HEALTH OF THE TELECOMMUNICATIONS SECTOR: A PERSPECTIVE FROM THE COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND COMMERCE

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HEALTH OF THE TELECOMMUNICATIONS SECTOR: A PERSPECTIVE FROM THE COMMISSIONERS OF THE FEDERAL COMMUNICATIONS COMMISSION

WEDNESDAY, FEBRUARY 26, 2003

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2123, Rayburn House Office Building, Hon. Fred Upton (chairman) presiding.

Members present: Representatives Upton, Bilirakis, Barton, Stearns, Gillmor, Cox, Deal, Whitfield, Shimkus, Wilson, Pickering, Fossella, Bass, Bono, Walden, Terry, Tauzin (ex officio), Markey, Rush, McCarthy, Doyle, Davis, Boucher, Towns, Deutsch, Eshoo, Stupak, Engel, Wynn, Green, and Dingell (ex officio).

Also present: Representatives Blunt and Burr.

Staff present: Howard Waltzman, majority counsel; Will Nordwind, ajority counsel; Jon Tripp, deputy communications director; Hollyn Kidd, legislative clerk; Gregg Rothschid, minority professional staff; and Brendan Kelsay, minority professional staff.

Mr. UPTON. Good morning, everyone.

The subcommittee will come to order. And without objection the subcommittee will proceed pursuant to committee Rule 4E. So ordered.

The Chair recognizes himself for an opening statement.

I'd like to warmly welcome both Chairman Powell back to the subcommittee and the rest of the Commissioners for their very first appearance before us this year. We appreciate your being here with us today to discuss the health of the telecommunications economy from your perspective and how FCC regulations impact the economy.

The importance of this hearing cannot be overstated. It comes on the heels of last Thursday's triennial review decision by the Commission. We come to this day with our economy at a critical crossroads. And to paraphrase my former boss, Ronald Reagan, I ask the question thanks to the FCC's decision is the telecommunications economy better off today than it was 6 days ago? I am afraid the answer is no.

Unfortunately, the majority in the triennial review failed to follow Chairman Powell's bold vision and leadership. The majority

misses a great opportunity. Where they had a chance to provide certainty, they have provided uncertainty. Where they had a chance to provide clarity and stability, they opted for chaos and continued regulatory haggling. In their third attempt to write rules for network unbundling, they have failed and the third time is no charm.

They have failed to follow the standards established by Congress written into the 1996 Act and reenforced by the courts. Sadly, the FCC's mile is a form of competition that only French farmers could love.

The one ray of hope in this mess is their efforts to prevent telephone rules and regulations from migrating to the new broadband networks. We should be encouraging the deployment of fiber and high speed networks, not discouraging them. And while it appears, and I emphasize that it only appears at this point without the written order, that the Commission tried to move toward a progressive broadband policy, they have included provisions requiring the phone companies to either maintain two networks, one fiber and one copper, or go to the State commissions for permission to replace the copper with fiber. That makes no sense.

Today these companies are replacing copper with fiber without going to anyone for permission. This runs counter to common sense. But the Commission seems to have adopted a chaotic mix of often conflicting rules that in one sense seems to promote investment and growth, and on the other hamstring it in a morass of what will be likely 52 different proceedings around the country.

The Commission, I believe, should have been focused on prompting clarity, certainty, investment and growth. If they had used these objectives as their touchstones, I believe that they would have come up with an order that reduces not increasing on bundling, but reduces not increases regulatory procedures and it would be based on a national framework.

I would bring to the attention the article today in The Wall Street Journal where it says it is hard to picture the financial markets giving the Bells the hundreds of billions of dollars it would take. Investors have their eyes in their heads.

Was this a good decision? Hello Washington, this is Wall Street calling. And the answer is no.

Clearly the reaction from Wall Street the last few days should convince us that the FCC's decision has created confusion and concern. We even have analysts talking about such key telecom equipment makes and innovators as lucent as dollar stocks. And this decision seems to have spooked investors even further. They crave clarity and they got confusion.

Appreciate you being here this morning. And I yield for an opening statement to my friend and colleague, the ranking member of the subcommittee, the gentleman Massachusetts, Mr. Markey.

Mr. BARTON. Parliamentary inquire before we go to Mr. Markey.

This is my first hearing of the Telecommunications Subcommittee. What is your rule on opening statements and questions? I know there's discussion——

Mr. UPTON. We have already adopted. It is now a committee rule, but by the reading of the—I think it was 4C(e) if you defer

your oral presentation of your opening statement, you will get 8 minutes on the first round of questions rather than 5.

Mr. BARTON. What if you give a 1-minute opening?

Mr. UPTON. No. Then you will 5 minutes on questioning.

Mr. BARTON. So it's all or nothing?

Mr. UPTON. You have a chance to defer or not.

Mr. BARTON. All right. I just want to clarify that.

Mr. UPTON. Mr. Markey?

Mr. MARKEY. Thank you, Mr. Chairman.

The Federal Communications Commission certainly has a full plate of issues to deal with this year, starting with last Thursday's decision on issues addressing the future or the lack thereof of competition for local telecommunications services to upcoming plans to deregulate certain services by redefining them, to the troubling direction the Commission appears to be heading in supporting greater media concentration in our country.

The FCC will make decisions in the coming months that will greatly effect prices consumers pay, the level of entrepreneurial opportunity, the prospects for job creation and innovation and the health of our media marketplace.

Last Thursday the FCC appears to have gotten it half right. By retaining the ability of States to address critical local competition issues in the so called UNE-P policy area, the Commission took note of the fact that many States had cited this UNE-P competition to the Bell companies as a basis for approving their applications to get into the long distance business.

In addition, millions and millions of consumers not only have seen lower prices for local and long distance services from competitors, they have also seen lower local and long distances prices from the Bell companies as well.

In Massachusetts, for example, Verizon recently announced in response to such competition that it was creating a variations freedom package that includes unmeasured, unlimited local regional long distance service plus home voicemail, caller ID, call waiting, three way calling and speed dialing up to 8 numbers all for $54.95 a month.

To say that UNE-P does not foster competition simply ignores the everyday reality of millions of Americans. And I want to commend Commissioners Copps and Adelstein and Martin for supporting clear consumer interest in this area.

Yet, the FCC last week also got it half wrong. And for those interested in the future of broadband competition and the prospects for job growth and innovation in the digital era, the broadband policy decisions and the FCC decision are deeply troubling. And given the response of the Bell companies after the FCC rendered its decision, it's clear the result for the economy will be devastating. Any small glowing ember of an economic recovery for the sector that existed has been effectively doused by the bucket of cold water the Bells threw on it after the FCC decision.

The broadband decision also reflects an apparent unwillingness or an inability to learn the lessons of the past. In the late 1980's immediately after the breakup of AT&T, the Bell companies sought relief of the restriction prohibiting them from entering the information services marketplace. They argued that if they were permitted

into information services, that that would give them the incentive to deploy fiber to the home. As Dave Barry might say I am not making this up, I sat here and listened to them tell us that.

Judge Harold Greene eventually lead them into that business, but they didn't deploy. Instead they came back to Congress and the FCC and said that only if they were allowed into cable TV business would they have the necessary revenue stream to deploy fiber to the home. So in the Telecommunications Act we bent over backwards to facilitate their entry into cable. But, again, they didn't get into cable to any great degree and they didn't deploy fiber to the home.

