indeed of all spectrum-based technologies, to provide broadband services to American consumers. While much of the recent attention has focused on the explosive growth of Wi-Fi services, I think that there also are a number of other prom-

ising spectrum technologies—licensed and unlicensed terrestrial services, as well as satellite-based services—that will be able to offer broadband services.

Question 8. Experts in technology we have talked with say that the technology clearly exists that would allow unlicensed devices to keep from harming incumbent systems. Do your experts tell you the same thing?

Answer. I am very encouraged by the recent agreement between industry and Federal Government agencies regarding the operation of wireless local area networks in the 5 GHz band and the protection of incumbent operations. I fully support this important consensus.

Digital Copyright Issues

Question 9. Commissioners, consumers are excited about the potential that digital television and HDTV have to increase dramatically the quality of their viewing experience. At the same time, those who make movies and shows are concerned that those shows and films distributed in digital format will be copied and distributed at a huge loss to them. Does it not seem to you that some form of protection for content carried over the air and over cable to these fantastic new TVs is necessary and fair?

Answer. Some sort of protection may be required. We are currently exploring this issue, including the scope of the FCC's jurisdiction in this area, in our broadcast flag proceeding.

Question 10. Commissioner Adelstein, you have said that the FCC is obligated to protect "the free flow of ideas and creativity." Do you believe that a part of that obligation includes the protection of creative content from piracy?

Answer. When I made that statement, I was referring to our public interest mandate, our role in ensuring that broadcasters serve the "public interest, convenience, and necessity." As part of that mandate, we must maintain broadcast ownership rules that promote the public interest. Whether the FCC has a role in protecting digital content from privacy depends in part on the scope of its jurisdiction. As stated above, we are currently considering that issue in our broadcast flag proceeding.

Media Concentration

After the elimination of radio consolidation protections in the 1990s, in California alone, one company, Clear Channel, owns a stunning 102 radio stations. In some towns that means every station is controlled by the same corporation. Now I hear that the FCC is considering eliminating the concentration protections for TV, cable, and newspapers.

Question 11. I also hear from the Writers Guild, local broadcasters, independent film makers, Consumers Union, and others that the FCC is rushing to judgment on whether to eliminate or drastically change its media concentration protections. If you eliminate the current rules altogether, then could TV and cable in California experience similar concentration as radio?

Answer. If we were to eliminate the current rules altogether, I believe TV and cable could conceivably experience similar concentration.

Miscellaneous

Question 12. Do you foresee an overlay strategy for the 310 area code that would prevent a split but only change digital cell phones prospectively, therefore eliminating the inconvenience to individuals who presently own cell phones and assuring that purchasers of analog cell phones would not have to change their code?

Answer. I oppose the taking back of telephone numbers from existing mobile wireless users, whether they have digital or analog phones. As noted in my answer below, I am hopeful that with the implementation of wireless local number portability and the consideration of the California PUC request to raise the contamination percentage to 25 percent for thousands-block pooling, we can significantly improve the numbering resources situation in California so as to eliminate any discussion of telephone number take backs.

On the HERO Act (public safety spectrum): The FCC has an open rulemaking on digital television. One of the areas of concern to me is that critical spectrum for public safety—spectrum that will help first responders coordinate effectively in the event of a terrorist attack such as 9/11—is being held pending the broadcasters' transition to digital television. Congresswoman Harman, who is now Ranking Member on the House Intelligence Committee, has introduced a bill, the HERO Act, to have the public safety spectrum in issue turned over by a date certain at the end of 2006, precisely to get at a problem first responders had in coordinating during and immediately after the 9/11 attacks.

Question 13. What has the FCC done, and what can it still do, to speed up the broadcasters' conversion and to get the public to participate in the transition as well?

Answer. In January 2002, the Commission issued state-wide licenses for public safety use of the 700 MHz band. However, many large cities will not have timely access to the 700 MHz public safety spectrum because of incumbent broadcasters on TV Channels 62, 63, 64, 65, 67, 68, and 69. Public safety representatives have urged that the 700 MHz band be cleared of incumbent broadcasters as soon as possible, and by no means later than the end of 2006. A date certain for access to the 700 MHz band is critical to public safety agencies' ability to engage in long-range financial planning and in the purchase of equipment. Inasmuch as Congress has mandated that a set Digital Television market penetration benchmark must be reached before a complete transition becomes mandatory, establishing a schedule for a complete transition of the 700 MHz public safety band to exclusive public safety use is a matter not completely within the Commission's control.

With regard to other actions taken to facilitate the transition, I commend the Chairman for his leadership in securing voluntary industry commitments to increase consumer access to compelling digital content and to increase consumer awareness of the digital transition. The Commission has proposed a graduated regime of sanctions to impose on stations that fail to build out their DTV facilities and adopted a DTV tuner mandate, requiring that televisions have the capability to receive and display DTV over-the-air channels. Two on-going proceedings aimed at facilitating the transition include the DTV periodic review (reviewing whether adjustments to the existing rules for the transition are needed) and a proceeding on the Digital Cable Compatibility proposal recently submitted jointly by cable operators and electronics manufacturers.

Question 14. On area code relief: My state, California, is a great market, particularly for high tech and new telecommunications services. One drawback to this impressive growth is that these new telecommunications services use telephone numbers. Senior citizens, residents and small businesses, particularly in urban areas, have had to endure many successive area code changes. The State of California has a petition pending to try some new avenues of relief. For example, the state wants to overlay a new code for devices that don't require human interaction—like credit card verification devices,—so that real people are not burdened or confused. The state has other innovative ideas, and these have included requiring wireless carriers to offer local number portability and ordering a wireless overlay in the Los Angeles area code 310 and 909 region. What is your position?

Answer. The issue of technology-specific overlays for mobile wireless customers is a difficult one. I am hopeful that with the implementation of wireless local number portability and the consideration of the California PUC request to raise the contamination percentage to 25 percent for thousands-block pooling, we can avoid the need for a technology-specific overlay directly targeting mobile wireless phones. If a technology specific overlay is adopted, we believe that the overlay should convert to an all services overlay at a date certain and that such a proposal should not include the taking back of telephone numbers from end users.

I am always interested in hearing innovative ideas from state commissions to make numbering usage more efficient. I will encourage the Commission to look into the possibility of area codes for non-geographically sensitive devices (such as credit card verification devices) and into increasing the contamination threshold for number pooling.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ERNEST F. HOLLINGS TO HON. MICHAEL J. COPPS

The D.C. Circuit's decision in *USTA* v. *FCC,* remanding the Commission's unbundling and line sharing rules, was inconsistent with the Supreme Court's holding in *Verizon.* However, the FCC's pending proposals to reduce competitors' access to network elements seem based on a similar predicate to the Court's suggestion that competitors using UNEs do not offer "real" competition to the incumbents.

Question 1. Do you believe that UNE–P competition is not real competition? If so, why? If not, why would the FCC seek to curtail such competition?

Answer. Congress made clear that facilitating competition within and across platforms are both important in the statutory framework. Congress recognized that many competitors would not be able to duplicate the incumbent's network. Congress therefore required the Commission to determine those network elements that an incumbent must unbundle and offer to its competitors in the local market. In those markets where competitors are impaired without access to loops, switching, and

transport, UNE–P may offer the only competitive alternative for certain customers. I am pleased that, in the face of intense pressure for the Commission to make broad nationwide decisions that would have doomed the future use of unbundled elements, we instead adopted a more reasonable process under which the state commissions conduct a granular analysis that takes into account geographic and customer variation in different markets. Through this process, we will be able to foster the competition that Congress sought in the 1996 Act and to fulfill the mandate of the law, which is "to secure lower prices and higher quality services for American consumers."

Question 1a. Do you believe, as the FCC stated in its petition for rehearing, that the "limitations that the panel's decision can be read to impose have no basis in the statutory text and appear to be inconsistent with several provisions of the 1996 Act"?

Answer. I remain concerned not only about these aspects of the court decision, but also about apparent inconsistencies between this decision and the Supreme Court decision issued several days before. It may therefore have been better to try to resolve the uncertainties by seeking review of the D.C. Circuit decision, rather than moving forward with another decision that will face a renewed round of litigation.

At our January 14, 2003 hearing at which you appeared, Chairman Powell stated that the Commission's *UNE Triennial Review* must include as a "core component" an analysis of "the proper role of state commissions in the implementation of our unbundling rules." Commissioner Martin likewise confirmed his belief that the Commission's rules should "allow for state cooperation and input, especially regarding highly fact intensive and local determinations" in recognition of the fact that "[a]ssessments of whether access to a [unbundled network] element is necessary to provide service may vary significantly among different markets, states and regions." Commissioner Adelstein characterized the states as "our partners in implementing the Act," Commissioner Copps noted that "[t]he path to success is not through preemption of the role of the states."

Question 2. How will the Commission ensure that its order in the *UNE Triennial Review* preserves the meaningful participation of the states in the development of local competition as Congress intended?

Answer. In some parts of the Order, the Commission recognized that the states have a significant role to play in our unbundling determinations. We understood in those sections that the path to success is not through preemption of the role of the states, but through cooperation with the states. In those areas, we adopted a reasonable process under which a state Commission is able to conduct a granular analysis that takes into account geographic and customer variation in different markets.

In other sections of the Order, however, we did not provide a meaningful role for the state commissions. In particular, the Commission limited—on a nationwide basis in all markets for all customers—competitors' access to broadband loop facilities whenever an incumbent deploys a mixed fiber/copper loop. The Commission has recognized time and again that loops are the ultimate bottleneck facility. Yet, the Commission has chosen to eliminate this bottleneck facility on a nationwide basis without adequate analysis of the impact on consumers, without analyzing different geographic or customer markets, and without conducting the granular, fact-intensive inquiry demanded by the courts.

Question 2a. Does the D.C. circuit decision's emphasis on a need for a more granular review of the need for UNEs suggest that the FCC must grant a strong oversight role to the states given that they are undeniably better equipped to gauge market conditions, competition, and compliance with the law on a market by market basis than is the FCC?

Answer. The D.C. Circuit made clear that a more granular analysis was necessary to take into account differences among specific markets or segments of markets. State commissions with closer proximity to the markets are often best positioned to make the fact-intensive determinations about impairments faced by competitors in their local markets.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUYE TO HON. MICHAEL J. COPPS

Question. Commissioner Copps, I share your concerns about the possible modification of ownership limits under consideration and I strongly agree with you about the need to ensure that every American stakeholder is given an opportunity to participate in this debate. I understand the Media Council and Society of Professional Journalists in Hawaii have formally requested an opportunity to discuss the media

concentration issue in general, and the Hawaii duopoly waiver situation in particular.

I respectfully request that the FCC work with the Media Council and Society of Professional Journalists to facilitate a hearing or meeting in Hawaii on this important issue.

Answer. This decision is too important to make in a business-as-usual way. We need a national dialogue on these critical issues. That is why I've been pushing so hard for media hearings. I plan to participate in forums that are currently being planned by a number of private groups in cities across the mainland—from New York to Chicago to Los Angeles. But it shouldn't fall exclusively to private organizations like the Columbia Law School or the Annenberg Center to rally the public on these matters. It's the FCC's responsibility—it is our public interest *duty* —to reach out and tell the public about this proceeding, and then to solicit and listen to their input.

I am committed to participating in as many public hearings on these issues as I can. To that end, I have made arrangements to hold field hearings in Seattle and Durham this month. But, in organizing these field hearings, we were not permitted to draw on the resources of the full Commission or our Media Bureau for assistance in all of the logistics that go into such events, nor were we provided any additional funding for them. Those resources would be critical to the success of an event in Hawaii. I for one would welcome the opportunity to work together with my colleagues and the staffs of the Media and Consumer & Governmental Affairs Bureaus to make such an event happen. I have asked the Chairman to address this matter of a hearing in Hawaii and I hope he will do so soon.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BARBARA BOXER TO HON. MICHAEL J. COPPS

Local Telephone Service Competition

Question 1. Competing companies generally offer service to consumers at prices 10–50 percent less than the Bells. If the FCC terminates the requirement for traditional phone companies to offer parts of their infrastructure for lease to competitors, wouldn't that leave the vast majority of California customers without a choice for local phone service and drive up rates for consumers?

Answer. The mission of facilitating competition in all telecommunications markets became the law of the land in the 1996 Act. I share your concern about the possibility that certain customers will be left without the competitive choices that Congress sought. The Triennial Review offered us the opportunity to encourage competition and to fulfill the mandate of the law, which is "to secure lower prices and higher quality services for American consumers." In some sections, the decision advances that mandate. We preserve voice competition in the local markets and we allow it to grow. We accord the states an enhanced role in making the granular determinations necessary to foster competition and to ensure that consumers will reap the benefits of lower prices, better services, and greater innovation. In other sections, however, I am troubled that we are undermining competition, particularly in the broadband market, by limiting—on a nationwide basis in all markets for all customers—competitors' access to broadband loop facilities. I fear that this decision may well result in higher prices for consumers and may put us on the road to remonopolization of the local market.

Question 2. Commissioners Copps and Adelstein, you issued a joint concurring statement in SBC's petition for forbearance in its application for dominant carrier status. In that statement, you stated that you voted for the proceeding not because it was the "optimal outcome, or even a good one," but because it was better than no decision at all. If the Commission had failed to act, there would have been an automatic grant of SBC's request. I am concerned that you would oppose the order but vote for it anyway because it was better than doing nothing. In your pending review on local phone competition, the Commission faces another deadline of February 20. Will you face a similar dilemma there?

Answer. Although the Commission adopted an Order on February 20, the procedural issues in this proceeding were far different than those raised by SBC's forbearance petition. The statute provides that, if the Commission does not deny a forbearance petition, it is deemed granted. The Commission therefore needed to act by a certain date on SBC's more far-reaching forbearance request. In the other instance, the Commission is responding to a court decision overturning its previous network element rules. As several parties argued, had the Commission not reached a decision, it is unlikely that there would have been immediate disruption in the

market because unbundling obligations would have continued pursuant to unexpired interconnection agreements, state law requirements, or other federal requirements.

Broadband DSL Competition

Question 3. According to the California PUC, half of my state has no access to cable broadband service and the speeds available over satellite are not competitive with DSL. If you do not continue to allow competition in DSL broadband service, will not consumers in my state be at the mercy of a DSL broadband monopoly?

