

**STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re: Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338.

Today's decision does two critical things: It starts a rulemaking to quickly replace rules within 6 months, swept away by a court incensed by the Commission's persistent refusal to apply the law faithfully. Second, it puts in place an interim freeze for 6 months, ensuring consumers and competitors are protected while we complete our work. Contrary to the inaccurate assertions being thrown around, there are no automatic price increase after 6 months for facilities providers. Today's Order only seeks comment on a transition that will not be necessary if the Commission gets its work done.

Over a year and a half ago, I dissented from the Majority's ill-considered decision to preserve at all costs a repudiated mode of competition—UNE-P. I took that position on policy grounds, but my greatest concern was the prolonged uncertainty it would unleash. I believed, given that this modality had twice before been struck down by the courts, it was a reckless decision that was sure to meet a similar fate, which, in turn, would plunge a fragile market into even further chaos. I wrote: "I fear as much or more for competitors as I do for incumbents, for the prolonged uncertainty . . . may prove stifling."¹ Despite the warning, we forged ahead and now we embark for the fourth time on an effort to write rules that promote local competition. Getting it right this time, without clever shortcuts, is vital.

I want to make one essential point at the outset, given the melodrama of my dissenting colleagues: There are not automatic price increases after 6 months for facilities providers. Such assertions are flat wrong. I elaborate on this more fully below.

I am not a fan of UNE-P as the vehicle for parking our aspirations for vigorous voice competition. It is a synthetic form of competition that would never have proved sustainable, or have provided long-lasting consumer benefits. I believe government policy should encourage intermodal and intramodal facilities-based competition. Bringing some of your own infrastructure to the table allows a competitor to offer a differentiated service to consumers. It allows a competitor to control more of its costs, and thus offer consumers potentially lower prices. A facilities competitor is less dependent on its major competitor for its service—an unenviable position for any competitor. And, a facilities competitor helps create vital redundant networks that can serve our nation if other facilities are damaged by those hostile to our way of life. Facilities competition is real competition and it is emerging everywhere.

¹ See *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 Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17519 (2003) (*Triennial Review Order*), corrected by Errata, 18 FCC Rcd 19020 (2003).

There is no need to fear that consumers will be left with nothing to choose from as UNE-P begins to whither. Consumers are using wireless telephones more than they are using wired telephones today—many now use their mobile as their primary phone. Cable companies are offering competitive telephone service to residential consumers. VoIP is surging into the marketplace as broadband grows, offering an exciting and new competitive alternative that offers cut-rate prices and futuristic features. Indeed, the venerable AT&T is pushing its own VoIP consumer service and re-entering the consumer wireless market. Aggressive AT&T advertisements for VoIP, touting the re-invention of the telephone, are blanketing the airwaves during the Summer Olympic Games. And, recent reports show Ma Bell has teamed up with cable providers to offer this service in direct competition to the Bells.² I applaud these developments.

I also have consistently supported intramodal competitors that are facilities-based. Carriers like Covad, NuVox, McLeod and XO have been important contributors to competition. In the *Triennial Review Order*, I supported fully requiring incumbents to unbundle DS1 loops and transport, as did every one of my colleagues. I remain steadfastly committed to providing the key network elements to these facilities competitors in this proceeding, without which they would be impaired. Indeed, I am quite confident that we will be able to provide these elements, once we have a full and complete record, consistent with the guidance of the court. We will move to do so as quickly as possible.

It is exceedingly important for the Commission to rewrite the new rules of competition as fast as it can. As I predicted in the *Triennial Review Order*, the course the Commission took a year and a half ago has led to more uncertainty that risks stifling investment. Clarity is needed to repair the damage. The court has vacated the competition rules and we need to work to fill the void. As an interim step, today we freeze any changes in the current competition rules for six months, to protect consumers from any sudden disruption in service. This will give us the time we need to repair the rules. I have committed to push the Commission to complete this proceeding in six months, before the freeze expires. As a sign of that commitment, I have already scheduled the decision for a vote at our December 2004 open meeting. I insist the parties and urge my colleagues to move heaven and earth to ensure we meet this objective. Consumers demand it and competitors and incumbents alike need it.

In addition to an interim freeze, we also seek comment on a transition proposal that will only take effect if the Commission does not act on final rules, or fails to justify an unbundled element. It is important to emphasize that no transition will be required, or go into effect if we meet our objective to finish the rules and re-justify necessary inputs. In other words, no price increases if we get the job done, which I am fully confident we will. For example, I have expressed a commitment and some confidence that DS1 loops and transport will remain unbundled elements for facilities-based providers. Should the

² *AT&T dials up VoIP service with cable deals*, USA Today, Aug. 19, 2004; *AT&T, Cable Providers Join Forces*, Wall Street Journal, Aug. 19, 2004.

Commission adopt final rules along these lines, facilities competitors will not be subject to price increases, or special access pricing. Indeed, I expect that will be the case.

Some parties wanted even more to be done to make elements available right this minute. I fully empathize with the desire to re-unbundle key elements immediately. A business loathes even a brief period of uncertainty. However, I believe there is no lawful way to order an incumbent to provide an element indefinitely that the court vacated with gusto. To do so now, without notice or comment from the public is a hazardous and unlawful course to take. To do so is to flaunt the court's decision and would lead, I am sure, to the court vacating our interim rule and perhaps making it even more difficult to sustain good competition rules. This is an unacceptable risk, for short-term gain. This is the game we played before that cost so dearly and I doubt seriously the court would be amused to play it again. It might be worth repeating the court's own words when it wiped these rules from the books: "This deadline is appropriate in light of the Commission's failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings. *So ordered.*"³ Will we ever learn?

Before concluding, I must reject utterly the inaccurate and revisionist statements of my dissenting colleagues. The unbundling rules have been tossed out because of their ill-considered UNE-P decision. We are working now to pick up the pieces. We are not free to simply plop the rules back into place as they seem to think. Second, they bemoan the harm to facilities competitors by our action today, while simultaneously refusing overtures by us to modify today's decision to provide greater confidence to this community going forward. They seem prepared to inflict harm on companies, in order to maintain the political purity to criticize today's well-considered step to reconstruct a regime blown down by the court's rejection of their approach.

Nonetheless, I believe a majority of the Commission is committed to providing a sound decision that will allow competition to flourish. I am confident that we can put in place the fundamentals of sustainable competition and get this right for American consumers.

³ *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004).