Why? Well, because they said they now needed interlata data relief for the emerging Internet marketplace. When they finally got around to opening their markets and obtaining long distance approval in their respective States, as you can now guess, they did not build out fiber to the home. Neither did they crisscross the country with the newly built long distance networks. They simply resold, in large part, the long distance services of AT&T, MCI and Sprint. Yet, by then they had a new request.

Again, I am not making this up. They said that if you deregulate our new investments for high speed service, take out the pesky competitors in the broadband marketplace and remove certain regulatory oversight, then they would really be going gangbusters getting fiber out to people's homes. They wanted a policy of new wires, new rules.

Last Thursday 3 of you agreed to endorse this proposition, and almost immediately afterwards the Bell companies announced that they were not going to invest. They will not deploy. That the promise of 4 years of legislation and months of your work at the FCC was nothing but a fiber fable. By endorsing the policy of new wires, new rules the Bells say what we will now get is no new hires and no new investment.

Do you feel betrayed? It is a long, long story. You look like many others have looked in the past, like Charlie Brown after Lucy pulls the football away. The Bells pulled it right away from you. It is just part of the fiber fable.

Thank you, Mr. Chairman.

Mr. UPTON. Thank you, Mr. Markey.

Mr. Tauzin.

Chairman TAUZIN. Thank you, Mr. Chairman.

Mr. Chairman, let me first welcome Chairman Powell and members of the Commission to this hearing. It is good to see you all again.

I want to thank you particularly, Mr. Chairman, for calling this hearing. You held a great hearing several weeks ago, at which time we heard from the investment community, analysis and comments from economists about the current state of the telecom sector of our economy. We learned three things that were unmistakable.

The first was that the telecom sector is in a dangerous state of economic disrepair. We learned that excessive regulation limits investment and retards growth. And we learned that regulatory uncertainty is the death knell for the telecommunications sector.

That message should have been as clear to the FCC as it was to this committee, and I believe the message apparently was heard by Chairman Powell and Commissioner Abernathy. Unfortunately, 3 of our Commissioners seemed to think that we can get the telecom sector back on its feet by perpetuating rules for years to come, perhaps a decade, that will require one group of stockholder companies to subsidize their competitor stockholder companies by creating a fog of regulatory uncertainty for years to come in the form of 51 State and DC proceedings that will likely lead to 51 suits that will go through 12 different appeal courts that will end up in the same Supreme Court that ordered the FCC to do its job and not to punt it to 51 different State and local authorities. What a mess.

What we have seen, Mr. Chairman, is the bureaucratic equivalent of Claus Von Bulow, giving its sick patient another legal dose of poisonous uncertainty of extended regulatory confusion and subsidize phony competition.

I will say that it appears we have a lot to be excited about with respect to the deregulation of broadband facilities. I will hold final judgment on that until we have seen the final rules, but it is clear at least that the Commission has gone a good step forward to deregulate broadband. But we want to see what the Commission contemplates, for example, for dark fiber and for the retirement of copper loops before we applaud too loudly.

If the Commission provides the regulatory relief that the agency claims it has provided, we on the committee and in the House will have won a tremendous victory. And for that I will be grateful. Many members of this committee and of the House have fought long and hard to deregulate broadband facilities and the relief outlined last week is exactly the kind of relief that we ought to have. It is the right policy.

But a deregulated environment for broadband is one thing. You also need an attractive market for investment. And in these areas of regulatory certain, of encouraging facility based competition and investment in new facilities, what the Commission has done falls woefully short. In fact, I think it has dealt a dangerous blow to our already sick telecom sector. We saw it with the loss of $15 billion in market cap the day after the decision. We saw it in a decision by the Bells that they cannot predict that investors will give them the billions of dollars it needs to invest in broadband with the regulatory uncertainty this Commission has delivered.

We're going to find out a lot today. We're going to learn why this Commission felt it was necessary to give AT&T and MCI WorldCom, this wonderful honest telecom company, why it's decided to give them the right to use other companies' facilities at below cost for at least another 3 years and 9 months. Why it is okay for MCI and AT&T and the other CLECs who have facility based switches all over America, thousands of them, to park their facilities, to park this switches, to put them in mothballs and to use the Bell facilities because it is cheaper to use somebody's else switch if the government says you can use it at below cost. Why it was important to give these two giant telecom companies to use somebody else's property assets at below cost for perhaps another decade.

Why this Commission did not hear the DC Court when it said it was your job to the granular analysis under UNE-P rules, not the States. Why the speeches so many of you gave about regulatory certainty and promoting facility based competition were nothing more than speeches when it came time for you to vote.

We're going to learn a lot today. We're also going to learn about how NERUC influenced this decision, the regulators and the States how they want to continue their regulatory grasp on this industry.

We're going to learn how, for example—we've obtained a document, I'll talk about it later with you in questions, from NERUC about how they intend even in the sunshine rules to perhaps illegally influence this Commission into making sure the rules are written so they can add back more regulatory authority under this new rule you propagated.

We will learn why the Supreme Court was ignored by this Commission when it said very clearly that this Congress delegated to the FCC, not to the States, the authority and the responsibility to make the rules here for a national telecommunications network and why this Commission felt it could ignore the Supreme Court of the United States and give this authority instead to the States.

We're going to learn a lot from this hearing, and look forward to it. Stick around.

Thank you, Mr. Chairman.

Mr. UPTON. I know you're just getting wound up.

I would recognize the gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

I share the concerns that have been expressed by the subcommittee chairman and also the chairman of the full committee with respect to the Commission's treatment of local exchange carrier obligations regarding broadband. While the decision would appear to encourage investment in advanced networks by removing the requirement that competitors then get access to them at a rate that is below the cost of the LEC deployment, the benefits of that decision could well be negated by the other decision made by the Commission that would enable the Public Service Commissions of the States to pass on whether or not the old copper networks could then be retired as those copper networks are over built with modern fiber optic facilities.

If the LECs are ultimately required to maintain and to operate the old networks, there will be little incentive to invest in the new ones.

As the Commission drafts an order incorporating these decisions, I hope that you will provide clarity on this matter by ensuring that the LEC can retire the old copper plant as new and modern facilities are constructed.

Like other members of this committee I was pleased that representatives of the cable television and consumer electronic industries reached agreement in late December on a universal plug-and-play standard for digital television sets. When the Commission implements that agreement by regulation, digital sets will be compatible with all cable television systems and consumers will not need a new set-top box each time they change cable television providers. I commend the Commission for its notice seeking comment on a proposed regulation incorporating that agreement.

A related matter, however, remains unresolved. There's an urgent need for the Commission to make available a consumer friendly version of the so-called PHILA license which equipment manufacturers are required to sign in order to manufacture cable compatible equipment. At present equipment manufacturers do not have an alternative to the very harmful PHILA license, and as they begin the lengthy design and manufacturing process for making cable compatible devices. A more consumer friendly version of this license is needed. And I urge the Commission to provide it at the earliest possible time.

Finally, I strongly urge the Commission to put in place regulations making telemedicine services more available in rural America. I have many hospitals in my congressional district that want to provide telemedicine services, that need to provide those services for the convenience and cost savings of their patients that are currently because of the pricing regime unable to do that.

I've had extensive correspondence with the Commission going back now for more than 1 year on the subject of the need for new regulations in this area. And I very much hope that the Commission will take that correspondence and other comments that the Commission has received on this subject into account, and put in place within just the next several months the new regulations that are needed to extend telemedicine services to a broader range of hospitals and clinics serving rural Americans.

Thank you very much, Mr. Chairman. I yield back.

Mr. UPTON. Thank you.

Mr. Barton.