Answer. I dissented from the far-reaching broadband sections of the Order, because I was troubled that we are undermining competition, particularly in the broadband market, by limiting—on a nationwide basis in all markets for all customers—competitors' access to broadband loop facilities whenever an incumbent deploys any fiber for that loop. That means that as incumbents deploy fiber anywhere in their loop plant—a step carriers have been taking in any event over the past years to reduce operating expenses—they are relieved of the unbundling obligations that Congress imposed to ensure adequate competition in the local market. And make no mistake—this decision affects not just new investment, but it also eliminates unbundling obligations for past investment. The Commission has recognized time and again that loops are the ultimate bottleneck facility. Yet, the Commission has chosen to eliminate this bottleneck facility on a nationwide basis without adequate analysis of the impact on consumers, without analyzing different geographic or customer markets, and without conducting the granular, fact-intensive inquiry demanded by the courts. To make matters even worse, in some markets such as the small and medium business market, there may not be any competitive alternatives if competitors cannot get access to loop facilities. I fear that this decision may well result in higher prices for consumers and may put us on the road to re-monopolization of the local market.

Question 4. If I understand correctly, regulation of broadband delivered over telephone lines is dependent on whether or not the Commission chooses to define DSL broadband as a "telecommunications" service, and as a result is regulated, or an "information" service, which would result in an unregulated environment. Can any of you explain how a voice conversation carried over phone lines could be declared a telecommunications service while an e-mail conversation carried over phone lines is not?

Answer. The Commission will soon be deciding how to classify broadband services, and whether the transmission component for broadband services, including for Internet access, should be offered outside of the statutory framework that applies to telecommunications carriers. Not only could this decision create a division between e-mail and voice conversations, but it could also lead to the result that certain voice conversations are fully deregulated while other voice services remain subject to Congress' statutory framework. My worry is that we are heading down the road of removing core communications services from the statutory frameworks intended and established by Congress, substituting our own judgment for that of Congress, and playing a game of regulatory musical chairs by moving technologies and services from one statutory definition to another.

Wi-Fi and the Jumpstart Broadband Act

Question 5. Commissioners, my staff has made the "Jumpstart Broadband Act" available to your offices. Have you had time to review the legislation and could you provide feedback on it?

Answer. I have reviewed the legislation. First I must state that as a FCC Commissioner it is my responsibility to implement legislation that is enacted. It is not my place to advise Congress on how to vote on a particular piece of legislation. However, I can state that the goal of expanding the spectrum resources available to wireless broadband devices is one that I support wholeheartedly. It is important that as we do so we do two things, both of which are included in your bill. The first is that the FCC should not lock ourselves into any one wireless broadband technology. 802.11(b) is a huge success, but other innovations are sure to come and any spectrum policy should insure that new technologies and new entrepreneurs have a chance to turn good ideas into consumer benefits. The second is that the FCC should make smart interference decisions as early as possible. This does not mean that we should be over-restrictive, allowing no interference however minimal. This would preclude innovation and competition. Instead we should seek out the level of protections that bring the best service to the most people.

Question 6. Commissioners, innovation has flourished in the current unlicensed spectrum bands. What do you believe the potential is for increased innovation and do you agree that more spectrum should be allocated to encourage this innovation?

Answer. The unlicensed bands have allowed tremendous innovation and have allowed entrepreneurs to bring products and services to Americans in ways that are just impossible in licensed bands. We should not allow a lust to auction to undermine the clear benefits that the spectrum commons model produces. I have worked to find more unlicensed spectrum in the past and I will do so in the future.

Question 7. Commissioners, would you agree that additional unlicensed spectrum could help spur new broadband services and would be a good idea regardless of how you proceed on the broadband proceedings before you?

Answer. The mistake that the Commission made in undermining broadband competition by denying competitors access to fiber optic facilities makes working to develop wireless broadband as a competitor even more important. If incumbent companies dominate the broadband market consumer prices will rise and innovation may suffer.

Question 8. Experts in technology we have talked with say that the technology clearly exists that would allow unlicensed devices to keep from harming incumbent systems. Do your experts tell you the same thing?

Answer. While we must be careful with our interference rules, clear and rational interference rules can be met by unlicensed devices.

Digital Copyright Issues

Question 9. Commissioners, consumers are excited about the potential that digital television and HDTV have to increase dramatically the quality of their viewing experience. At the same time, those who make movies and shows are concerned that those shows and films distributed in digital format will be copied and distributed at a huge loss to them. Does it not seem to you that some form of protection for content carried over the air and over cable to these fantastic new TVs is necessary and fair?

Answer. Some form of protection is clearly needed. Copyright law already provides one form of protection. Technology may offer another. But the question of whether the FCC should impose a technology on the high-tech industry in order to protect the content industry is complicated. While we want content owners to be able to protect their products, we must be mindful of the unintended consequences of our actions. I will look for a way to give content producers the tools they need, while not creating large new costs that will be borne by consumers, threatening personal privacy, or undermining free speech and fair use.

Media Concentration

After the elimination of radio consolidation protections in the 1990s, in California alone, one company, Clear Channel, owns a stunning 102 radio stations. In some towns that means every station is controlled by the same corporation. Now I hear that the FCC is considering eliminating the concentration protections for TV, cable, and newspapers.

Question 10. If you eliminate the current rules altogether, then could TV and cable in California experience similar concentration as radio?

Answer. If we eliminate these rules, I fear the entire media landscape—across the country—very well *could* look like radio, where abandoning media concentration rules led to the wholesale consolidation that you describe. I don't believe that we yet understand the implications of our actions. We *do* have the radio experience to learn from. Many believe that the loosening of ownership caps and limits created real problems in radio. Arguably, consolidation created some economies and efficiencies that allowed broadcast media companies to operate more profitably and may even have kept some stations from going dark and depriving communities of service. But it is also true that radio consolidation went far beyond what anyone expected. Conglomerates now own dozens, even hundreds—and, in one case, more than a thousand—stations all across the country. More and more of their programming seems to originate hundreds of miles removed from listeners and their communities.

And we know there are 34 percent fewer radio station owners in March 2003 than there were before these protections were eliminated. The majority of radio markets are now oligopolies. That raises serious questions. Media watchers like the Media Access Project, Consumers Union, and Professor Robert McChesney argue that this concentration has led to far less coverage of news and public interest programming. The Future of Music Coalition in its multi-year study finds a homogenization of music that gets air play, and that radio serves now more to advertise the products of vertically-integrated conglomerates than to entertain Americans with the best and most original programming.

I don't believe we have obtained the data to determine the prospective effect on localism, diversity, and independence of TV, cable, radio, and newspapers if we eliminate our protections, especially given our history with radio consolidation.

I also hear from the Writers Guild, local broadcasters, independent film makers, Consumers Union, and others that the FCC is rushing to judgement on whether to eliminate or drastically change its media concentration protections.

Question 11. Commissioner Copps, I understand that the Commission has contracted out a number of studies on media concentration. Are you satisfied that those studies have examined the effect of elimination of media concentration rules on citizen access to diverse viewpoints or to the control exerted by a few businesses over the majority of media?

Answer. No, I am not. The studies that the Commission is relying on are narrow and incomplete, and several outside groups argue that they are seriously flawed. They don't provide an analysis of what would happen if we were to lift the television audience cap 20 or 30 or 50-percent instead of scrapping it; they don't address what the likely *prospective* effect on localism, diversity, and independence would be if we eliminate the national cap and other protections—of particular interest, given our history with radio consolidation; and they don't answer questions such as:

- How do consolidation and co-ownership affect the media's focus on issues important to minorities and to the objective of diversity? What are the effects on children?
- What effects have media mergers, radio consolidation, and TV duopolies had on the personnel and resources devoted to news, public affairs, and public service programming, and on the output of such programming? How about the effect on the creative arts?
- How are advertising and small business affected?

We need answers to these questions and many others before we can make an informed decision.

Miscellaneous

Question 12. Do you foresee an overlay strategy for the 310 area code that would prevent a split but only change digital cell phones prospectively, therefore eliminating the inconvenience to individuals who presently own cell phones and assuring that purchasers of analog cell phones would not have to change their code?

Answer. We need to work closely with state public utility commissions on these numbering issues. We must work together *as partners* to tackle numbering problems. That is why I advocated allowing more states to undertake number pooling before the national system was implemented. And that is why I am hoping we can address as expeditiously as possible petitions from states to undertake additional number conservation measures. California filed just such petitions last fall. Those petitions sought to implement a technology specific overlay and to increase the contamination threshold for reclaiming blocks of numbers. I am disappointed to see it has been several months and we have still not issued a decision. I hope we will put resources towards completing this proceeding as soon as possible. As long as measures are fair to consumers and industry, we should accommodate state requests to implement strategies that will address their situation. And once we grant a state's petition, we should allow other states to use those same strategies if they want.

On the HERO Act (public safety spectrum): The FCC has an open rulemaking on digital television. One of the areas of concern to me is that critical spectrum for public safety—spectrum that will help first responders coordinate effectively in the event of a terrorist attack such as 9/11—is being held pending the broadcasters' transition to digital television. Congresswoman Harman, who is now Ranking Member on the House Intelligence Committee, has introduced a bill, the HERO Act, to have the public safety spectrum in issue turned over by a date certain at the end of 2006, precisely to get at a problem first responders had in coordinating during and immediately after, the 9/11 attacks.

Question 13. What has the FCC done, and what can it still do, to speed up the broadcasters' conversion and to get the public to participate in the transition as well?

Answer. In August, 2002, the Commission took two major steps to encourage the long-delayed transition to digital television. We moved to resolve the continuing industry deadlock over inclusion of technologies to provide digital broadcast copy protection, and we addressed the important issue of requiring digital tuners in our television receivers. Given digital media's susceptibility to piracy, the issue of content protection must be resolved before broadcasters will make new, innovative and expensive digital content widely available. The high price and scarcity of DTV-capable

receivers that are on the market now are not consistent with realizing the Congressional goal of transitioning to digital television at such time as 85 percent of homes have digital reception capability, but history indicates, and some of the major manufacturers agree, that the costs of incorporating DTV tuners into television sets should fall fairly rapidly as all sets include these tuners.

We were also able recently to re-start the process of addressing the Commission's long-dormant proceedings on the public interest obligations of broadcasters in the DTV environment. And there does seem to be some industry movement now as well, such as recent broadcaster and cable commitments to digital programming and the industry's recent agreement on action to address cable compatibility issues. Public comments are being sought on the broadcast flag, broadcasters' public interest obligations in the DTV environment, and cable compatibility issues.

So, we are making some progress, but there is still a long way to go. We still have to resolve must-carry, the definition of "primary video" and "program-related" and so on, but my sense is we're moving faster now than we were a year ago.

Question 14. On area code relief: My state, California, is a great market, particularly for high tech and new telecommunications services. One drawback to this impressive growth is that these new telecommunications services use telephone numbers. Senior citizens, residents and small businesses, particularly in urban areas, have had to endure many successive area code changes. The State of California has a petition pending to try some new avenues of relief. For example, the state wants to overlay a new code for devices that don't require human interaction—like credit card verification devices,—so that real people are not burdened or confused. The state has other innovative ideas, and these have included requiring wireless carriers to offer local number portability and ordering a wireless overlay in the Los Angeles area code 310 and 909 region. What is your position?

Answer. We must aggressively look for innovative strategies to conserve numbers and use them more efficiently. The FCC has been taking some steps to implement these strategies. We are rolling out number pooling so that carriers receive fewer numbers at a time. And as of last fall, wireless carriers are participating in these pooling efforts. We are adopting criteria to limit the quantity of numbers that carriers can hold without using. We are requiring carriers to file information so that we can monitor the use of numbers. We are moving forward—albeit not as quickly as I would have liked—to ensure that wireless carriers implement local number portability just as wireline carriers have already done. Portability not only allows you to keep your number when you switch carriers—something that is good for consumers—but it also aids our efforts to conserve numbers. There are also additional steps we should be considering. I agree that we should explore separate area codes for those numbers consumers do not dial. These services include ATM machines, credit card authorization machines, location systems such as On-Star, and even gas station pumps. This step could free up more numbers for consumers. Finally, we need to get a handle on bigger issues looming on the horizon. We need to address the impact of new technologies such as voice over the Internet on the use of numbering resources. We need to be ahead of this curve, because these new technologies could swamp our best efforts at number conservation.

Question 15. For Commissioner Copps: Commissioner Copps, I understand you personally visited the area in Los Angeles—the 310 and 909 area codes—and attended a Town Meeting on area code issues. What do the business people, senior citizens, disabled community and other residents of that area want?

Answer. I heard clearly the frustration consumers are experiencing with the proliferation of new telephone numbers and area codes. Every time there is an area code change, consumers face substantial burdens. Not only is there the confusion and inconvenience of a new number, but there are significant costs as people need to change business cards, stationery, company brochures, the sides of company vehicles, and advertising. California has seen a virtual explosion in the number of new area codes. In the last three years of the 20th century, Californians faced more area code changes than in the 50 years prior to that. Consumers at the Town Meeting wanted the FCC, working together with the California Commission, to undertake a concerted, cooperative effort to do all that we can to slow the rate of area code changes.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV TO HON. MICHAEL J. COPPS

Universal Service

The E-Rate has made it possible for us to expedite the integration of technology into our education system by wiring tens of thousands of schools and libraries across the country. I think it is extremely important for the Commission to pursue Universal Service reforms that will ensure the long-term viability of *all aspects* of the program—including the E-rate.

Question 1. Please update me about the status of the Commission's efforts to strengthen the Universal Service program. I am interested in what reforms are needed to enable us to serve the needs of low-income and rural Americans in the long-term AND continue the progress we've made in wiring schools and libraries.

Answer. I share your concern about the need to maintain a strong and sustainable Universal Service mechanism. My overriding objective as an FCC Commissioner is to help bring the best, most accessible and cost-effective communications system in the world to all of our people—and I mean *all* of our people. To that end, we must implement Congress' directive to preserve and advance universal service.

The Commission and the Federal-State Joint Board are at present actively reviewing many issues that go to the heart of our efforts to strengthen the Universal Service program. The Commission is considering the services that should be supported by these mechanisms and must issue a decision by this summer. The Commission is also in the midst of a proceeding to improve the operation and oversight of the E-Rate program in order to ensure that our children and communities have access to the tools they need to succeed in the 21st century. Similarly, the Commission has undertaken a proceeding to improve the rural health care program, which helps rural health care providers obtain access to modern telecommunications and information services. In addition, the Federal-State Joint Board on Universal Service has begun a proceeding to examine the portability of Universal Service in markets with competition and will soon make recommendations to the Commission on ways to improve the effectiveness of the Lifeline and Link-Up programs. By completing these proceedings expeditiously and in a manner that adheres closely to Congress' statutory framework, we can continue to serve the needs of low-income and rural Americans and continue the progress we've made in wiring schools and libraries across the country.

Effect of Broadband Deregulation on Universal Service

The Commission is considering changing the way certain broadband services are regulated by re-classifying them as "information services."

Question 2. What impact would these changes have on the way contributions are collected for the Universal Service program? At a time when we are searching for ways to strengthen Universal Service, do you think it is wise to pursue action that may threaten existing funding sources?

Answer. I share your concern about the potential effect that a statutory reclassification may have on our ability to support Universal Service. At present, providers of DSL services contribute to Universal Service whereas cable modem providers do not. If the Commission were to determine that wireline broadband Internet access is an information service provided via telecommunications, providers of such services might no longer contribute unless the Commission exercises its permissive authority to require contributions. I believe we need to address expeditiously the issue of broadband providers' contribution to Universal Service. We must continue to look for long-term solutions that will put the fund on a solid footing. When the Commission finally addresses this issue, I hope we will do so in a manner that does not narrow the contribution base and undermine the sufficiency of the fund. We must also work to avoid a system that opens the door to regulatory arbitrage or distortions in the market.

Broadband and Competition

I believe that stimulating investment in high-speed Internet services will help our economy and provide a variety of other benefits as well (telemedicine, distance learning, etc.)

Question 3. What do you think the best strategies are for speeding up the deployment of broadband without threatening competition in local telephone markets?

Answer. Today, having access to advanced communications—broadband—is every bit as important as access to basic telephone services was in the past. As you point out, providing meaningful access to advanced telecommunications for all our citizens may well spell the difference between continued stagnation and long-term economic

revitalization. Already, broadband is a key component of our Nation's systems of education, commerce, employment, health, government and entertainment. Congress recognized the importance of broadband access in the Telecommunications Act of 1996. Not only did Congress give the FCC and the state commissions the statutory mandate to advance the cause of bringing access to advanced telecommunications to each and every citizen of our country, but it also directed that one of the guiding principles of Universal Service is that "access to advanced telecommunications and information services should be provided in all regions of the Nation."

I believe we can promote deployment of broadband without undermining the competition that Congress sought in the 1996 Act. Indeed, competition can promote broadband deployment. We are now seeing competition not only within delivery platforms, but also among delivery platforms. We are seeing convergence of industries, convergence of services, and convergence of markets. It is clear that companies are moving to deploy advanced technologies in response to competition from other broadband providers. As Congress predicted, the competition resulting from the 1996 Act unleashed an unprecedented investment in a 21st century communications infrastructure.

I dissented from the far-reaching broadband sections of the Order, because I was troubled that we are undermining competition in the broadband market. I fear that this decision may well result in higher prices for consumers and may put us on the road to re-monopolization of the local market.

We must also remember, however, that at the same time that Congress sought to promote competition, it also reaffirmed a core principle at the heart of the public interest—Universal Service. A critical pillar of federal telecommunications policy is that all Americans should have access to reasonably comparable services at reasonably comparable rates. Congress has been clear—it has told us to make comparable technologies available all across the Nation. We must ensure that we give meaning to and carry out our duties under these provisions.

I believe that the Commission should initiate, within the rather broad authority given it by the Congress, a more proactive program to promote the deployment of broadband to all Americans. I therefore support launching a proceeding to examine steps we should take to promote the deployment of advanced services, and the role of Universal Service in that effort. This should be a priority matter.

Local Competition

According to recent reports in the *Wall Street Journal*, the Commission may be preparing to scale back competitors' access to local networks by changing the rules relating to the unbundled network element platform. According to recent FCC statistics, competition in local telephone markets is just now starting to take hold in a meaningful way.

Question 4. If the unbundled network platforms were to no longer be an available method for competitors' to access Bell networks, what would it mean for the future of local competition—particularly in rural areas and regions with challenging topography where the cost of deploying facilities is particularly high?

Answer. Congress recognized that many competitors would not be able to duplicate the incumbent's network. Congress therefore required the Commission to determine those network elements that an incumbent must unbundle and offer to its competitors in the local market. In those markets where competitors are impaired without access to loops, switching, and transport, UNE–P may offer the only competitive alternative for certain customers. I am pleased that, in the face of intense pressure for the Commission to make broad nationwide decisions that would have doomed the future use of unbundled elements, we instead adopted a more reasonable process under which the state commissions conduct a granular analysis that takes into account geographic and customer variation in different markets. Through this process, we will be able to foster the competition that Congress sought in the 1996 Act and to fulfill the mandate of the law, which is "to secure lower prices and higher quality services for American consumers."

Interplay Between State Regulators and the FCC

In a recent letter to all five of the Commissioners, several representatives of the National Association of Regulatory Utility Commissioners wrote, "State flexibility to maintain UNE–P as well as the ability to add to any national UNE list is critical to keeping competition 'on track'."

Question 5. What is your vision for the appropriate interplay between state regulators and the FCC in implementing the '96 Act and promoting a competition telecommunications maret that benefits consumers?

Answer. As I stated in my response to Senator Hollings' sixth question, quite aside from anything the Commission has done in the *Triennial Review*, the states

play a substantial role in ensuring that the 1996 Act is fully and faithfully implemented and in promoting competition. The states have broad authority over retail rates for local exchange services and the rates charged by incumbents for access to unbundled network elements. Moreover, section 252 gives them a central role in arbitrating and approving interconnection agreements. With regard to unbundled network elements, Congress established the role of the states in section 251(d). Section 251(d)(2) make clear that Congress intended the *Commission* to determine what network elements will be unbundled. Section 251(d)(3) preserves state access regulations that are consistent with the Act's unbundling requirements and that do not substantially prevent the implementation of those requirements.

My vision for the appropriate interplay between state regulators and the Commission is in accord with this basic division of labor established by Congress. The states must continue to play their substantial role in regulating the local exchange market. But the requirements of the 1996 Act are, at the end of the day, a Federal program to introduce competition into the local exchange markets, and one that this Commission has been given substantial responsibility for implementing. Congress entrusted *this Commission* with determining the availability of unbundled network elements. Accordingly, any delegation to the states should not rely on a simple and broad assumption that the states are inherently better equipped to make all determinations, but rather on some reasonable relationship between the facts that need to be determined and the ability of the states to determine these facts.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ERNEST F. HOLLINGS TO HON. KEVIN J. MARTIN

All FCC Commissioners should answer: The DC Circuit's decision in *USTA* v. *FCC,* remanding the Commission's unbundling and line sharing rules, was inconsistent with the Supreme Court's holding in *Verizon.* However, the FCC's pending proposals to reduce competitors' access to network elements seem based on a similar predicate to the Court's suggestion that competitors using UNEs do not offer "real" competition to the incumbents.

Question 1. Do you believe that UNE–P competition is not real competition?

If so, why? If not, why would the FCC seek to curtail such competition?

Question 1a. Do you believe, as the FCC stated in its petition for rehearing, that the "limitations that the panel's decision can be read to impose have no basis in the statutory text and appear to be inconsistent with several provisions of the 1996 Act"?

Answer. The Commission has examined competition in the 271 Application process. Section 271 allows the BOCs into the in-region interLATA market upon showing that their in-region local markets are open to competition and other statutory requirements are met. One of the statutory tests requires the BOCs to demonstrate the presence of a facilities-based competitor. Under this test, contained in Section 271(c)(1)(A) (entitled "Presence of a Facilities-Based Competitor"), the BOC must demonstrate that a competing provider offers telephone service "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."

In its 1997 271 application for the state of Michigan, Ameritech argued that competitors using UNEs satisfied the "Presence of a Facilities Based Competitor" prong.[1] Specifically it stated that "facilities-based" competition included competition using UNEs. Moreover, it asserted that "own telephone exchange service facilities" includes both facilities to which a carrier has title and unbundled elements obtained from a BOC."[2] Ameritech further argued "that unbundled network elements are a carrier's own facilities because resellers do not have control over the facilities they use to provide service, whereas carriers have control over facilities they construct and over unbundled network elements they purchase."

In that same proceeding, BellSouth and SBC also argued that competitors using UNEs satisfied the "presence of a Facilities-Based Competitor" test. BellSouth and SBC argued "that Congress intended to treat unbundled network elements as a competing provider's own facilities in order to give the BOC the incentive to make all checklist items available and provide competing providers with the flexibility to

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[1] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In—Region, InterLA TA Services In Michigan, FCC 97–298, para.87 (rd. August 19, 1997).

[2] *Id.*

choose whether to build a particular facility or purchase unbundled network elements from the BOC."[3]

The Commission agreed that competitors using UNEs satisfied the test that required the "presence of a Facilities-Based competitor. The Commission interpreted "the phrase "own telephone exchange service facilities," in section 271(c)(1)(A), to include unbundled network elements that a competing provider has obtained from a BOC." In making this interpretation the Commission rejected the argument that "providers can offer unique services and provide consumers with genuine competitive choices only when they build facilities." Instead the Commission concluded that "many of the benefits that consumers would realize if competing providers build facilities can also be realized through the use of unbundled network elements."

Since that decision the Commission has granted 35 long distance applications and has reaffirmed this policy in several applications. In granting 271 applications, the Commission has repeatedly concluded that incumbent carriers have satisfied the requirements of Track A based on "the numerous [competitive] carriers providing facilities-based service to residential and business customers in [the] market" and based on record evidence that "each of these carriers serve more than a *de minimis* number of residential and business customers via UNE–P or full-facilities lines."

All FCC Commissioners should answer: At our January 14, 2003 hearing at which you appeared, Chairman Powell stated that the Commission's *UNE Triennial Review* must include as a "core component" an analysis of "the proper role of state commissions in the implementation of our unbundling rules." Commissioner Martin likewise confirmed his belief that the Commission's rules should "allow for state cooperation and input, especially regarding highly fact intensive and local determinations" in recognition of the fact that "[a]ssessments of whether access to a [unbundled network] element is necessary to provide service may vary significantly among different markets, states and regions." Commissioner Adelstein characterized the states as "our partners in implementing the Act," Commissioner Copps noted that "[t]he path to success is not through preemption of the role of the states."

Question 2. How will the Commission ensure that its order in the *UNE Triennial Review* preserves the meaningful participation of the states in the development of local competition as Congress intended?

Question 2a. Does the D.C. circuit decision's emphasis on a need for a more granular review of the need for UNEs suggest that the FCC must grant a strong oversight role to the states given that they are undeniably better equipped to gauge market conditions, competition, and compliance with the law on a market by market basis than is the FCC?

Answer. During my tenure at the Commission, I have witnessed first hand the helpful role that the states have played in our mutual goal of implementing the requirements of the 1996 Act.

Our decision in the Triennial Proceeding sets forth a market-specific impairment analysis for unbundling network elements that provides an important role for the states. As I have stated before, I believe the states are in a better position to be able to make fact-specific determinations about particular geographic markets.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BARBARA BOXER TO HON. KEVIN J. MARTIN

Local Telephone Service Competition

Question 1. Competing companies generally offer service to consumers at prices 10–50-percent less than the Bells. If the FCC terminates the requirement for traditional phone companies to offer parts of their infrastructure for lease to competitors, wouldn't that leave the vast majority of California customers without a choice for local phone service and drive up rates for consumers?

Answer. Competition for local service has enabled millions of consumers to benefit from lower telephone rates.

The Telecommunications Act requires that competitors have access to portions of the incumbents' networks when they are "impaired" in their ability to provide service. The Commission's decision in the Triennial review proceeding sets forth a framework to determine impairment based on a fact-specific granular analysis which recognizes that competitors face different operational and economic barriers in different markets.

[3] *Id.* at para. 88.

Broadband DSL Competition

Question 2. According to the California PUC, half of my state has no access to cable broadband service and the speeds available over satellite are not competitive with DSL. If you do not continue to allow competition in DSL broadband service, will not consumers in my state be at the mercy of a DSL broadband monopoly?

Answer. Under the Commission's decision, competitive DSL service providers can continue to access an incumbents' local loop to provide DSL service to consumers. Moreover, competitive service providers may also continue to take advantage of the Commission's "line-splitting" rules—that currently enable competitive DSL service providers to reach CLEC end user customers by negotiating for access to the loop provided by a CLEC offering voice service.

Question 3. If I understand correctly, regulation of broadband delivered over telephone lines is dependent on whether or not the Commission chooses to define DSL broadband as a "telecommunications" service, and as a result is regulated, or an "information" service, which would result in an unregulated environment. Can any of you explain how a voice conversation carried over phone lines could be declared a telecommunications service while an e-mail conversation carried over phone lines is not?

Answer. The terms "telecommunications service" and "information service" are defined in the Communications Act of 1934, as amended by the 1996 Act. The Act defines "Information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." The Act defines "Telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of facilities used."

The Commission has stated that under this definition, "an entity *provides* telecommunications only when it both provides a transparent transmission path *and* it does not change the form or content of the information." If this offering is made directly to the public for a fee, it is deemed a "telecommunications service." On the other hand, "[w]hen an entity offers subscribers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information *via telecommunications,'* it does not provide telecommunications, it is *using* telecommunications."

In the Wireline Broadband Proceeding, the Commission tentatively concluded that providers of wireline broadband Internet access service "offer more than a transparent transmission path to end-users and offer enhanced capabilities." The Commission tentatively concluded that this service is "an 'information service' under section 3 of the Act" because providers of wireline broadband Internet access "provide subscribers with the ability to run a variety of applications that fit under the characteristics stated in the information service definition."

In the order approving the AOL-Time Warner merger, the Commission concluded that it "has Title I jurisdiction over instant messaging services . . ." and that the FCC "need not classify instant messaging services . . . as information services, cable services or telecommunications services . . .

Wi-Fi and the Jumpstart Broadband Act

Question 4. Commissioners, my staff has made the "Jumpstart Broadband Act" available to your offices. Have you had time to review the legislation and could you provide feedback on it?

Answer. Thank you for providing the Commission with your legislation. I generally support making more spectrum available for unlicensed devices. Unlicensed devices have been a huge success story, from cordless phones to wireless broadband connections, such as 802.1 lb and Bluetooth. Accordingly, I think the Commission should make more spectrum available for unlicensed devices, particularly for broadband, and I support efforts to movie quickly to do so.