Mr. BARTON. Thank you, Mr. Chairman.

I am asking you now just to consent to put my entire statement in the record.

Mr. UPTON. Without objection.

Mr. BARTON. I will defer it, but I am not sure I'll be able to wait for all the others, so I am going to take 3 minutes now.

Mr. UPTON. Go ahead. The gentleman's recognized for 3 minutes.

Mr. BARTON. As I looked around the hearing room up on the podium it strikes me that there are not a lot of us that are here up on this end of the dias that were here in 1996 when we passed the Telecommunications Act. Mr. Markey was here, Mr. Boucher was here. Mr. Rush was here. Mr. Stupak may have been here. And on our side we go down to about Chris Cox. The rest of them are newbies. They weren't here when we fought this fight.

I was here and I was on the conference committee, and our goal when we passed the Telco Act in 1996 was over time to create a level playing field and to really create competition. And nobody really knew how to do that, so we put in this very complicated system of steps it had to go through, and we threw it into your lap to decide.

We're now here today, and with some exceptions, most of us that voted for the Act would say that the decision last week was the wrong decision, that it is a step back, it is not a step forward. We didn't know at the time that the way the rules were implemented created an unlevel playing field so that the long distance providers got access to the local loop at a below market rate, a below price rate. And that is what Chairman Tauzin was talking about.

Now, from the ATT and World Com perspective, that is a good deal and nobody can be upset if their representatives say let us keep that good deal. But from the intent of the Act it is not a good deal. And the stock market has reacted accordingly in the last week.

So as somebody who voted for the Act 7 years ago, as somebody who was on the conference committee, as somebody who wants there to be competition across the board, as somebody who has watched what's happened in the last 7 years I am very, very disappointed by this decision.

Now there have been a lot of fingers pointed at certain members of the Commission, and I am not going to get into all that. But, you know, I am going to be a part of a process to do everything I can to change this decision at every level. Because I really want there to be competition at every level in the telco industry. And if we let this decision stand, you are not going to see that. You've created an unlevel playing field, and that was not the intent of the Act.

You know, I called the subcommittee chairman, former Congressman Jack Fields who along with Mr. Bliley is kind of viewed at the godfather of this. And I said "Jack, is this what you intended?" And he said there is no way this is what we intended 7 years ago.

So I know these are difficult questions, but this is not just another ruling by another Federal commission in Washington that does not have a real impact in the real world. It really matters. And sometimes the Congress will come in and overreach, sometimes we just throw things in your lap and say please do the right things, but sometimes when the Congress feels that you have done the wrong thing, we are going to try to help you do the right thing. And I am going to be a part of that process.

So I yield back, and I will ask some questions at the appropriate time.

[The prepared statement of Hon. Joe Barton follows:]

PREPARED STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

I would like to thank Chairman Upton for holding this important hearing, and Chairman Tauzin for his presence here today. When this hearing was first scheduled, we had no idea that we would have so much to discuss. However, that all changed last Thursday. That day the FCC made a landmark decision in regards to a number of subjects, including local carrier competition, especially in regards to UNE-P.

We all know that the goal of the 1996 Telecom Act was to promote facilities-based competition. And to give competitors a chance to build scale so that they might be able to deploy their own facilities, the Act required the incumbent local exchange telephone companies (ILECs) to open their networks to their new competitors' Competitive Local Exchange Companies (CLECs).

A CLEC entering the local phone market had three options to provide telecommunications services:

- build its own facilities (facilities-based competition), which the FCC calls the interconnection option of service in that the CLEC constructs its own facilities then interconnects with the ILEC;
- resale at wholesale rates any telecommunications service that the ILEC provides on a retail basis; and/or
- buy unbundled network elements (UNEs) from the ILEC.

In the case of UNE's there are generally two ways that a CLEC purchases them from the ILEC:

- . lease them individually to combine with its own facilities—e.g. combining the ILEC's loop with the CLEC's switch; or
- buy all of the UNEs that are used by a single end-user in combinations and apply no facilities of its own.

This last case is known as UNE-Platform or UNE-P.

UNE-P is physically similar to resale. In each case, the CLEC uses the ILEC network to provide service to the end-user and essentially limits its own functions to marketing, inputting the order into the ILEC's systems, and billing. The CLEC does not use any of its own network facilities but simply rides in total the ILEC network. However, the FCC's interpretation of the Act treats the two cases very differently in terms of the cost to the CLEC. Under resale, the CLEC pays the ILEC the wholesale rate based upon the retail rates charged by the ILECs minus a set discount (generally about 20%) Under UNE-P, the CLEC pays the sum total of the cost of each of the unbundled network elements based on the TELRIC standard—not the true ILEC cost of providing these elements. In this case, not only is the CLEC getting a discount from the retail rate of 50 to 60%, but also they actually get the service at below the ILEC's cost.

In my opinion, the FCC ruling merely continues this failed policy and violates the intent of the 1996 Telecommunications Act.

It seems rather nonsensical to me that governmental policy requires one company to subsidize its competitors. In this case, the regional bells subsidize WorldCom and AT&T, the largest users of the UNE-P platform.

Yet forgetting the impact on companies, these discounted services are not being offered evenly to all consumers. Evidence of cherry picking the most profitable consumer areas, often called redlining, is growing. I do not think the 1996 Act had the idea of promoting an uneven marketplace for the consumer.

I come to this hearing with an open mind, and will listen to the witnesses intently. However, the recent decisions do raise a lot of questions, and I look forward to hearing answers to many of those questions.

Mr. UPTON. Thank you, Mr. Barton.

Mr. Doyle.

Mr. DOYLE. Thank you, Mr. Chairman.

Good morning. And thank you for scheduling today's proceedings.

I want to extend a warm welcome to each of the Commissioners and express my gratitude for you taking the time from your busy schedules to be with us this morning.

Although I was not a member of the Telecommunications Subcommittee last session of Congress, I am looking forward to actively working on issues within our subcommittee jurisdiction that will provide and expand cutting edge telecommunication services to my constituents in Pittsburgh. Part of the reason I chose to serve on this subcommittee is Pittsburgh is becoming increasingly a center of high tech manufacturing and high tech businesses and jobs. I am confident that the work we do will help Pittsburgh expand even further its growth in these areas.

During my service on this subcommittee you can rest assured that one of my primary goals will be to ensure the availability of affordable choices and diverse services for every neighborhood both inner city and suburban within my district.

My district has one of the highest concentrations of senior citizens in America, the majority of which live on fixed incomes and therefore a healthy telecommunications industry is a vital importance to my district.

In areas where new competitors have entered the market for local and long distance services, monthly rates have dropped. Believe me, in an era of high cost of living and increased drug costs, seniors in my district are truly appreciative of the savings on their monthly phone bill that competition provides.

In this regard, I want to commend the recent decision by the Commission to preserve the current UNE-P agreement. I strongly believe that this structure creates an environment that ensures competition for residential phone services and, thus, will improve choices in affordability for people in Pittsburgh and cities across America.

I especially applaud Commissioners Martin, Adelstein and Copps for voting to preserve this competition and recognizing that the Federal Government should empower States with the ability to address the communication needs of their residents. However, I am very deeply concerned and disappointed with the decision to eradicate the line sharing requirements regarding fiber. In my view, the Commission's ruling offers little incentive for new competition in the high speed Internet market and will severely harm the chances for any existing or new company to offer alternative choices for services.

As with the residential phone service market, it is clear that competition in the broadband market will ensure that more customers in the city of Pittsburgh will have affordable high speed Internet connections available for their business and personal use.

Access to competitively priced DSL services is especially important for middle and low income households in my district where equal access means equal opportunity for educational, professionals and social growth not present before. I am greatly disappointed with this aspect of the FCC ruling which may mean that constituents will have fewer options and therefore reduced opportunity for affordable access to high speed Internet connections.

My colleagues, I want to express my commitment and strong support for initiatives that foster greater competition, lower prices and increased access for my constituents back in Pittsburgh. And I remain committed and stand ready to work with those companies and industries that are taking concrete steps to help achieve these goals.

Thank you, Mr. Chairman.

Mr. UPTON. Thank you, Mr. Doyle.

Mr. Bilirakis.

Mr. BILIRAKIS. Thank you, Mr. Chairman. Just a few seconds to commend you for holding this, what promises to be a most exciting hearing and to welcome, of course, Chairman Powell and the Commissioners to our subcommittee.

The issues basically have been laid out I think by all of the members and I am not going to go into that. I just would like to sort of apologize to the Commissioners and to my fellow members. This is what we call the Florida Federal State Summit Day where many of our State legislators have come up from Florida. They certainly didn't pick a very good day for it. But anyhow, they'll be meeting throughout the day. And because I Chair the Health Subcommittee, I am going to have to spend some time with those good people. But I do look forward to your testimony.

And my AA, who is also my legislative person on this issue, will be in here all day listening to your comments and taking notes.

Thank you, Mr. Chairman.

Mr. UPTON. Tell them to keep the orange prices down.

Mr. Stupak.

Mr. STUPAK. Thank you, Mr. Chairman. And thanks for holding this hearing, and to the Commissioners welcome.

And to Commissioner Adelstein, it is good to see you here as the newest member of the FCC Board.

First, I'd like to talk a little bit about the results of last Thursday's ruling. I would like to commend Commissioners Martin, Adelstein and Copps for their hard work in keeping competition in the voice market and preserving the authority of the States in determining the access competitors should have to UNEs, that is the unbundled network element. I believe that this access is critical to maintaining competition and benefits to consumers.

Consumers in my State of Michigan have benefited greatly from the unbundled network element platform known as UNE-P. In Michigan as of December 2002, 23 percent of the residential voice customers are served by competitors using UNE-P. As a result of this competition, unlimited local service by SBC has gone down from a price of $43 in 1999 to $14 as of June, 2002. There is no question that the UNE-P has greatly served Michigan's consumers, and I urge the members of this subcommittee to stand with the FCC majority and maintain their ruling to allow competition to continue.

I particularly agree with the FCC for adopting a State led granular analysis. Local market and geographic factors must be weighed in order to best achieve competition. However, I am perplexed that the same analysis was not used in the broadband arena. It seems to me, just as one size does not fit all in the voice market, a localized and market analysis is just as necessary in the broadband market. I object to the wholesale deregulation of broadband services and at the very least, I believe that a specific assessment should have been made as to the impact this deregulation would have on the ability of rural markets to obtain broadband.

I am also troubled that the broadband ruling by the FCC went even further than the Tauzin-Dingell bill some of you remember from the last few sessions of Congress. I did not support the Tauzin-Dingell Bill and its deregulation of the Bells. But even that bill, Tauzin-Dingell still preserved some degree of line sharing and made some attempt to contain build out requirements. I said at the time, and I still believe, that the Tauzin-Dingell bill went too far in deregulation and did not require enough in its build out requirements. For the FCC to take provisions in a bill that Congress did not pass and take this deregulation to an even greater degree is of great concern to me.

Members of this committee voted for build out requirements because of the belief that if the Bells are given such broad relief, they should be held accountable for their build out promises. I see no accountability now as a result of last week's ruling. In fact, I see quite the opposite.

In the last Congress Tauzin-Dingell was passed by the House in response to the Bells' promises that with regulatory relief for their broadband infrastructure, they would have the incentive they need to roll out broadband. Now the Bells have gotten the relief they sought, and even more, and yet they are telling us that broadband deployment is still not possible until the Bells receive even more relief from voice regulations.

I see a trend here: The Bells will deploy when they are assured monopoly status and profit guarantees.

Mr. Chairman, I see my time is up. I could go on and on, but I am sure we will get a chance to talk about other issues such as universal service, broadcast media ownership and ways which can best promote improving telecommunications in rural areas like mine.

Thank you.

Mr. UPTON. Thank you.

Mr. Bass.

Mr. Walden.

Ms. Wilson.

Ms. WILSON. Thank you, Mr. Chairman. And thank you also for holding this hearing.

I wanted to thank the Commissioners for coming and spending some time. And thank you for your service. I know that you and your staffs have spent a lot of time working on these issues and to try honestly to come to a position that you think is best for the country. And while there may be differences among you, as there are differences among us, they are not personal and they are not political. They are about policy and what we can best do to serve our constituents and the consumers of the United States.

I am not unfamiliar with these honest differences. Back in early 2001 Mr. Luther and I sponsored the amendment on line sharing, which failed in a tie vote. And there were strong feelings about what those provisions would do for consumers.

I also don't represent AT&T or World Com, or Qwest, for that matter. What I do try to represent are the constituents in a rural State in the mountain west who are, in some cases, very far away from a city that might offer broadband communications.

I think we're at a crossroads. And I think the real question now for the FCC and for the Congress, and for the President on building a broadband infrastructure for all Americans is this: Do we create a mandate for incumbents to deploy broadband and allow the return to the monopoly structure of the past or do we continue down the road for competition in all sectors of the industry and accept the ups and downs of that marketplace and give the consumers the benefit of good old American free enterprise? I tend to favor the later in both long distance and in local service.

I want to see competition, because I believe that competition brings better service and more choices for consumers.

I do think it is apparent that the continued competition in all sectors of the telecommunications industry is benefiting consumers. They benefit consumers in my state.

I was in Clovis, New Mexico on Monday. I am not sure anyone here in this room has ever been to Clovis, New Mexico, but it is kind of a major metropolitan area for eastern New Mexico. If you go about 2 hours north of Clovis to Des Moines, New Mexico, you could get DSL service there before you could get it in downtown Albuquerque.

I think competition and universal service brings choices to consumers that's not available when you have a monopoly that controls the system.

I want to see good jobs. I want to see broadband services, particularly in rural areas in places in New Mexico where most of us have never been. But I don't believe that an unbalanced policy will create jobs or increase investment.

And again, I thank you for your service, for your impassioned views, even when those views disagree.

Thank you.

Mr. UPTON. Thank you.

Mr. Dingell.

Mr. DINGELL. Thank you, Mr. Chairman, members of the Commission thank you.

Last week the Commission concluded a triennial review of its unbundled network elements rules. In that proceeding the Commission had the opportunity to issue a set of competition rules that could have had an enormous and positive impact on the telecom sector, one which is currently plagued by bankruptcies, lay-offs, decreasing revenues, declining investment and growing unemployment. I had high hopes that this Commission after having been twice reversed by Federal courts would get it right. I regret I was disappointed.

Most specifically, I had hoped that the Commission would eliminate the unbundled network element platform, a terrible policy and one that I can assure you was never contemplated by those of us who wrote the law.

I'd also hoped that the Commission would follow our direction to write the rules themselves and not simply and illegally delegate the authority to the States. But a misguided majority of the Commission failed on both counts.

The central goal of the 1996 Act was facility based local competition, because only facility based competition is sustainable. By allowing the unbundled network element platform to continue, the Commission has eliminated any incentive that certain companies might otherwise have to build their own networks.