As the Jumpstart Broadband Act recognizes, providing additional unlicensed spectrum in the 5 GHz band raises the question of interference to important U.S. Government applications. The legislation thus requires protections for Department of Defense systems now operating in that spectrum. Indeed, industry and government officials have recently agreed on such protections.

Question 5. Commissioners, innovation has flourished in the current unlicensed spectrum bands. What do you believe the potential is for increased innovation and do you agree that more spectrum should be allocated to encourage this innovation?

Answer. I believe there is significant potential for increased innovation in unlicensed spectrum. 'While there are numerous possibilities for new products and services, one of the most exciting potential innovations is a last-mile application to connect people's homes to the Internet. Such a service would offer a real alternative to telephone wires, cable, and satellite connections. For example, one company can purportedly send Wi-Fi transmissions up to seven kilometers away. I think it is imperative that we encourage these kinds of innovations and ensure they have sufficient spectrum to flourish. I thus agree that more spectrum should be made available for unlicensed devices and support efforts to more quickly do so.

Question 6. Commissioners, would you agree that additional unlicensed spectrum could help spur new broadband services and would be a good idea regardless of how you proceed on the broadband proceedings before you?

Answer. I believe that additional spectrum could spur new broadband services. As mentioned, I am hopeful that unlicensed operations could provide a last-mile application to connect people's homes to the Internet. Regardless of the development of broadband through telephone wires and cable systems, additional broadband technologies are always beneficial.

Question 7. Experts in technology we have talked with say that the technology clearly exists that would allow unlicensed devices to keep from harming incumbent systems. Do your experts tell you the same thing?

Answer. I have heard different things from different experts. The Commission's Office of Engineering and Technology states that the agreement reached among the National Telecommunications and Information Administration, the Department of Defense, and the Federal Communications Commission will provide access to additional 5 GHz spectrum for unlicensed devices without harming incumbent systems.

Digital Copyright Issues

Question 8. Commissioners, consumers are excited about the potential that digital television and HDTV have to increase dramatically the quality of their viewing experience. At the same time, those who make movies and shows are concerned that those shows and films distributed in digital format will be copied and distributed at a huge loss to them. Does it not seem to you that some form of protection for content carried over the air and over cable to these fantastic new TVs is necessary and fair?

Answer. Digital television offers many benefits to consumers—a markedly sharper picture resolution and better sound; an astounding choice of video programming, including niche programs and movies on demand; CD-quality music channels of all genres; interactivity; sophisticated program guides with parental control capabilities; and innovative services such as high speed Internet service. Many people believe that digital content will remain limited until copy protection issues are resolved. Therefore, resolving this issue could be important to the DTV transition.

Our jurisdiction in this area is unclear. We have a pending proceeding asking whether we have the jurisdiction to require implementation of a digital broadcast content protection mechanism, known as the "broadcast flag." The record is still open and I have not come to a conclusion on this point.

I am still hopeful that there may be technological solutions that will both prevent the commercial distribution that concerns content owners, and yet preserve the home recording rights that consumers have come to expect.

Media Concentration

After the elimination of radio consolidation protections in the 1990s, in California alone, one company, Clear Channel, owns a stunning 102 radio stations. In some towns that means every station is controlled by the same corporation. Now I hear that the FCC is considering eliminating the concentration protections for TV, cable, and newspapers.

Question 9. If you eliminate the current rules altogether, then could TV and cable in California experience similar concentration as radio?

I also hear from the Writers Guild, local broadcasters, independent film makers, Consumers Union, and others that the FCC is rushing to judgment on whether to eliminate or drastically change its media concentration protections.

Answer. The existing media ownership rules were crafted to promote three principles: competition, diversity, and localism. While the media marketplace may have changed since those rules were first adopted, our need to promote these core values has not.

I recognize, however, that we have a statutory mandate to review our media ownership rules every two years to make sure they are still necessary. As we debate these rules, we must be mindful of recent court action. The courts have been looking at our decisions with increasing scrutiny, striking the rules down when the Commis-

sion has not adequately justified their retention. In fact, the D.C. Circuit has struck down the last five media ownership rules it has reviewed. In most of these cases, the court expressly chastised the Commission for failing to consider the plethora of new voices present in the marketplace today.

Thus, our ownership rules should protect competition, diversity, and localism, but do so in a manner reflective of today's media environment.

Miscellaneous

Question 10. Do you foresee an overlay strategy for the 310 area code that would prevent a split but only change digital cell phones prospectively, therefore eliminating the inconvenience to individuals who presently own cell phones and assuring that purchasers of analog cell phones would not have to change their code?

Answer. The FCC could grant the California Commission authority to implement a specialized overlay to which only new wireless subscribers would be assigned. This would avoid a split and allow current wireless customers to keep their cell phone numbers. I have previously supported efforts to provide states additional flexibility they require to address numbering issues, such as implementing technology specific overlays.

On the HERO Act (public safety spectrum): The FCC has an open rulemaking on digital television. One of the areas of concern to me is that critical spectrum for public safety—spectrum that will help first responders coordinate effectively in the event of a terrorist attack such as 9/11—is being held pending the broadcasters' transition to digital television. Congresswoman Harman, who is now ranking member on the House Intelligence Committee, has introduced a bill, the HERO Act, to have the public safety spectrum in issue turned over by a date certain at the end of 2006, precisely to get at a problem first responders had in coordinating during and immediately after, the 9/11 attacks.

Question 11. What has the FCC done, and what can it still do, to speed up the broadcasters' conversion and to get the public to participate in the transition as well?

Answer. Last May, the Commission proposed a set of graduated sanctions for those broadcasters that fail to meet their build-out deadlines, beginning with admonishment and reporting requirements and culminating in the rescission of the station's DTV authorization. The Bureau has been following this practice in acting upon licensees' extension requests.

Last August, the Commission required that all TV sets of a certain size include a broadcast tuner. Also last August, the Commission issued a notice of proposed rulemaking regarding whether we have authority over copy protection of digital broadcast content, and if so, whether we should use that authority to mandate a digital broadcast copy protection mechanism.

Finally, in January of this year we released a notice of proposed rulemaking on the recent agreement between the consumer electronics industry and the cable industry to allow for the creation of cable-ready digital television sets.

There is still, however, much for the Commission to do. For example, in addition to those issues outlined above, we also have a proceeding pending relating to broadcasters' digital cable carriage rights.

Question 12. On area code relief: My state, California, is a great market, particularly for high tech and new telecommunications services. One drawback to this impressive growth is that these new telecommunications services use telephone numbers. Senior citizens, residents and small businesses, particularly in urban areas, have had to endure many successive area code changes. The state of California has a petition pending to try some new avenues of relief. For example, the state wants to overlay a new code for devices that don't require human interaction—like credit card verification devices,—so that real people are not burdened or confused. The state has other innovative ideas, and these have included requiring wireless carriers to offer local number portability and ordering a wireless overlay in the Los Angeles area code 310 and 909 region. What is your position?

Answer. I have previously supported efforts to provide states additional flexibility they require to address numbering issues, such as implementing technology specific overlays. I understand that state commissions often bear the brunt of consumer complaints. State commissions, not the FCC, feel the outcry from consumers when number conservation measures are adopted. The Commission is currently considering the issues raised in the California Public Service Commission's petition. I plan to give the issues raised in the California PUC petition full consideration.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ERNEST F. HOLLINGS TO HON. KATHLEEN Q. ABERNATHY

The D.C. Circuit's decision in *USTA* v. *FCC,* remanding the Commission's unbundling and line sharing rules, was inconsistent with the Supreme Court's holding in *Verizon.* However, the FCC's pending proposals to reduce competitors' access to network elements seem based on a similar predicate to the Court's suggestion that competitors using UNEs do not offer "real" competition to the incumbents.

Question 1. Do you believe that UNE–P competition is not real competition? If so, why? If not, why would the FCC seek to curtail such competition?

Answer. UNE–P competition is "real" competition. Carriers entering the market using the UNE platform have offered consumers additional choice, new service packages, and lower prices. Such entry has spurred new offerings from incumbent LECs. At the same time, the Commission must consider whether all the elements that make up the UNE platform may be unbundled in all markets consistent with section 251(d)(2) of the Act, and also whether such competition will be economically efficient and sustainable in the long term.

I do not believe that the FCC is seeking to curtail UNE–P competition. Rather, the focal point of the Commission's inquiry in the *Triennial Review* proceeding is determining which elements must be unbundled pursuant to sections 251(c) and 251(d)(2), as construed by the Supreme Court and the D.C. Circuit Court of Appeals. Because the D.C. Circuit reversed the FCC's previous order establishing unbundling requirements, the Commission must adopt new requirements. In doing so, according to the D.C. Circuit's mandate, the Commission must conduct a granular analysis of "impairment"—that is, the Commission must ascertain whether each element "is one for which multiple, competitive supply is unsuitable." *USTA* v. *FCC, 290* F.3d 415, 427 (2002). If this analysis results in a finding that there is no impairment caused by a lack of access to a component of the UNE platform in a particular market, then the platform would not be available in that market (although other elements for which impairment is found *would* remain available on an unbundled basis, and total service resale would remain an option). This outcome, however, would result from the Commission's implementation of the Act consistent with direction from the court of appeals, rather than from an affirmative effort to curtail a particular entry strategy.

Question 1a. Do you believe, as the FCC stated in its petition for rehearing, that the "limitations that the panel's decision can be read to impose have no basis in the statutory text and appear to be inconsistent with several provisions of the 1996 Act"?

Answer. I agree that the D.C. Circuit's analysis did not defer sufficiently to the FCC's judgment and that the court went beyond the point necessary to reverse the Commission's rules as overbroad. The court's interpretation of the impairment standard, in my view, is not the only permissible reading of the statutory text. Nevertheless, as a Commissioner I am bound to follow the law as it is interpreted by the court of appeals.

At our January 14, 2003 hearing at which you appeared, Chairman Powell stated that the Commission's *UNE Triennial Review* must include as a "core component" an analysis of "the proper role of state commissions in the implementation of our unbundling rules." Commissioner Martin likewise confirmed his belief that the Commission's rules should "allow for state cooperation and input, especially regarding highly fact intensive and local determinations" in recognition of the fact that "[a]ssessments of whether access to a [unbundled network] element is necessary to provide service may vary significantly among different markets, states and regions." Commissioner Adelstein characterized the states as "our partners in implementing the Act," Commissioner Copps noted that "[t]he path to success is not through preemption of the role of the states."

Question 2. How will the Commission ensure that its order in the *UNE Triennial Review* preserves the meaningful participation of the states in the development of local competition as Congress intended?

Answer. I have no doubt that the state commissions will play a pivotal role in carrying out the market-opening provisions in section 251 of the Act. As an initial matter, the statute assigns the states key responsibilities in approving interconnection agreements, mediating and arbitrating disputes, and setting rates for unbundled network elements, among other things. *See* 47 U.S.C. § 252. In addition, states have taken the lead in developing performance standards concerning the ordering, provisioning, and maintenance and repair of unbundled network elements. States will continue to supervise the negotiation process, establish network element prices, and monitor incumbents' performance in carrying out the standards adopted

in the Triennial Review proceeding. In addition, where the FCC is unable to make granular impairment findings based on limitations in the record, the Commission is likely to delegate authority to state commissions to make factual findings that will determine the outcome of the impairment analysis. Finally, states retain authority to regulate local competition pursuant to state law, provided such state regulation "is consistent with the requirements of [section 251] and does not substantially prevent implementation of the requirements of [section 251] and the purposes of [Part II of Title II of the Act]." 47 U.S.C. § 251(d)(3)(B&C),

Question 2a. Does the D.C. circuit decision's emphasis on a need for a more granular review of the need for UNEs suggest that the FCC must grant a strong oversight role to the states given that they are undeniably better equipped to gauge market conditions, competition, and compliance with the law on a market by market basis than is the FCC?

Answer. As noted above, where the FCC is unable to make sufficiently granular impairment findings, it is likely to enlist the states in performing the granular analysis mandated by the court of appeals. I also agree that states are particularly well equipped to perform an oversight role in ensuring that incumbent LECs comply with the Act and the FCC's rules. For example, states have established detailed performance measurements for "hot cuts" (the process of connecting a loop to a competitor's switch), and I expect that states will play the primary role in monitoring that process on a localized basis.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV TO HON. KATHLEEN Q. ABERNATHY

Universal Service

The E-Rate has made it possible for us to expedite the integration of technology into our education system by wiring tens of thousands of schools and libraries across the country. I think it is extremely important for the Commission to pursue Universal Service reforms that will ensure the long-term viability of *all* aspects of the program—including the E-rate.

Question 1. Please update me about the status of the Commission's efforts to strengthen the Universal Service program. I am interested in what reforms are needed to enable us to serve the needs of low-income and rural Americans in the long-term AND continue the progress we've made in wiring schools and libraries.

Answer. The Commission has launched several proceedings to ensure the continuing vitality of the universal service program. As described below, these proceedings aim to improve and strengthen *all* of our support mechanisms, and therefore will benefit consumers in high-cost areas, families with low income, and patrons of schools, libraries, and rural health care facilities. As Chair of the Federal-State Joint Board on Universal Service, I make it a top priority to ensure that these programs deliver the intended benefits in a fair, efficient, and effective manner.

- **Schools, Libraries, and Rural Health Clinics.** The Commission has a pending rulemaking that seeks to improve the efficiency and effectiveness of the support mechanism for schools and libraries. In connection with this rulemaking, I recently announced that I am organizing a public forum on May 8 focusing on proposals to improve our oversight over the program, including means of combating waste, fraud, and abuse. I hope to develop consensus at the Commission on ways of avoiding wasteful expenditures and preventing gaming of the system so that deserving school children and library patrons continue to have access to critical services. The Commission also has a pending rulemaking on how to improve the administration of the support mechanism for rural health care facilities. This mechanism appears to be underutilized, so the Commission is exploring how to remove obstacles to rural health clinics' obtaining support.
- **Contribution Methodology.** In December 2002 the Commission adopted a number of measures to stabilize the universal service contribution factor in an effort to mitigate the growing funding burden on consumers. For example, the Commission increased the contributions of most wireless carriers, eliminated the lag between the reporting of revenues and the recovery of contribution costs, and prohibited mark-ups of contribution costs on customers' bills. While these were important steps, I believe that more fundamental reform may be necessary to ensure the sustainability of universal service funding in the long term. As bundled service offerings that include local and long-distance voice services and broadband Internet services become ever more prevalent, it is increasingly difficult to isolate revenues from interstate telecommunications services. Accordingly, I believe that a contribution methodology incorporating a component

based on end-user connections (or some other surrogate), in addition to or in lieu of our revenue-based methodology, may create a more sustainable model for funding universal service in the future. The Commission has sought comment on several proposals and will consider additional reforms based on the record now being developed.