Moreover, by ensuring that local phone prices will be set artificially low by the States, the FCC has made it much more difficult for companies that seek to build their own facilities to compete in the local marketplace. Unfortunately, the courts once again will have to sort through this mess while the American consumers and those who work in the telecommunications sector will suffer the consequences of this decision.

The decision last week did have one silver lining in that broadband portion appears to mirror much of what the committee sought to achieve last year in passing the Tauzin-Dingell Bill. I have read in recent days, however, that certain Bell CEOs have announced that they will not invest in advanced networks because they did not receive all the relief that they were seeking. I hoped that that is untrue.

I expect the Bells will use this new found regulatory freedom to do what they have promised, which is to invest rapidly and on a significant scale in local broadband networks. Such action, if taken, will lead over time to the creation of thousands of jobs and a much more competitive broadband marketplace.

Let me briefly address another important topic. The Commission will soon conclude a proceeding that appears to be aimed at weak-

ening or eliminating the present media ownership rules. The premise underlying this proceeding is that the emergence of new media platforms, and particularly cable and the Internet, has created so many voices that we don't need to worry about the tremendous consolidation that continues to occur in the industry.

Ladies and gentlemen of the Commission, I challenge that premise. While there has been an expansion of delivery systems, the most watched national news broadcasts, the most popular cable news channels, and the most visited websites for news and information are all owned and controlled by only a small handful of companies. While concerns over concentration in most industries are appropriately addressed through the anti-trust laws, Federal policy has long recognized that in a vibrant democracy, the consolidation of those entities who distribute information poses far more serious concerns then, for example, concentration of those who distribute toothpaste or mouthwash.

The Commission in its review of media ownership limits is required by law to promote competition and the public interest. The public interest analysis has long consisted of two components—localism and diversity. The Supreme Court recently upheld the Commission's authority in Turner Broadcasting System v. the FCC stating that protecting diversity is, "Governmental purpose of the highest order" ensuring the public's access to "a multiplicity of information sources." I support the Court's rational in Turner. I hope that the Commission will use it as a guidepost as it concludes these proceedings. I expect that I shall, and I like others up here, will try to hold them accountable if they do not.

I thank you for your kindness to me, Mr. Chairman.

Mr. UPTON. Thank you, Mr. Dingell.

Mr. Shimkus.

Mr. SHIMKUS. I'll defer, Mr. Chairman.

Mr. UPTON. Mr. Pickering.

Mr. PICKERING. Mr. Chairman, I would like to listen to the Commissioners first. I would defer to questions.

Mr. UPTON. Thank you.

Mr. Cox.

Mr. COX. Thank you, Mr. Chairman. Thank you for holding this hearing.

Thank you, Chairman Powell and the Commissioners for your time and your counsel as we consider how changes in regulation might encourage a rebound in the moribund telecom industry.

We're facing continuing declining investment in faster Internet connections by both incumbent service providers and their competitors. This is a recipe for continuing recession in these markets.

In the tech industry in my home State the familiar saying is that you've got to innovate your way out of recession. But without new investment, we're not going to have any new innovation and thus, there will be no end to the current malaise. For this reason not only the industry but the FCC has been under considerable pressure.

There's been a great deal of criticism of the FCC's new rules for telecom markets that you announced last week. Ironically, the rules appear to express the original spirit of Chairman Tauzin's efforts in the last Congress to encourage the deployment of high

speed broadband and to ensure that new markets aren't burdened by the antiquated regulations of the old monopoly telephone system.

Two years ago at this subcommittee's markup of Chairman Tauzin's Internet Freedom and Broadband Deployment Act, in April of 2001, the Chairman criticized restraints on local phone company entry into long distance and also criticized the policy of forcing incumbent local phone companies to offer their brand new broadband facilities on an unbundled basis to their competitors at prices dictated by government. The FCC appears to have taken those criticisms to heart. The Commission reports that in 2002 it approved 26 applications for Bell companies to enter long distance or so called inter-LATA markets.

And as for deregulating broadband, in the most recent action the Commission has removed all requirements for incumbent local companies to share new fiber connections with their competitors. For those of us dreaming of real broadband, not the one or two megabits per second of many current broadband services, but 100 or 200 megabits per second and the ability to make videophone calls or the ability to watch any movie ever made on demand, or any sporting event going on in the country in high definition, the new rules create a powerful incentive to invest in the next generation of broadband. Local phone companies now have the freedom to profit from investment in new faster connections while still being required to ensure competition in their existing voice telephone markets. These rules will encourage telecom companies to invest the marginal dollar in bringing fiber-optic cable deeper into neighborhoods—and we can reasonably hope—right into our homes, fulfilling the Chairman's goal of deregulated broadband.

To complement these new rules I urge the Commission to refrain from any new regulation of other broadband providers, including cable and satellite.

Finally, I'd like to take full advantage of Chairman Upton's gracious offer to allow a free-for-all at this morning's hearing. I am grateful that we're not constrained by a narrow agenda, and I would urge my colleagues to unite in opposition to the one policy that we all know would be disastrous for technology companies and consumers alike: new taxes on Internet access.

I urge my colleagues to support H.R. 49 to permanently extend the moratorium on Internet access taxes.

And I thank the chairman.

Mr. UPTON. Thank you, Mr. Cox.

Mr. Rush.

Mr. RUSH. Thank you, Mr. Chairman.

Mr. Chairman, I want to commend you on convening today's hearing. And today we have the opportunity to hear from the 5 FCC Commissioners on the state of the telecom industry. And as you know, the telecom industry is reeling from tremendous economic loss and its survival will depend on how several policy issues are addressed at the national level.

As we have witnessed, the Commission tackled one of these issues last week when it voted to continue UNE-P and deregulate the broadband market. However, I for one am dismayed that the Commission failed to include a provision that will require the

ILECs to build our broadband facilities to undeserved areas, in particular urban poor and rural areas.

I am also concerned that the Commission's decisions regarding UNE-P will have an unintended consequence and create a massive job cuts in the telecommunication sector. As I said, Mr. Chairman, the Commission will tackle several important issues this year including its revision of media ownership rules. The FCC's decision to relax its rules on media ownership or continue to caps will have a tremendous impact on our goal of promoting diversity and localism on our public airwaves.

I hope that when the time comes to review these rules, that the Commission remains committed to preserving diversity including diversity in ownership and the localism.

In regard to the e-rate program, I understand that the FCC has conducted investigations where it found that the e-rate program is riddled with fraud and financial abuse apparently due to deceitful contractors. In light of this news, I am looking forward to hearing the Commissioners' views on how they intend to solve this problem. I question the commitment of the FCC to administer this program fairly and efficiently when fraudulent individuals are receiving funding but legitimate institutions with legitimate needs are being denied access to the program based on minor technical irregularities on their application.

Mr. Chairman, I thank you. And I yield back the balance of my time.

Mr. UPTON. Thank you.

Mr. Sterns.

Mr. STEARNS. Good morning. And thank you, Mr. Chairman.

Let me welcome the Commissioners and appreciate your sitting here.

We have a new procedure if a person passes, then they pick up 3 minutes on their questions. So, you know, you're probably expecting more questions.

I think most people would agree it was just a half loaf, the final decision that you folks made. And we heard at our February 5 Telecommunications Subcommittee hearing about regulatory uncertainly. And, you know, quite frankly, after that decision I think we now have regulatory uncertainty again. You perhaps increased it with sustained judicial scrutiny. So I think that's probably one of the large disappointments of our members that you were given the authority in the Telecom Act to promulgate regulations, make decisive decisions and that I think as it turns out now, we're going to have more litigation, more judicial scrutiny.

The second point I would make is that in reference to what Chairman Powell said in his testimony, that "The Commission has yet to craft judicially sustainable unbundled network element rules. Furthermore, the Commission faced judicial setbacks in the areas of intercarrier compensation and reciprocal compensation." The Chairman continues with "The Commission lost its last 3 cases covering 5 rules in cable and broadcast ownership."

So I doubt that we will ever have regulatory certainty as a competing interest will continue to battle no matter what decision you're rendered, but I think the feeling was that it is got more litigious. You decision should not exacerbate the opportunities for liti-

gation and complicate things. And I think investment decisions are going to be a little more difficult now, and that's probably the key that all of us are worried about because the telecom industry is in such a disarray.

And the second point I mentioned earlier is that while the FCC can and should delegate certain authorities to the state, and I am a proponent of state's rights, we're dealing with a Federal statute where Congress seeded a tremendous amount of authority to the Commission and you used that authority. The Commission adopted the UNE-P approach without statutory authorization. So that's a concern of ours.

At the very least, the Commission should retain primary decisionmaking rule in determining the future of its own creation.

And last, Mr. Chairman, just in the last 38 seconds I have left, I want to talk a little bit about the ongoing Commission decision with ownership, media ownership rules. I have a bill in this area, and it is an issue I have been involved with since the 1996 Act and believe strongly that the FCC must address the ongoing changes in the media marketplace allowing for modernization in this market to continue. Along these lines I am introducing legislation again to ease some of these antiquated ownership restrictions, including cost ownership limitation and multiple ownership of TV broadcast stations. So I look forward to that review.

And, Mr. Chairman, I appreciate the hearing.

Mr. UPTON. Thank you.

Mr. Davis.

Mr. DAVIS. Mr. Chairman, I'll pass for now. Thank you.

Mr. UPTON. Ms. Eshoo.

Ms. ESHOO. Thank you, Mr. Chairman. Good morning to you. And to you, Chairman Powell and the entire Commission.

It looks like you made a decision that hasn't pleased anyone. Maybe there's something in that.

I appreciate this hearing being held this morning on the heels of the decision, the weighty decision that you made recently and to answer some of our questions about a number of issues that confront the telecommunications industry.

The policies of the 1996 Telecom Act were designed to lead to more consumer choice and lower prices while also opening up the telecom market to competition.

And to my friend Joe Barton, I was here, too, and I was one of the conferees on that. So I remember a lot of it, and I think that I have a good sense of what the intent of the Congress was.

The Act established, I think, an effective mechanism for growth based upon a model where competitors would be given an opportunity to share the networks of a historical monopoly while attracting customers and eventually building their own networks. Now, making parts of the monopoly network available on an unbundled basis was the key to encouraging the investment in new networks. Competitors being given the chance to compete against the established monopoly would then rush or hasten themselves into the market to compete with those monopolies.

The giant monopolies, despite their traditional reluctance to deploy innovative technologies, would feel compelled to then invest in order to keep up with their nimble competitors and not lose cus-

tomers. I think that's a pretty clear snapshot of it. And then the consumer would be the beneficiary. The investment of the new networks would lead to better quality, competition would increase consumer choices and consumers would pay lower prices.

So did the plan work? What happened? I think its impact was delayed by continuous litigation, a lack of enforcement and a reluctance to comply with the Act. But in States where competition has finally taken hold, consumers are enjoying lower prices. And companies that make use of this access are offering unique services to distinguish themselves from what the Bells are offering. That's why I was pleased that the FCC saw the benefit of retaining these rules as they relate to the unbundled network platform.

But I am confused about something, and that's the FCC's conclusion that the same analysis doesn't apply to broadband. I am not so sure, and you'll have obviously ample opportunity to answer this, why it makes sense to assure continued competition in voice services through leasing of certain network elements but with regard to broadband competition, that is eliminated by removing important elements like line sharing. I think our shared goal is to accelerate broadband deployment, and I think it appears that giving the Bells broadband relief was premised on the belief that they would then deploy advanced fiber networks. But over the last 5 years we've been told that companies don't have an incentive to invest in a new network if they must then share with its competitors.

So we've also been told repeatedly that this debate is about data and not about voice, because broadband is the key to reigniting our economy.

So I think that we're at yet another important juncture. I don't think any of the decisions that are taken are easy. They are not simple. And I'd like to believe that we all start with the basic intent to do, obviously, the best for our country. So I look forward to questioning the Commissioners both on E911, media consolidation and the issue that I raised in my opening statement.

Thank you, Mr. Chairman. And thank you, members of the Commission, for being here today.

Mr. UPTON. Thank you.

Mr. Terry.

Mr. TERRY. Defer.

Mr. UPTON. Mr. Fossella. Defers.

Mr. Gillmor.

Mr. GILLMOR. Thank you, Mr. Chairman. I'll simply enter my very profound statement in the record.

Mr. UPTON. Ms. Bono.

Ms. BONO. Defer.

Mr. UPTON. Mr. Whitfield. Defer.

This side, Mr. Wynn.

Mr. WYNN. Defer.

Mr. UPTON. Mr. Green.

Mr. GREEN. Mr. Chairman, I'll defer, but following my colleague Mr. Gillmor, I express the frustration at what we've seen. So I'll look forward to the questioning.

Mr. UPTON. Thank you.

That completes the opening statements from the subcommittee this morning.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. PAUL E. GILLMOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

I thank the Chairman for yet another opportunity to address the health of the telecommunications sector, and greatly appreciate FCC commissioners' participation today, in light of last week's unbundled network element (UNE) Triennial Review ruling.

Earlier this month, our subcommittee held a hearing where investors reconfirmed that the telecommunications sector continues to experience an economic slump. Yet today, after regulatory action has progressed to help remedy such circumstances, the question remains: How will the Commission's Triennial Review impact the financial state of service providers and equipment manufacturers, and more importantly, will it generate more certainty with industry spurring facility-based competition.

I am primarily concerned with the Commission's decision to grant states the authority to decide whether to spur competition between the ILECS and CLECS. Such a directive potentially creates administrative and cost-related burdens on state public utility commissions, incumbents, their competitors, and ultimately the consumer. This notion served evident soon after the FCC's decision last Thursday, as afternoon trading resulted in a loss for a number of respective telecommunications companies.

I am initially pleased with the Commission's actions easing restrictions that would have required incumbents to provide rivals discount access to fiber-optic lines, confirming a competitive broadband market that I hope will soon bring more investment and services to consumers. However, I do realize that there are many details that must be hammered-out and look forward to the FCC providing clarity to other issues such as the state's role in determining whether an incumbent must maintain its retired copper.

Again, I welcome the panel and look forward to your testimony, and yield back the remainder of my time.

PREPARED STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Thank you, Mr. Chairman.

I would like to thank you all for coming Today to share your views with the Subcommittee on the health of the telecommunications sector.

As you have recently completed the Triennial Review, deliberations that some have described as a contentious, I look forward to hearing your testimony and your reflections on last week's proceedings.

I hope in your testimony you will address the recent, precipitous fall of Telecommunications stocks in the wake of the FCC's order last Thursday. I hope you can convince me that the market deflation is not a proxy for those who put their money on the line to fund this critical sector—which is what it appears to be to me. The pain that was doled out on Wall Street was shared by animals of all stripes in the telecom sector. Are investors telling us this was a lose—lose order? The investor's actions are telling me there is still great uncertainty in telecom regulations. I hope you will all agree with me that in order for robust, affordable competition, the FCC needs to establish clear, consistent and judicially sustainable regulations. Absent that, the market may continue to voice its dissatisfaction.