- **High-Cost Support.** The Commission has several proceedings underway that focus on the distribution of support to high-cost areas. First, with respect to our non-rural support mechanism, we are considering a Recommended Decision from the Federal-State Joint Board on Universal Service responding to a remand by the Tenth Circuit Court of Appeals. This proceeding focuses on how to ensure that funding is sufficient for non-rural carriers serving high-cost areas. Second, the Commission is considering another Joint Board Recommended Decision regarding the definition of services that are eligible for universal service support (the Joint Board recommended preserving the status quo). Third, the Commission recently referred a proceeding to the Joint Board concerning the intersection of competition and universal service in rural areas. This proceeding will address the so-called "portability" of support—i.e., the manner in which competitive ETCs are funded—as well as questions concerning support for multiple lines, among other issues.
- **Low-Income Support.** Finally, the Joint Board will soon release a Recommended Decision on various proposals to improve the effectiveness of the Lifeline and LinkUp programs for low-income consumers. This Recommended Decision will suggest new ways for low-income consumers to qualify for support and also address questions regarding verification of eligibility and outreach efforts.

Effect of broadband deregulation on Universal Service

The Commission is considering changing the way certain broadband services are regulated by re-classifying them as "information services".

Question 2. What impact would these changes have on the way contributions are collected for the Universal Service program? At a time when we are searching for ways to strengthen Universal Service, do you think it is wise to pursue actions that may threaten *existing* funding sources?

Answer. The Commission's ongoing analysis of the appropriate classification of broadband Internet access services should not affect the Commission's authority to assess contributions on service providers. Section 254(d) authorizes the Commission to assess contributions on carriers that provide "telecommunications services," as well as on providers of "telecommunications." Thus, if the Commission were to rule that an incumbent LEC's self-provisioned DSL transmission is an information service, the Commission also could impose a universal service contribution obligation on the "telecommunications" portion of that information service. The Commission's *Wireline Broadband NPRM* sought comment on whether to extend contribution obligations in this manner in the event that the Commission rules that broadband Internet access services do not include any separate telecommunications services. Therefore, I do not believe that the regulatory classification of broadband Internet access services threatens the universal service contribution base—regardless of the classification, the Commission must make a *policy* judgment whether providers should make separate contributions for broadband services.

Broadband and Competition

I believe that stimulating investment in high-speed Internet services will help our economy and provide a variety of other benefits as well (telemedicine, distance learning, etc.).

Question 3. What do you think the best strategies are for speeding-up the deployment of broadband without threatening competition in local telephone markets?

Answer. Section 706 of the Telecommunications Act of 1996 provides one of the Commission's most important responsibilities—promoting broadband deployment. Congress directed the Commission to facilitate broadband deployment through various means, including the elimination of regulatory barriers to infrastructure investment. Our recent Triennial Review decision took significant steps to accomplish this goal. For example, the Commission ruled that packetized channels over fiber loops and subloops would not be subject to unbundling at TELRIC rates, thus creating a powerful incentive for carriers to deploy new fiber facilities. At the same time, the Commission required the continued unbundling of high-capacity loops (e.g., T–1 lines) to preserve competition in the small and medium enterprise market.

I am disappointed, however, that a majority of the Commission decided to eliminate the line-sharing obligation. Had the Commission freed incumbents from

unbundling obligations over newly deployed fiber but maintained the obligation to unbundle a broadband channel over existing copper, the Commission could have promoted both competition *and* investment. Nevertheless, even though I believe the Commission was unwise to eliminate line sharing, on balance the broadband portions of the Triennial Review decision are likely to help accelerate the rollout of broadband services to all Americans.

Local Competition

According to recent reports in the *Wall Street Journal*, the Commission may be preparing to scale back competitors' access to local networks by changing the rules relating to the unbundled network element platform. According to recent FCC statistics, competition in local telephone markets is just now starting to take hold in a meaningful way.

Question 4. If the unbundled network element platform were to no longer be an available method for competitors' to access Bell networks, what would it mean for the future of local competition—particularly in rural areas and regions with challenging topography where the cost of deploying facilities is particularly high?

Answer. I believe that making significant changes to the availability of the unbundled network element platform (UNE–P) would have promoted competition in the long term by giving carriers incentives to deploy their own facilities. There is no doubt that facilities-based competition will promote consumer welfare more effectively than a resale-type model such as UNE–P, which provides access to the incumbent's network at superefficient TELRIC prices. Unfortunately, a majority of the Commission adopted a framework under which states have discretion to preserve UNE–P in all markets indefinitely. That framework is unlikely to create significant incentives for competitors to deploy facilities of their own, and therefore is unlikely to promote sustainable competition. Moreover, the majority's framework is likely to engender litigation in each of the 50 states, thereby plunging the industry into uncertainty for years to come. I believe that the FCC should have adopted a *national* framework that eliminated the obligation to unbundle circuit switches in markets where there is clear evidence of switch deployment by competitors and where operational impairments have been addressed. Such an approach could have preserved unbundling obligations in rural markets where the cost characteristics create an insurmountable barrier to entry.

Interplay between state regulators and the FCC

In a recent letter to all five the Commissioners, several representatives of the National Association of Regulatory Utility Commissioners wrote, "State flexibility to maintain UNE–P as well as the ability to add to any national UNE list is critical to keeping competition 'on track'".

Question 5. What is your vision for the appropriate interplay between state regulators and the FCC in implementing the 1996 Act and promoting a competitive telecommunications market that benefits consumers?

Answer. The FCC and state commissioners both play an important rule in promoting local competition, and the Act spells out the terms of their partnership. Section 251(d) of the Act directs the FCC to decide which network elements should be made available at cost-based rates. Where the FCC lacks sufficient information, it may be appropriate to rely on state commissions for fact-finding purposes, although I believe that the FCC must retain the ultimate authority over the availability of network elements. For example, under the FCC's new framework for unbundled transport, the Commission adopted a binding objective trigger that determines where impairment is present, and the states will make findings to determine where the trigger has been met. I believe this is the appropriate model for federal-state cooperation. By contrast, the majority's switching decision abdicates our federal responsibility by leaving it to individual states to determine where unbundled switching should be available. While Congress gave the FCC responsibility for deciding which network elements to unbundle, section 252 gives states important roles in setting prices for interconnection and unbundled network elements, approving interconnection agreements, and mediating and arbitrating disputes. Moreover, section 251(d)(3) preserves state authority to adopt regulations that are consistent with the requirements of section 251 and do not substantially prevent implementation of the federal regime.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV TO HON. JONATHAN S. ADELSTEIN

Universal Service

The E-Rate has made it possible for us to expedite the integration of technology into our education system by wiring tens of thousands of schools and libraries across the country. I think it is extremely important for the Commission to pursue Universal Service reforms that will ensure the long-term viability of *all aspects* of the program—including the E-rate.

Question 1. Please update me about the status of the Commission's efforts to strengthen the Universal Service program. I am interested in what reforms are needed to enable us to serve the needs of low-income and rural Americans in the long-term AND continue the progress we've made in wiring schools and libraries.

Answer. I strongly support maintaining a strong and sound universal service mechanism, including the E-rate. I recently had the privilege of being made a member of the Federal-State Joint Board on Universal Service. Because only one Democrat can serve on the Joint Board, Commissioner Copps and I established a rotation schedule which would allow me to begin serving this year. He intends to return some time in 2004. We plan to confer closely.

The FCC and the Federal-State Joint Board are actively reviewing many issues that go to the heart of your question regarding our efforts to strengthen the program. The Joint Board will soon make a recommendation to the FCC regarding Lifeline and Link-Up to ensure that people who need access to these programs know about them and can participate more readily. We are looking at the question of the portability of funding and the best manner in which to do that.

The FCC also is looking at which services should be included in the definition of universal services and thus eligible for funding. We are also addressing the contribution methodology to ensure that the funding mechanism is specific, predictable and sufficient, as Congress directed.

Currently, the administration of the Schools and Libraries program is experiencing significant criticism. We are working on ways to address some of the concerns that have been raised by various interested entities. We also plan to hold an open forum on May 8, 2003 to better understand some of the issues and potential solutions.

My goal is to ensure that universal service funding, for high cost areas, schools and libraries, rural health care facilities and low income consumers works as Congress intended.

Effect of broadband deregulation on Universal Service

The Commission is considering changing the way certain broadband services are regulated by re-classifying them as "information services."

Question 2. What impact would these changes have on the way contributions are collected for Universal Service program? At a time when we are searching for ways to strengthen Universal Service, do you think it is wise to pursue action that may threaten existing funding sources?

Answer. I share the concern about the potential effect that the Title I reclassification may have on our ability to support universal service funds. It potentially creates a problem in the area of not only contribution to the fund, but also in revenue recovery by the small and rural ILECs that have made the investment to bring broadband services to their customers. Such an action potentially could eviscerate efforts to bring advanced services to rural America.

So the question is should the FCC treat broadband offered by incumbent local exchange carriers—usually DSL—as a telecommunications service regulated under Title II of the Communications Act—which is the Common Carrier portion of the Act—or as an information service under Title I—the general provisions of the Act. This seemingly simple difference can have huge ramifications for universal service. If these broadband services are classified as information services, the FCC loses much of the oversight that comes with Title II. And information service providers don't now contribute to universal service. This raises a lot of questions. Does it mean, for example, that revenues from these services can't contribute toward universal service? We've got to think hard about this at a time when the demands on the fund are increasing and contributions are decreasing.

Broadband and Competition

I believe that stimulating investment in high-speed Internet services will help our economy and provide a variety of other benefits as well (telemedicine, distance learning, etc.)

Question 3. What do you think the best strategies are for speeding up the deployment of broadband without threatening competition in local telephone markets?

Answer. I believe that Congress has many tools with which it can work to speed the deployment of broadband. Some of these would be loan and grant programs, and another way would be through tax credits.

Although universal service doesn't directly support advanced services, it's a vital mechanism that lays the groundwork for the creation of the broadband networks of the future. The high-bandwidth applications, like video services, that will drive revenues and expand opportunities will ride on these networks. And thus universal service will play a key role in bringing them to everyone in America.

Competition has historically functioned as a major force in spurring broadband deployment. The Commission can choose to deregulate where competition has already steadfastly taken hold. Under the Act, deregulation must follow competition, and not vice versa.

Local Competition

According to recent reports in the *Wall Street Journal,* the Commission may be preparing to scale back competitors' access to local networks by changing the rules relating to the unbundled network element platform. According to recent FCC statistics, competition in local telephone markets is just now starting to take hold in a meaningful way.

Question 4. If the unbundled network platforms were to no longer be an available method for competitors' to access Bell networks, what would it mean for the future of local competition—particularly in rural areas and regions with challenging topography where the cost of deploying facilities is particularly high?

Answer. Congress intended competition to take shape in many forms. One is facilities-based, another is through resale, and another is through interconnection. Although I believe that facilities-based competition is the most stable, I do believe that Congress intended it to take many shapes.

That being said, I believe that the Commission's record supported a finding of impairment to competitors without access to UNE–P in at least the mass market. Approximately 10 million customers are served through UNE–P and the Commission itself has found it to be appropriate to base Track A approval in the 271 process on the presence of UNE–P competition. Had we eradicated access to UNE–P, we may have done away with a great deal of competitive choice that customers now have.

Interplay between state regulators and the FCC

In a recent letter to all five the Commissioners, several representatives of the National Association of Regulatory Utility Commissioners wrote, "State flexibility to maintain UNE–P as well as the ability to add to any national UNE list is critical to keeping competition 'on track'."

Question 5. What is your vision for the appropriate interplay between state regulators and the FCC in implementing the '96 Act and promoting a competition telecommunications market that benefits consumers?

Answer. As I stated in my testimony, I perceive that Congress made the state commissions our partners in both the areas of competition and universal service.

In some areas, Congress explicitly granted us the jurisdiction, and in others, Congress granted the state commissions the jurisdiction. One such example is in the establishment and pricing of UNEs. We establish the "menu" of UNE's and the state commissions price them through their ratemaking authority.

In the Triennial Review Order I believe that we have maintained the appropriate balance with the state commissions in our efforts to promote a telecommunications market that benefits consumers.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ERNEST F. HOLLINGS TO HON. JONATHAN S. ADELSTEIN

All FCC Commissioners should answer: The DC Circuit's decision in *USTA* v. *FCC*, remanding the Commission's unbundling and line sharing rules, was inconsistent with the Supreme Court's holding in *Verizon.* However, the FCC's pending proposals to reduce competitors' access to network elements seem based on a similar predicate to the Court's suggestion that competitors using UNEs do not offer "real" competition to the incumbents.

Question 1. Do you believe that UNE–P competition is not real competition? If so, why? If not, why would the FCC seek to curtail such competition?

Question 1a. Do you believe, as the FCC stated in its petition for rehearing, that the "limitations that the panel's decision can be read to impose have no basis in the statutory text and appear to be inconsistent with several provisions of the 1996 Act"?

Answer. The Telecommunications Act of 1996 envisioned competition coming in many forms. These modes are resale, interconnection and facilities-based competition, separately and in combination with each other. As a member of the Federal Communications Commission, it is incumbent upon me to honor Congress' vision of how it intended to bring competition to the local loop. My position is to implement the law, not impose my policy views upon it. Legislation is rightly in the hands of Congress. Although never specifically mentioned as a specific "element," "UNE–P" is competition that finds its roots in the interconnection-based provisions of the Act. We determine which of our unbundled network elements (UNEs) must be made available to competitors through the filter of Section 252(d)(2) Access Standards, commonly known as the necessary and impair standard. We must apply this standard to the individual UNEs and determine if a competitor would be impaired in its efforts to provide the service it seeks to offer without access to that particular UNE. If we find that there is no impairment, then we will move UNE–P from our list of UNE's that are available; if a legal impairment still exists, then UNE–P will continue to be available. Since this language requires that we only consider whether unbundled network elements are necessary and if a carrier will be impaired without access to them "at a *minimum,*" the statute allows us to look at other considerations such as the effect on competition and the deployment of broadband under Section 706.