Representing the entire state of Wyoming, I know firsthand how important telecommunications are to rural residents. We're the 9th largest state by area, but the smallest in population—just under a half a million. In fact, if you look in the dictionary under "rural" it reads "see Wyoming." Unfortunately, however, despite all the fabulous things Wyoming living provides, it is still rural America and, therefore, lags behind the rest of the country in comprehensive telecom choices and innovative telecom solutions. I would like to see that changed.

I look forward to your comments on how this most recent FCC action will connect more Wyomingites to the Internet through broadband connections and ensure that the full spectrum of telecom services are available to everyone back home, and in fact all across the rural west, commensurate with those in New York, Los Angeles and Washington, D.C. That is, in fact, the promise of broadband, to be connected and productive no matter where you choose to connect from.

I look forward to hearing your testimony and welcome you to the Subcommittee.

PREPARED STATEMENT OF HON. MARY BONO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

I would like to begin by saying that I am honored to be a part of the important work that this Subcommittee will face in the coming legislative session. I look forward to working with my colleagues to tackle the tough issues that affect consumers from every walk of life, every day of their lives.

My colleagues have made many important observations here today and I do not wish to be repetitive, but there are a few important issues that I do want to go on the record as having responded to today. The first issue is the critical importance to the telecommunications industry of regulatory certainty.

Throughout this broadband debate we have all heard from carriers of all shapes and sizes, urban and rural, incumbent and competitors alike. They have very different business plans and, as you know all too well, different opinions on the way competition should proceed. The one common theme among all of these disparate companies, however, is a strong and urgent call for regulatory certainty. Individual investors, Wall Street analysts and companies alike all demand it.

I fear that the recent FCC action on the Triennial Review threatens to exponentially increase regulatory uncertainty for the telecommunications sector. I fear lawsuits all across the country that will drag out resolution of these important issues for many years to come. Our world of digital packets of information traveling at the speed of light knows no geographic boundaries. However the resulting state-by-state patchwork of burdensome regulations threatens to pose yet another obstacle to getting reasonably priced broadband to our constituents.

The old adage is true, you can't make everyone happy, all of the time. But if we level the playing field and let the markets work, the smart people in these companies can at least develop business plans and investors can judge their strategy on the merits. These companies need some clear direction so they can plan their futures, adjust, adapt and deliver for their shareholders.

The constant ebb and flow of law suits, court decisions and legislative and regulatory changes at the federal, state and local levels must be brought into order. Unfortunately, it appears the recent Commission action only makes our troubling situation worse. I would urge you all to carefully consider the chilling effect that regulatory uncertainty has on investment, and ultimately our economy.

In this new era of rapidly advancing inter-modal competition, there are media ownership rules that similarly require careful examination to determine if they have been rendered irrelevant by the multiple and growing numbers of sources of information for consumers. I urge the Commission to carefully examine these rules and make prudent adjustments to those that have become irrelevant.

Finally, as you may know, I have written to the FCC to urge that you deny requests from states requesting the authority to implement technology-specific overlays that would require a take-back of wireless numbers. My own state of California comes to mind.

The bottom line is that consumers will not stand for a take-back of their wireless numbers. Consumers should not have to travel to their wireless phone store to have their numbers reprogrammed and then be burdened with the challenge of communicating their new number to friends, colleagues and loved ones. I recognize the serious nature of number exhaustion, but encourage you to continue to pursue successful approaches such as thousand block pooling to ensure that wireless customers are not unfairly discriminated against.

Just ten short years ago we watched as the telecommunications sector drove the greatest economic expansion in the history of the world. This House Energy and Commerce Committee along with you the Commissioners of the FCC and the Senate Commerce Committee hold the keys to the greatest economic engine the world has ever seen. The American people that are suffering through this depressed economy demand leadership. We must provide certainty and stability to the telecommunications sector so that our markets can work and drive our economy to greatness once again.

Thank you Mr. Chairman.

PREPARED STATEMENT OF HON. LEE TERRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. Chairman, today we find ourselves at a crossroads in the future development and economic viability of the telecommunications industry in this country. The industry continues to be faced with a complex regulatory scheme that stifles new investment and innovation. Unfortunately, it is the American consumer who loses.

Last week's decision by the Federal Communications Commission ("FCC") to clarify and fix the old rules and regulations was an opportunity lost. Instead of giving the financial markets a reason to cheer, the FCC managed to depress the prices of telephone companies and leave their customers and shareholders with more questions than answers about tomorrow's telecommunication world.

The FCC decision to permit states to fashion separate UNE rules opens up the prospect of creating 51 different sets of rules governing future investments and operations of telecommunication firms. Carriers are now using their limited financial resources to provide new services to customers but this decision will require them to stretch these resources even further to the detriment of better telephone service.

On most issues you will find me squarely in the camp of supporting the rights of states to regulate commerce within their borders. However, in 1996 Congress decided this issue the other way and preempted state regulation of the telecommunications industry. Congress established a policy of federal regulation of the industry, which in last week's decision the FCC appears to have overturned. Even Justice Antonin Scalia, a traditional state's rights advocate, has found the 1996 preemption by Congress of state jurisdiction in this area constitutional.

Mr. Chairman, FCC Chairman Powell, in his statement to accompany the Commission's decision last week stated that, "this 'Picasso-esque' state process would be 'chaotic'." Incredibly, the decision, opposed by Chairman Powell but supported by three commissioners, seems only to prolong this "chaotic" state of telecom regulation. The challenge to any company to create a new business plan to include a Competitive Local Exchange Carrier ("CLEC") has just been increased significantly by the uncertainty of this most recent FCC decision.

As economic disincentive continues due to the current complex regulatory scheme, I become even more concerned for the well being and preservation of those providing telecommunications service to rural America. Rural and non-rural telecommunications companies have been and continue to provide quality telecommunications services to customers in High-Cost areas. However, the Commission's decision does not bring clarity to the providers who continue to deploy broadband to these areas. In the end it will be the consumer who will be hurt.

In rural America, broadband is used as an economic incentive to bring companies into small towns, which allows these communities to grow and survive. The lack of investment in broadband and other telecommunications facilities will force many companies that rely on a solid broadband network to retreat into big cities where large broadband platforms already exist.

Rural consumers rely just as heavily on telecommunications services as do those consumers who live in larger cities, and the Telecommunications Act of 1996 was designed to make sure that all consumers had access to the same types of services. However, as the FCC moves forward in their rulemakings I am finding it harder and harder to understand why there continues to be a lack of future certainty in the prospects of quality telecommunications service for rural America.

Mr. Chairman, today's hearing is timely and will give the subcommittee a good record on which to address many of the questions left in limbo by the FCC's decision. I look forward to working with the chairman and my colleagues as we try to find the right answers to guide the future of the telecommunications industry.

PREPARED STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman: As I have read the news story's concerning the recent FCC decision impacting our local broadband and phone service, I cannot help but feel disappointed.

The Commission had a great opportunity to promote better broadband access for consumers, spur technology investment, and promote competition.

Unfortunately it did none of the above.

Instead the Commission punted to 51 local Public Utility Commissions and threw the fate of an entire industry back into the black hole of regulation.

No regulatory relief was granted from the below cost pricing of the Unbundled Network Element rates that are draining the Bell companies dry.