All FCC Commissioners should answer: At our January 14, 2003 hearing at which you appeared, Chairman Powell stated that the Commission's *UNE Triennial Review* must include as a "core component" an analysis of "the proper role of state commissions in the implementation of our unbundling rules." Commissioner Martin likewise confirmed his belief that the Commission's rules should "allow for state cooperation and input, especially regarding highly fact intensive and local determinations" in recognition of the fact that "[a]ssessments of whether access to a [unbundled network] element is necessary to provide service may vary significantly among different markets, states and regions." Commissioner Adelstein characterized the states as "our partners in implementing the Act," Commissioner Copps noted that "[t]he path to success is not through preemption of the role of the states."

Question 2. How will the Commission ensure that its order in the *UNE Triennial Review* preserves the meaningful participation of the states in the development of local competition as Congress intended?

Question 2a. Does the D.C. circuit decision's emphasis on a need for a more granular review of the need for UNEs suggest that the FCC must grant a strong oversight role to the states given that they are undeniably better equipped to gauge market conditions, competition, and compliance with the law on a market by market basis than is the FCC?

Answer. I believe that Congress intended for the Federal Communications Commission and the state commissions to be partners in the implementation of both pillars of the Communications Act of 1996, universal service, and competition and any corresponding subsequent deregulation. Section 251 (d)(3) is entitled "Preservation of State Access Regulations". To paraphrase the provision, the Commission cannot preclude the enforcement of any regulation, order, or policy of a state commission that establishes access and interconnection obligations of local exchange carriers; is consistent with the requirements of the interconnection section of the Act; and does not substantially prevent implementation of the requirements of this section and the purposes of the common carrier regulation portion of the Act. I view this particular provision as ensuring that we cannot scuttle the state commissions' efforts to respond to the competitive initiatives in the Act unless the state's efforts would serve to substantially impair the Commission's ability to carry out the requirements that the Act places on the Federal Communications Commission. I believe that the states must be given a significant role in this process just as they have been given significant roles, in among others, the Section 251 arbitration proceedings, the Section 271 process, and under Section 254, the designation of Eligible Telecommunications Carrier status. The state commissions are closer to the ground in the implementation process. That is one of the reasons for which the Congress chose to make them an integral part of the team to implement the 1996 Act. I believe that the states must participate in determining if access to a particular UNE is necessary and that if that carrier doesn't have access to it, it will be impaired in the provision of that service. I believe that the appropriate role of the state is fluid depending upon the particular UNE under discussion. If a particular UNE lends itself to a national

statement of impairment or no impairment, then we have satisfied the USTA court's direction of granularity. With other UNE's, a national determination may not be possible, and thus the states are best suited, with guidance, to make that determination.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BARBARA BOXER TO HON. JONATHAN S. ADELSTEIN

Local Telephone Service Competition

Question 1. Competing companies generally offer service to consumers at prices 10–50-percent less than the Bells. If the FCC terminates the requirement for traditional phone companies to offer parts of their infrastructure for lease to competitors, wouldn't that leave the vast majority of California customers without a choice for local phone service and drive up rates for consumers?

Answer. Yes, wholesale relief from the UNE requirements could possibly leave a vast majority of customers without access to competitive choices and the benefits, of lower prices and better service, that flow from competition. However, such comprehensive relief from these requirements is not being contemplated at this time.

Question 2. Commissioners Copps and Adelstein, you issued a joint concurring statement in SBC's petition for forbearance in its application for dominant carrier status. In that statement, you stated that you voted for the proceeding not because it was the "optimal outcome, or even a good one," but because it was better than no decision at all. If the Commission had failed to act, there would have been an automatic grant of SBC's request. I am concerned that you would oppose the order but vote for it anyway because it was better than doing nothing. In your pending review on local phone competition, the Commission faces another deadline of February 20. Will you face a similar dilemma there?

Answer. No, we do not face a similar dilemma here. First, we expect to complete this process by the District Court imposed deadline. Second, in the proceeding entitled *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, the situation was such that without any Commission action, all of our regulatory oversight over SBC's affiliate would have lapsed completely on a date certain. In Section 272, Congress required Bell companies to provide long-distance and manufacturing services through a separate affiliate. In implementing these requirements, the Commission concluded that Congress adopted these safeguards because it recognized that Bell companies may still exercise market power at the time they enter long-distance markets. Congress provided that these requirements would continue for three years, but could be extended by the Commission by rule or order. Thus, no Commission decision would have meant no remaining oversight or control. I chose to concur in that item because, although I was pleased with neither our lack of analysis, nor the ultimate decision, we were able to include some safeguards to make it less likely that the SBC affiliate could engage in discriminatory treatment because of SBC's dominance in the market. The interconnection rules in the Act call for negotiation, and if necessary, State commission arbitration, in order to breathe life into the interconnection process. These relationships are contractual in nature. As such, even if we had not been able to reach a decision by February 20, 2003, the contracts would remain in force and effect and there would not be unbridled chaos as some have suggested.

Broadband DSL Competition

Question 3. According to the California PUC, half of my state has no access to cable broadband service and the speeds available over satellite are not competitive with DSL. If you do not continue to allow competition in DSL broadband service, will not consumers in my state be at the mercy of a DSL broadband monopoly?

Answer. Yes, if there were no requirements placed on the Bell companies to unbundle their networks, then it is possible that the incumbent LEC would be the only provider of DSL or any other form of broadband competition in particular markets. As you are aware, the access to loops, switching and transport is a different issue than the *pricing* for that access. If not priced as UNE's under total element long run incremental costs (TELRIC), the RBOCs might price these features and functionalities at just and reasonable rates. And although line sharing gives competitive carriers access at TELRIC rates or zero, they could possibly access the higher frequency bandwidth portion of the line at just and reasonable rates under these provisions. Moreover, competitors would still have access to the entire loop.

Question 4. If I understand correctly, regulation of broadband delivered over telephone lines is dependent on whether or not the Commission chooses to define DSL

broadband as a "telecommunications" service, and as a result is regulated, or an "information" service, which would result in an unregulated environment. Can any of you explain how a voice conversation carried over phone lines could be declared a telecommunications service while an e-mail conversation carried over phone lines is not?

Answer. That is just one of the challenges faced in determining whether these services should be treated as information services under Title I of the Act, or as telecommunications services under Title II of the Act. Both allow us to regulate it, but in completely different ways and to very different ends. Your example is a good one in terms of demonstrating how difficult it is to classify these services.

Wi-Fi and the Jumpstart Broadband Act

Question 5. Commissioners, my staff has made the "Jumpstart Broadband Act" available to your offices. Have you had time to review the legislation and could you provide feedback on it?

Answer. I commend your efforts and the efforts of Senator Allen in encouraging the deployment of additional unlicensed services in the 5 GHz band. The Jumpstart Broadband Act provides a solid framework for a Commission allocation for unlicensed use by wireless broadband devices and appropriately recognizes the important need for interference protection standards to protect incumbent Federal government agency users of 5 GHz spectrum.

Question 6. Commissioners, innovation has flourished in the current unlicensed spectrum bands. What do you believe the potential is for increased innovation and do you agree that more spectrum should be allocated to encourage this innovation?

Answer. I do agree that more spectrum should be allocated for unlicensed services. Unlicensed operations are one of the few communications success stories over the past couple of years, and I think the Commission should continue to promote the development and deployment of more advanced unlicensed broadband devices and services. In doing so, though, we must continue to be mindful of interference to existing licensed users. I look forward to addressing some of these issues at the Commission over the next several months.

Question 7. Commissioners, would you agree that additional unlicensed spectrum could help spur new broadband services and would be a good idea regardless of how you proceed on the broadband proceedings before you?

Answer. I am very excited about the promise of unlicensed wireless technologies, and indeed of all spectrum-based technologies, to provide broadband services to American consumers. While much of the recent attention has focused on the explosive growth of Wi-Fi services, I think that there also are a number of other promising spectrum technologies—licensed and unlicensed terrestrial services, as well as satellite-based services—that will be able to offer broadband services.

Question 8. Experts in technology we have talked with say that the technology clearly exists that would allow unlicensed devices to keep from harming incumbent systems. Do your experts tell you the same thing?

Answer. I am very encouraged by the recent agreement between industry and Federal government agencies regarding the operation of wireless local area networks in the 5 GHz band and the protection of incumbent operations. I fully support this important consensus.

Digital Copyright Issues

Question 9. Commissioners, consumers are excited about the potential that digital television and HDTV have to increase dramatically the quality of their viewing experience. At the same time, those who make movies and shows are concerned that those shows and films distributed in digital format will be copied and distributed at a huge loss to them. Does it not seem to you that some form of protection for content carried over the air and over cable to these fantastic new TVs is necessary and fair?

Answer. Some sort of protection may be required. We are currently exploring this issue, including the scope of the FCC's jurisdiction in this area, in our broadcast flag proceeding.

Question 10. Commissioner Adelstein, you have said that the FCC is obligated to protect "the free flow of ideas and creativity." Do you believe that a part of that obligation includes the protection of creative content from piracy?

Answer. When I made that statement, I was referring to our public interest mandate, our role in ensuring that broadcasters serve the "public interest, convenience, and necessity." As part of that mandate, we must maintain broadcast ownership rules that promote the public interest. Whether the FCC has a role in protecting

digital content from privacy depends in part on the scope of its jurisdiction. As stated above, we are currently considering that issue in our broadcast flag proceeding.

Media Concentration

After the elimination of radio consolidation protections in the 1990s, in California alone, one company, Clear Channel, owns a stunning 102 radio stations. In some towns that means every station is controlled by the same corporation. Now I hear that the FCC is considering eliminating the concentration protections for TV, cable, and newspapers.

Question 11. I also hear from the Writers Guild, local broadcasters, independent film makers, Consumers Union, and others that the FCC is rushing to judgment on whether to eliminate or drastically change its media concentration protections. If you eliminate the current rules altogether, then could TV and cable in California experience similar concentration as radio?

Answer. If we were to eliminate the current rules altogether, I believe TV and cable could conceivably experience similar concentration.

Miscellaneous

Question 12. Do you foresee an overlay strategy for the 310 area code that would prevent a split but only change digital cell phones prospectively, therefore eliminating the inconvenience to individuals who presently own cell phones and assuring that purchasers of analog cell phones would not have to change their code?

Answer. I oppose the taking back of telephone numbers from existing mobile wireless users, whether they have digital or analog phones. As noted in my answer below, I am hopeful that with the implementation of wireless local number portability and the consideration of the California PUC request to raise the contamination percentage to 25 percent for thousands-block pooling, we can significantly improve the numbering resources situation in California so as to eliminate any discussion of telephone number take backs.

On the HERO Act (public safety spectrum): The FCC has an open rulemaking on digital television. One of the areas of concern to me is that critical spectrum for public safety—spectrum that will help first responders coordinate effectively in the event of a terrorist attack such as 9/11—is being held pending the broadcasters' transition to digital television. Congresswoman Harman, who is now ranking member on the House Intelligence Committee, has introduced a bill, the HERO Act, to have the public safety spectrum in issue turned over by a date certain at the end of 2006, precisely to get at a problem first responders had in coordinating during and immediately after, the 9/11 attacks.

Question 13. What has the FCC done, and what can it still do, to speed up the broadcasters' conversion and to get the public to participate in the transition as well?

Answer. In January 2002, the Commission issued state-wide licenses for public safety use of the 700 MHz band. However, many large cities will not have timely access to the 700 MHz public safety spectrum because of incumbent broadcasters on TV Channels 62, 63, 64, 65, 67 68, and 69. Public safety representatives have urged that the 700 MHz band be cleared of incumbent broadcasters as soon as possible, and by no means later than the end of 2006. A date certain for access to the 700 MHz band is critical to public safety agencies' ability to engage in long-range financial planning and in the purchase of equipment. Inasmuch as Congress has mandated that a set Digital Television market penetration benchmark must be reached before a complete transition becomes mandatory, establishing a schedule for a complete transition of the 700 MHz public safety band to exclusive public safety use is a matter not completely within the Commission's control.

With regard to other actions taken to facilitate the transition, I commend the Chairman for his leadership in securing voluntary industry commitments to increase consumer access to compelling digital content and to increase consumer awareness of the digital transition. The Commission has proposed a graduated regime of sanctions to impose on stations that fail to build out their DTV facilities and adopted a DTV tuner mandate, requiring that televisions have the capability to receive and display DTV over-the-air channels. Two on-going proceedings aimed at facilitating the transition include the DTV periodic review (reviewing whether adjustments to the existing rules for the transition are needed) and a proceeding on the Digital Cable Compatibility proposal recently submitted jointly by cable operators and electronics manufacturers.

Question 14. On area code relief: My state, California, is a great market, particularly for high tech and new telecommunications services. One drawback to this impressive growth is that these new telecommunications services use telephone num-

bers. Senior citizens, residents and small businesses, particularly in urban areas, have had to endure many successive area code changes. The state of California has a petition pending to try some new avenues of relief. For example, the state wants to overlay a new code for devices that don't require human interaction—like credit card verification devices,—so that real people are not burdened or confused. The state has other innovative ideas , and these have included requiring wireless carriers to offer local number portability and ordering a wireless overlay in the Los Angeles area code 310 and 909 region. What is your position?

Answer. The issue of technology-specific overlays for mobile wireless customers is a difficult one. I am hopeful that with the implementation of wireless local number portability and the consideration of the California PUC request to raise the contamination percentage to 25 percent for thousands-block pooling, we can avoid the need for a technology-specific overlay directly targeting mobile wireless phones. If a technology specific overlay is adopted, we believe that the overlay should convert to an all services overlay at a date certain and that such a proposal should not include the taking back of telephone numbers from end users.

I am always interested in hearing innovative ideas from state commissions to make numbering usage more efficient. I will encourage the Commission to look into the possibility of area codes for non-geographically sensitive devices (such as credit card verification devices) and into increasing the contamination threshold for number pooling.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ERNEST F. HOLLINGS TO HON. MICHAEL J. COPPS

All FCC Commissioners should answer: The DC Circuit's decision in *USTA* v. *FCC,* remanding the Commission's unbundling and line sharing rules, was inconsistent with the Supreme Court's holding in *Verizon.* However, the FCC's pending proposals to reduce competitors' access to network elements seem based on a similar predicate to the Court's suggestion that competitors using UNEs do not offer "real" competition to the incumbents.

Question 1. Do you believe that UNE–P competition is not real competition? If so, why? If not, why would the FCC seek to curtail such competition?

Answer. Congress made clear that facilitating competition within and across platforms are both important in the statutory framework. Congress recognized that many competitors would not be able to duplicate the incumbent's network. Congress therefore required the Commission to determine those network elements that an incumbent must unbundle and offer to its competitors in the local market. In those markets where competitors are impaired without access to loops, switching, and transport, UNE–P may offer the only competitive alternative for certain customers. I am pleased that, in the face of intense pressure for the Commission to make broad nationwide decisions that would have doomed the future use of unbundled elements, we instead adopted a more reasonable process under which the state commissions conduct a granular analysis that takes into account geographic and customer variation in different markets. Through this process, we will be able to foster the competition that Congress sought in the 1996 Act and to fulfill the mandate of the law, which is "to secure lower prices and higher quality services for American consumers."

Question 1a. Do you believe, as the FCC stated in its petition for rehearing, that the "limitations that the panel's decision can be read to impose have no basis in the statutory text and appear to be inconsistent with several provisions of the 1996 Act"?

Answer. I remain concerned not only about these aspects of the court decision, but also about apparent inconsistencies between this decision and the Supreme Court decision issued several days before. It may therefore have been better to try to resolve the uncertainties by seeking review of the D.C. Circuit decision, rather than moving forward with another decision that will face a renewed round of litigation.

All FCC Commissioners should answer: At our January 14, 2003 hearing at which you appeared, Chairman Powell stated that the Commission's *UNE Triennial Review* must include as a "core component" an analysis of "the proper role of state commissions in the implementation of our unbundling rules." Commissioner Martin likewise confirmed his belief that the Commission's rules should "allow for state cooperation and input, especially regarding highly fact intensive and local determinations" in recognition of the fact that "[a]ssessments of whether access to a [unbundled network] element is necessary to provide service may vary significantly among different markets, states and regions." Commissioner Adelstein characterized

the states as "our partners in implementing the Act," Commissioner Copps noted that "[t]he path to success is not through preemption of the role of the states."

Question 2. How will the Commission ensure that its order in the *UNE Triennial Review* preserves the meaningful participation of the states in the development of local competition as Congress intended?

Answer. In some parts of the Order, the Commission recognized that the states have a significant role to play in our unbundling determinations. We understood in those sections that the path to success is not through preemption of the role of the states, but through cooperation with the states. In those areas, we adopted a reasonable process under which a state commission is able to conduct a granular analysis that takes into account geographic and customer variation in different markets.

In other sections of the Order, however, we did not provide a meaningful role for the state commissions. In particular, the Commission limited—on a nationwide basis in all markets for all customers—competitors' access to broadband loop facilities whenever an incumbent deploys a mixed fiber/copper loop. The Commission has recognized time and again that loops are the ultimate bottleneck facility. Yet, the Commission has chosen to eliminate this bottleneck facility on a nationwide basis without adequate analysis of the impact on consumers, without analyzing different geographic or customer markets, and without conducting the granular, fact-intensive inquiry demanded by the courts.

Question 2a. Does the D.C. circuit decision's emphasis on a need for a more granular review of the need for UNEs suggest that the FCC must grant a strong oversight role to the states given that they are undeniably better equipped to gauge market conditions, competition, and compliance with the law on a market by market basis than is the FCC?

Answer. The D.C. Circuit made clear that a more granular analysis was necessary to take into account differences among specific markets or segments of markets. State commissions with closer proximity to the markets are often best positioned to make the fact-intensive determinations about impairments faced by competitors in their local markets.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUYE TO HON. MICHAEL J. COPPS

Question. Commissioner Copps, I share your concerns about the possible modification of ownership limits under consideration and I strongly agree with you about the need to ensure that every American stakeholder is given an opportunity to participate in this debate. I understand the Media Council and Society of Professional Journalists in Hawaii have formally requested an opportunity to discuss the media concentration issue in general, and the Hawaii duopoly waiver situation in particular.

I respectfully request that the FCC work with the Media Council and Society of Professional Journalists to facilitate a hearing or meeting in Hawaii on this important issue.

Answer. This decision is too important to make in a business-as-usual way. We need a national dialogue on these critical issues. That is why I've been pushing so hard for media hearings. I plan to participate in forums that are currently being planned by a number of private groups in cities across the mainland—from New York to Chicago to Los Angeles. But it shouldn't fall exclusively to private organizations like the Columbia Law School or the Annenberg Center to rally the public on these matters. It's the FCC's responsibility—it is our public interest *duty* —to reach out and tell the public about this proceeding, and then to solicit and listen to their input.

I am committed to participating in as many public hearings on these issues as I can. To that end, I have made arrangements to hold field hearings in Seattle and Durham this month. But, in organizing these field hearings, we were not permitted to draw on the resources of the full Commission or our Media Bureau for assistance in all of the logistics that go into such events, nor were we provided any additional funding for them. Those resources would be critical to the success of an event in Hawaii. I for one would welcome the opportunity to work together with my colleagues and the staffs of the Media and Consumer & Governmental Affairs Bureaus to make such an event happen. I have asked the Chairman to address this matter of a hearing in Hawaii and I hope he will do so soon.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BARBARA BOXER TO HON. MICHAEL J. COPPS

Local Telephone Service Competition

Question 1. Competing companies generally offer service to consumers at prices 10–50-percent less than the Bells. If the FCC terminates the requirement for traditional phone companies to offer parts of their infrastructure for lease to competitors, wouldn't that leave the vast majority of California customers without a choice for local phone service and drive up rates for consumers?

Answer. The mission of facilitating competition in all telecommunications markets became the law of the land in the 1996 Act. I share your concern about the possibility that certain customers will be left without the competitive choices that Congress sought. The Triennial Review offered us the opportunity to encourage competition and to fulfill the mandate of the law, which is "to secure lower prices and higher quality services for American consumers." In some sections, the decision advances that mandate. We preserve voice competition in the local markets and we allow it to grow. We accord the states an enhanced role in making the granular determinations necessary to foster competition and to ensure that consumers will reap the benefits of lower prices, better services, and greater innovation. In other sections, however, I am troubled that we are undermining competition, particularly in the broadband market, by limiting—on a nationwide basis in all markets for all customers—competitors' access to broadband loop facilities. I fear that this decision may well result in higher prices for consumers and may put us on the road to re-monopolization of the local market.

Question 2. Commissioners Copps and Adelstein, you issued a joint concurring statement in SBC's petition for forbearance in its application for dominant carrier status. In that statement, you stated that you voted for the proceeding not because it was the "optimal outcome, or even a good one," but because it was better than no decision at all. If the Commission had failed to act, there would have been an automatic grant of SBC's request. I am concerned that you would oppose the order but vote for it anyway because it was better than doing nothing. In your pending review on local phone competition, the Commission faces another deadline of February 20. Will you face a similar dilemma there?

Answer. Although the Commission adopted an Order on February 20, the procedural issues in this proceeding were far different than those raised by SBC's forbearance petition. The statute provides that, if the Commission does not deny a forbearance petition, it is deemed granted. The Commission therefore needed to act by a certain date on SBC's more far-reaching forbearance request. In the other instance, the Commission is responding to a court decision overturning its previous network element rules. As several parties argued, had the Commission not reached a decision, it is unlikely that there would have been immediate disruption in the market because unbundling obligations would have continued pursuant to unexpired interconnection agreements, state law requirements, or other federal requirements.

Broadband DSL Competition

Question 3. According to the California PUC, half of my state has no access to cable broadband service and the speeds available over satellite are not competitive with DSL. If you do not continue to allow competition in DSL broadband service, will not consumers in my state be at the mercy of a DSL broadband monopoly?

Answer. I dissented from the far-reaching broadband sections of the Order, because I was troubled that we are undermining competition, particularly in the broadband market, by limiting—on a nationwide basis in all markets for all customers—competitors' access to broadband loop facilities whenever an incumbent deploys any fiber for that loop. That means that as incumbents deploy fiber anywhere in their loop plant—a step carriers have been taking in any event over the past years to reduce operating expenses—they are relieved of the unbundling obligations that Congress imposed to ensure adequate competition in the local market. And make no mistake—this decision affects not just new investment, but it also eliminates unbundling obligations for past investment. The Commission has recognized time and again that loops are the ultimate bottleneck facility. Yet, the Commission has chosen to eliminate this bottleneck facility on a nationwide basis without adequate analysis of the impact on consumers, without analyzing different geographic or customer markets, and without conducting the granular, fact-intensive inquiry demanded by the courts. To make matters even worse, in some markets such as the small and medium business market, there may not be any competitive alternatives if competitors cannot get access to loop facilities. I fear that this decision may well result in higher prices for consumers and may put us on the road to re-monopolization of the local market.

Question 4. If I understand correctly, regulation of broadband delivered over telephone lines is dependent on whether or not the Commission chooses to define DSL broadband as a "telecommunications" service, and as a result is regulated, or an "information" service, which would result in an unregulated environment. Can any of you explain how a voice conversation carried over phone lines could be declared a telecommunications service while an e-mail conversation carried over phone lines is not?

Answer. The Commission will soon be deciding how to classify broadband services, and whether the transmission component for broadband services, including for Internet access, should be offered outside of the statutory framework that applies to telecommunications carriers. Not only could this decision create a division between e-mail and voice conversations, but it could also lead to the result that certain voice conversations are fully deregulated while other voice services remain subject to Congress' statutory framework. My worry is that we are heading down the road of removing core communications services from the statutory frameworks intended and established by Congress, substituting our own judgment for that of Congress, and playing a game of regulatory musical chairs by moving technologies and services from one statutory definition to another.

Wi-Fi and the Jumpstart Broadband Act

Question 5. Commissioners, my staff has made the "Jumpstart Broadband Act" available to your offices. Have you had time to review the legislation and could you provide feedback on it?

Answer. I have reviewed the legislation. First I must state that as a FCC Commissioner it is my responsibility to implement legislation that is enacted. It is not my place to advise Congress on how to vote on a particular piece of legislation. However, I can state that the goal of expanding the spectrum resources available to wireless broadband devices is one that I support wholeheartedly. It is important that as we do so we do two things, both of which are included in your bill. The first is that the FCC should not lock ourselves into any one wireless broadband technology. 802.11(b) is a huge success, but other innovations are sure to come and any spectrum policy should insure that new technologies and new entrepreneurs have a chance to turn good ideas into consumer benefits. The second is that the FCC should make smart interference decisions as early as possible. This does not mean that we should be over-restrictive, allowing no interference however minimal. This would preclude innovation and competition. Instead we should seek out the level of protections that bring the best service to the most people.

Question 6. Commissioners, innovation has flourished in the current unlicensed spectrum bands. What do you believe the potential is for increased innovation and do you agree that more spectrum should be allocated to encourage this innovation?

Answer. The unlicensed bands have allowed tremendous innovation and have allowed entrepreneurs to bring products and services to Americans in ways that are just impossible in licensed bands. We should not allow a lust to auction to undermine the clear benefits that the spectrum commons model produces. I have worked to find more unlicensed spectrum in the past and I will do so in the future.

Question 7. Commissioners, would you agree that additional unlicensed spectrum could help spur new broadband services and would be a good idea regardless of how you proceed on the broadband proceedings before you?

Answer. The mistake that the Commission made in undermining broadband competition by denying competitors access to fiber optic facilities makes working to develop wireless broadband as a competitor even more important. If incumbent companies dominate the broadband market consumer prices will rise and innovation may suffer.

Question 8. Experts in technology we have talked with say that the technology clearly exists that would allow unlicensed devices to keep from harming incumbent systems. Do your experts tell you the same thing?

Answer. While we must be careful with our interference rules, clear and rational interference rules can be met by unlicensed devices.

Digital Copyright Issues

Question 9. Commissioners, consumers are excited about the potential that digital television and HDTV have to increase dramatically the quality of their viewing experience. At the same time, those who make movies and shows are concerned that those shows and films distributed in digital format will be copied and distributed at a huge loss to them. Does it not seem to you that some form of protection for content carried over the air and over cable to these fantastic new TVs is necessary and fair?

Answer. Some form of protection is clearly needed. Copyright law already provides one form of protection. Technology may offer another. But the question of whether the FCC should impose a technology on the high-tech industry in order to protect the content industry is complicated. While we want content owners to be able to protect their products, we must be mindful of the unintended consequences of our actions. I will look for a way to give content producers the tools they need, while not creating large new costs that will be borne by consumers, threatening personal privacy, or undermining free speech and fair use.

Media Concentration

After the elimination of radio consolidation protections in the 1990s, in California alone, one company, Clear Channel, owns a stunning 102 radio stations. In some towns that means every station is controlled by the same corporation. Now I hear that the FCC is considering eliminating the concentration protections for TV, cable, and newspapers.

Question 10. If you eliminate the current rules altogether, then could TV and cable in California experience similar concentration as radio?

Answer. If we eliminate these rules, I fear the entire media landscape—across the country—very well *could* look like radio, where abandoning media concentration rules led to the wholesale consolidation that you describe. I don't believe that we yet understand the implications of our actions. We *do* have the radio experience to learn from. Many believe that the loosening of ownership caps and limits created real problems in radio. Arguably, consolidation created some economies and efficiencies that allowed broadcast media companies to operate more profitably and may even have kept some stations from going dark and depriving communities of service. But it is also true that radio consolidation went far beyond what anyone expected. Conglomerates now own dozens, even hundreds—and, in one case, more than a thousand—stations all across the country. More and more of their programming seems to originate hundreds of miles removed from listeners and their communities.

And we know there are 34 percent fewer radio station owners in March 2003 than there were before these protections were eliminated. The majority of radio markets are now oligopolies. That raises serious questions. Media watchers like the Media Access Project, Consumers Union, and Professor Robert McChesney argue that this concentration has led to far less coverage of news and public interest programming. The Future of Music Coalition in its multi-year study finds a homogenization of music that gets air play, and that radio serves now more to advertise the products of vertically-integrated conglomerates than to entertain Americans with the best and most original programming.

I don't believe we have obtained the data to determine the prospective effect on localism, diversity, and independence of TV, cable, radio, and newspapers if we eliminate our protections, especially given our history with radio consolidation.

I also hear from the Writers Guild, local broadcasters, independent film makers, Consumers Union, and others that the FCC is rushing to judgement on whether to eliminate or drastically change its media concentration protections.

Question 11. Commissioner Copps, I understand that the Commission has contracted out a number of studies on media concentration. Are you satisfied that those studies have examined the effect of elimination of media concentration rules on citizen access to diverse viewpoints or to the control exerted by a few businesses over the majority of media?

Answer. No, I am not. The studies that the Commission is relying on are narrow and incomplete, and several outside groups argue that they are seriously flawed. They don't provide an analysis of what would happen if we were to lift the television audience cap 20 or 30 or 50-percent instead of scrapping it; they don't address what the likely *prospective* effect on localism, diversity, and independence would be if we eliminate the national cap and other protections—of particular interest, given our history with radio consolidation; and they don't answer questions such as:

- How do consolidation and co-ownership affect the media's focus on issues important to minorities and to the objective of diversity? What are the effects on children?
- What effects have media mergers, radio consolidation, and TV duopolies had on the personnel and resources devoted to news, public affairs, and public service programming, and on the output of such programming? How about the effect on the creative arts?
- How are advertising and small business affected?

We need answers to these questions and many others before we can make an informed decision.

Miscellaneous

Question 12. Do you foresee an overlay strategy for the 310 area code that would prevent a split but only change digital cell phones prospectively, therefore eliminating the inconvenience to individuals who presently own cell phones and assuring that purchasers of analog cell phones would not have to change their code?

Answer. We need to work closely with state public utility commissions on these numbering issues. We must work together *as partners* to tackle numbering problems. That is why I advocated allowing more states to undertake number pooling before the national system was implemented. And that is why I am hoping we can address as expeditiously as possible petitions from states to undertake additional number conservation measures. California filed just such petitions last fall. Those petitions sought to implement a technology specific overlay and to increase the contamination threshold for reclaiming blocks of numbers. I am disappointed to see it has been several months and we have still not issued a decision. I hope we will put resources towards completing this proceeding as soon as possible. As long as measures are fair to consumers and industry, we should accommodate state requests to implement strategies that will address their situation. And once we grant a state's petition, we should allow other states to use those same strategies if they want.

On the HERO Act (public safety spectrum): The FCC has an open rulemaking on digital television. One of the areas of concern to me is that critical spectrum for public safety—spectrum that will help first responders coordinate effectively in the event of a terrorist attack such as 9/11—is being held pending the broadcasters' transition to digital television. Congresswoman Harman, who is now ranking member on the House Intelligence Committee, has introduced a bill, the HERO Act, to have the public safety spectrum in issue turned over by a date certain at the end of 2006, precisely to get at a problem first responders had in coordinating during and immediately after, the 9/11 attacks.

Question 13. What has the FCC done, and what can it still do, to speed up the broadcasters' conversion and to get the public to participate in the transition as well?

Answer. In August, 2002, the Commission took two major steps to encourage the long-delayed transition to digital television. We moved to resolve the continuing industry deadlock over inclusion of technologies to provide digital broadcast copy protection, and we addressed the important issue of requiring digital tuners in our television receivers. Given digital media's susceptibility to piracy, the issue of content protection must be resolved before broadcasters will make new, innovative and expensive digital content widely available. The high price and scarcity of DTV-capable receivers that are on the market now are not consistent with realizing the Congressional goal of transitioning to digital television at such time as 85-percent of homes have digital reception capability, but history indicates, and some of the major manufacturers agree, that the costs of incorporating DTV tuners into televisions set should fall fairly rapidly as all sets include these tuners.

We were also able recently to re-start the process of addressing the Commission's long-dormant proceedings on the public interest obligations of broadcasters in the DTV environment. And there does seem to be some industry movement now as well, such as recent broadcaster and cable commitments to digital programming and the industry's recent agreement on action to address cable compatibility issues. Public comments are being sought on the broadcast flag, broadcasters' public interest obligations in the DTV environment, and cable compatibility issues.

So, we are making some progress, but there is still a long way to go. We still have to resolve must-carry, the definition of "primary video" and "program-related" and so on, but my sense is we're moving faster now than we were a year ago.

Question 14. On area code relief: My state, California, is a great market, particularly for high tech and new telecommunications services. One drawback to this impressive growth is that these new telecommunications services use telephone numbers. Senior citizens, residents and small businesses, particularly in urban areas, have had to endure many successive area code changes. The state of California has a petition pending to try some new avenues of relief. For example, the state wants to overlay a new code for devices that don't require human interaction—like credit card verification devices,—so that real people are not burdened or confused. The state has other innovative ideas , and these have included requiring wireless carriers to offer local number portability and ordering a wireless overlay in the Los Angeles area code 310 and 909 region. What is your position?

Answer. We must aggressively look for innovative strategies to conserve numbers and use them more efficiently. The FCC has been taking some steps to implement these strategies. We are rolling out number pooling so that carriers receive fewer numbers at a time. And as of last fall, wireless carriers are participating in these pooling efforts. We are adopting criteria to limit the quantity of numbers that carriers can hold without using. We are requiring carriers to file information so that we can monitor the use of numbers. We are moving forward—albeit not as quickly as I would have liked—to ensure that wireless carriers implement local number portability just as wireline carriers have already done. Portability not only allows you to keep your number when you switch carriers—something that is good for consumers—but it also aids our efforts to conserve numbers. There are also additional steps we should be considering. I agree that we should explore separate area codes for those numbers consumers do not dial. These services include ATM machines, credit card authorization machines, location systems such as On-Star, and even gas station pumps. This step could free up more numbers for consumers. Finally, we need to get a handle on bigger issues looming on the horizon. We need to address the impact of new technologies such as voice over the Internet on the use of numbering resources. We need to be ahead of this curve, because these new technologies could swamp our best efforts at number conservation.

Question 15. For Commissioner Copps: Commissioner Copps, I understand you personally visited the area in Los Angeles—the 310 and 909 area codes—and attended a Town Meeting on area code issues. What do the business people, senior citizens, disabled community and other residents of that area want?

Answer. I heard clearly the frustration consumers are experiencing with the proliferation of new telephone numbers and area codes. Every time there is an area code change, consumers face substantial burdens. Not only are there the confusion and inconvenience of a new number, but there are significant costs as people need to change business cards, stationery, company brochures, the sides of company vehicles, and advertising. California has seen a virtual explosion in the number of new area codes. In the last three years of the 20th century, Californians faced more area code changes than in the 50 years prior to that. Consumers at the Town Meeting wanted the FCC, working together with the California Commission, to undertake a concerted, cooperative effort to do all that we can to slow the rate of area code changes.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV TO HON. MICHAEL J. COPPS

Universal Service

The E-Rate has made it possible for us to expedite the integration of technology into our education system by wiring tens of thousands of schools and libraries across the country. I think it is extremely important for the Commission to pursue Universal Service reforms that will ensure the long-term viability of *all aspects* of the program—including the E-rate.

Question 1. Please update me about the status of the Commission's efforts to strengthen the Universal Service program. I am interested in what reforms are needed to enable us to serve the needs of low-income and rural Americans in the long-term AND continue the progress we've made in wiring schools and libraries.

Answer. I share your concern about the need to maintain a strong and sustainable universal service mechanism. My overriding objective as an FCC Commissioner is to help bring the best, most accessible and cost-effective communications system in the world to all of our people—and I mean *all* of our people. To that end, we must implement Congress' directive to preserve and advance universal service.

The Commission and the Federal-State Joint Board are at present actively reviewing many issues that go to the heart of our efforts to strengthen the universal service program. The Commission is considering the services that should be supported by these mechanisms and must issue a decision by this summer. The Commission is also in the midst of a proceeding to improve the operation and oversight of the E-Rate program in order to ensure that our children and communities have access to the tools they need to succeed in the 21st century. Similarly, the Commission has undertaken a proceeding to improve the rural health care program, which helps rural health care providers obtain access to modern telecommunications and information services. In addition, the Federal-State Joint Board on Universal Service has begun a proceeding to examine the portability of universal service in markets with competition and will soon make recommendations to the Commission on ways to improve the effectiveness of the Lifeline and Link-Up programs. By completing these

proceedings expeditiously and in a manner that adheres closely to Congress' statutory framework, we can continue to serve the needs of low-income and rural Americans and continue the progress we've made in wiring schools and libraries across the country.

Effect of broadband deregulation on Universal Service

The Commission is considering changing the way certain broadband services are regulated by re-classifying them as "information services."

Question 2. What impact would these changes have on the way contributions are collected for Universal Service program? At a time when we are searching for ways to strengthen Universal Service, do you think it is wise to pursue action that may threaten existing funding sources?

Answer. I share your concern about the potential effect that a statutory reclassification may have on our ability to support universal service. At present, providers of DSL services contribute to universal service whereas cable modem providers do not. If the Commission were to determine that wireline broadband Internet access is an information service provided via telecommunications, providers of such services might no longer contribute unless the Commission exercises its permissive authority to require contributions. I believe we need to address expeditiously the issue of broadband providers' contribution to universal service. We must continue to look for long-term solutions that will put the fund on a solid footing. When the Commission finally addresses this issue, I hope we will do so in a manner that does not narrow the contribution base and undermine the sufficiency of the fund. We must also work to avoid a system that opens the door to regulatory arbitrage or distortions in the market.

Broadband and Competition

I believe that stimulating investment in high-speed Internet services will help our economy and provide a variety of other benefits as well (telemedicine, distance learning, etc.)

Question 3. What do you think the best strategies are for speeding up the deployment of broadband without threatening competition in local telephone markets?

Answer. Today, having access to advanced communications—broadband—is every bit as important as access to basic telephone services was in the past. As you point out, providing meaningful access to advanced telecommunications for all our citizens may well spell the difference between continued stagnation and long-term economic revitalization. Already, broadband is a key component of our nation's systems of education, commerce, employment, health, government and entertainment. Congress recognized the importance of broadband access in the Telecommunications Act of 1996. Not only did Congress give the FCC and the state commissions the statutory mandate to advance the cause of bringing access to advanced telecommunications to each and every citizen of our country, but it also directed that one of the guiding principles of universal service is that "access to advanced telecommunications and information services should be provided in all regions of the Nation."

I believe we can promote deployment of broadband without undermining the competition that Congress sought in the 1996 Act. Indeed, competition can promote broadband deployment. We are now seeing competition not only within delivery platforms, but also among delivery platforms. We are seeing convergence of industries, convergence of services, and convergence of markets. It is clear that companies are moving to deploy advanced technologies in response to competition from other broadband providers. As Congress predicted, the competition resulting from the 1996 Act unleashed an unprecedented investment in a 21st century communications infrastructure.

I dissented from the far-reaching broadband sections of the Order, because I was troubled that we are undermining competition in the broadband market. I fear that this decision may well result in higher prices for consumers and may put us on the road to re-monopolization of the local market.

We must also remember, however, that at the same time that Congress sought to promote competition, it also reaffirmed a core principle at the heart of the public interest—universal service. A critical pillar of federal telecommunications policy is that all Americans should have access to reasonably comparable services at reasonably comparable rates. Congress has been clear—it has told us to make comparable technologies available all across the nation. We must ensure that we give meaning to and carry out our duties under these provisions.

I believe that the Commission should initiate, within the rather broad authority given it by the Congress, a more proactive program to promote the deployment of broadband to all Americans. I therefore support launching a proceeding to examine

steps we should take to promote the deployment of advanced services, and the role of universal service in that effort. This should be a priority matter.

Local Competition

According to recent reports in the *Wall Street Journal*, the Commission may be preparing to scale back competitors' access to local networks by changing the rules relating to the unbundled network element platform. According to recent FCC statistics, competition in local telephone markets is just now starting to take hold in a meaningful way.

Question 4. If the unbundled network platforms were to no longer be an available method for competitors' to access Bell networks, what would it mean for the future of local competition—particularly in rural areas and regions with challenging topography where the cost of deploying facilities is particularly high?

Answer. Congress recognized that many competitors would not be able to duplicate the incumbent's network. Congress therefore required the Commission to determine those network elements that an incumbent must unbundle and offer to its competitors in the local market. In those markets where competitors are impaired without access to loops, switching, and transport, UNE–P may offer the only competitive alternative for certain customers. I am pleased that, in the face of intense pressure for the Commission to make broad nationwide decisions that would have doomed the future use of unbundled elements, we instead adopted a more reasonable process under which the state commissions conduct a granular analysis that takes into account geographic and customer variation in different markets. Through this process, we will be able to foster the competition that Congress sought in the 1996 Act and to fulfill the mandate of the law, which is "to secure lower prices and higher quality services for American consumers."

Interplay between state regulators and the FCC

In a recent letter to all five the Commissioners, several representatives of the National Association of Regulatory Utility Commissioners wrote, "State flexibility to maintain UNE–P as well as the ability to add to any national UNE list is critical to keeping competition 'on track'."

Question 5. What is your vision for the appropriate interplay between state regulators and the FCC in implementing the '96 Act and promoting a competition telecommunications market that benefits consumers?

Answer. As I stated in my testimony, I believe we must work closely and cooperatively with our colleagues at the state commissions. The Commission and the state commissions have a joint responsibility under the Act to ensure that conditions are right for competition to flourish. We rely on state commissions for their efforts to open local markets to competition. We rely on state commissions to evaluate the openness of local markets in applications for long-distance authorization under Section 271. Similarly, state commissions are often best positioned to make the granular, fact-intensive determinations about any impairment faced by competitors in their local markets.

In some parts of the Order, the Commission recognized that the states have a significant role to play in our unbundling determinations. We understood in those sections that the path to success is not through preemption of the role of the states, but through cooperation with the states. In those areas, we adopted a reasonable process under which a state commission is able to conduct a granular analysis that takes into account geographic and customer variation in different markets.

In other sections of the Order, however, we did not provide a meaningful role for the state commissions. In particular, the Commission limited—on a nationwide basis in all markets for all customers—competitors' access to broadband loop facilities whenever an incumbent deploys a mixed fiber/copper loop. The Commission has recognized time and again that loops are the ultimate bottleneck facility. Yet, the Commission has chosen to eliminate this bottleneck facility on a nationwide basis without adequate analysis of the impact on consumers, without analyzing different geographic or customer markets, and without conducting the granular, fact-intensive inquiry demanded by the courts.

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