The muddled broadband relief granted to new fiber leaves a lot of questions that will hinder fiber to home deployment.

Most importantly and what is causing me the greatest concern is how Wall Street perceived the FCC decision.

I can say with good certainty that there review was not positive.

Blake Bath, recent subcommittee witness from the Wall Street investment firm Lehman Brother, essentially says this ruling severely wounds the Bells.

It creates significant regulatory uncertainty that will scare off new capital investment in the sector.

Scott Cleland with the Precursor Group spelled it out in even clearer term when he said and I quote, "The FCC majority chose more government price reductions for consumers over stimulating job creation and investment."

What is important to take away from this statement is that while consumers may enjoy a short and temporary price reduction for the telecommunications services, it will be just that—short and temporary.

Every Bell with the exception of maybe Verizon is losing money on the UNE front and nothing lives forever if it is constantly losing blood.

When the 96 Telecommunications Act was passed there was a clear intent to foster facilities based competition, it now appears that we are abandoning that goal.

Going forward, I expect this ruling to be a bonanza for the legal community in this town and that eventually the federal courts will do the job each of you was supposed to do.

While I have read each of your statements and understand that you each had only the best intentions, this ruling is going to be a disaster for the American consumer.

You have done nothing to spur new investment and have in fact inflicted severe financial harm on all the major players left standing in the technology arena.

It is my sincere hope that Energy & Commerce Committee immediately make plans to correct this flawed decision through legislation since a regulatory solution is no longer possible.

Thank you Mr. Speaker and I yield back the balance of my time.

PREPARED STATEMENT OF HON. RICHARD BURR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. Chairman, I appreciate the opportunity to submit my views on the health of the telecommunications sector.

I am especially pleased that Commissioners from the Federal Communications Commission (FCC) are here to share their thoughts on this subject. Certainly, there is a great deal of interest from many people, including Members of this Committee, to learn about some of the details of the Triennial review. Quite frankly, I think that this Subcommittee is owed a more detailed explanation of not just what happened, but why.

As a lawmaker, it is my goal to improve the lives of my constituents and promote fair and equitable solutions in matters of public policy. As a regulator, it is your job at the Federal Communications Commission to implement the will of this body, and again, to improve the lives of all Americans and promote fair and equitable solutions in matters of public policy.

Most people don't care about how the phone works, how switching is priced, or that UNEs are bundled or unbundled. But, what they do care about is that we, the people in this body, and you, the regulators, get it right. It is our job to ensure that telephone and broadband services are affordable and available to the American public.

I do not believe that the FCC got it right. In fact, I believe the FCC foolishly ceded its responsibility to act and passed the buck to state regulators in the name of federalism. A gross distortion of the term, I might add. A proven federalist, Justice Antonin Scalia clearly determined the 1996 Telecommunications Act to be federal in nature and that the Act did not grant authority to states to make regulatory decisions.

It is clear to me that the Commission has willfully defied the intent of this body on several aspects in their Order. The FCC is required by Section 251(d)(2) of the 1996 Act to prescribe national rules for network elements. The Order instead gives state regulators the authority to determine which network elements must be made available and which do not. In the end, the consumer suffers because UNE-P is unsettled and Incumbent Carriers will resist additional investment in equipment and infrastructure that must be sold at garage sale prices.

As regards the broadband relief granted in the Order, I concur with Chairman Powell. The Commission did take a substantial step forward. Under leadership from our distinguished full Committee Chairman, Billy Tauzin and Ranking Member John Dingell, I believe that this Committee helped to push that debate and force positive action. It is, however, unfortunate that such laudable action will go unrealized. The health of the telecommunications sector will not even remain status quo, but will in all likelihood go from bad to worse as a result of this Order. Jobs in western North Carolina will be lost because companies like Nortel, Lucent, and Corning cannot sustain in the current market.

People may not be able to tell you how the telephone works, but they sure can tell you how it feels to be unemployed. I am inclined to ask my Chairman to consider legislation to address the serious deficiencies in the Order. It is my hope that it is not too late.

Before I close, I would like to address one additional matter. As the Commission continues to review the national ownership 35 percent cap, I hope that they will this time bear the consumer in mind. This nation needs more voices in broadcasting and our local broadcasters need the ability to serve the needs of each individual community. I admire the conviction of a North Carolina broadcaster, Jim Goodmon, who made the decision to remove the show Temptation Island from the programming schedule. Clearly, his principles are in the public interest unlike those who choose to disregard the will of Congress.

PREPARED STATEMENT OF HON. ROY BLUNT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

My plan had been to come to the hearing and make a congratulatory statement, thanking the Commission for finally doing something positive to revive the telecommunications sector and thereby, beginning to reverse the telecommunications meltdown that we have been experiencing.

Regrettably, I am compelled this morning to make a far different statement than I had intended, because I was truly distressed to learn last Thursday, **"Black Thursday",** the outline of the Commission's Triennial Review decision.

As best that I can figure out from assessing the public materials provided by the Commission, Wall Street's reaction to the decision and the media accounts of it, I believe that far from reversing the meltdown, the Commission majority may have succeeded in further exacerbating it.

Chairman Powell last October alerted the Congress to the abysmal financial condition of the telecommunications industry with 500,000 jobs lost, $2 trillion in market value extinguished and telecommunications companies laboring under $1 trillion in debt.

This is one of the most vital sectors of the economy, not only as a financial engine to drive the economy towards recovery, but also vital to national and homeland security. What did last Thursday's Triennial Review decision do to remedy this situation and engender revitalization? Well, since Thursday's decision through Monday, the market capitalization losses in the telecommunications sector have been $21.7 billion.

The Commissioners who sit before us today are entrusted with promoting competition and reducing burdensome regulations in the communications arena. This is not a foreign concept to them. In fact, Commissioner Martin testified before the Senate Commerce Committee last month, that "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 will only aggravate current market conditions and prolong the angst and uncertainty that surround the deployment of advanced services" (Commissioner Kevin Martin). Still yet, Commissioner Copps testified "part of the market's problem is uncertainty about policy directions on such things as competition".

Regrettably some of the commissioners say one thing and believe another with the end result being uncertainty and ambiguity driving forces of litigation to come. As has been the case at every step since Congress in 1996 directed the FCC to write rules promoting local phone competition. The FCC's two previous attempts to devise rules that could withstand court review failed.

FCC Commissioner Abernathy predicted that lawyers will "thrive" while carriers become "mired in a regulatory wasteland." Chairman Powell believes the decision "will prove too chaotic for an already fragile telecom market" and will produce "a molten mass of regulatory activity." Furthermore, he sees a legal quagmire in the new state-oriented rules, predicting "51 major state proceedings . . . litigated through 51 different federal district courts . . . likely to be heard by 12 Federal Courts of Appeals . . . eventually back in the Supreme Court."

The last thing this sector needs is more ambiguity and uncertainty. Particularly as the Commission will address local competition, broadband deployment, broadcast ownership reform, homeland security, and 21st Century spectrum policy.

Unfortunately, our Commission has failed to seize the golden opportunity to reverse the disastrous regulatory policies of the Clinton/Gore FCC. I hope the same does not happen in the coming months.

Mr. UPTON. We welcome the Honorable Kevin Martin, Commissioner of the FCC, the Honorable Michael Copps, Commissioner of the FCC, fellow Commissioners, the Chairman of the FCC Mr. Michael Powell, and Commissioner Kathleen Abernathy and Commissioner Jonathan Adelstein.

I would just note for the record that because we have such member interest today, I am going to be watching this time clock with great scrutiny. And your statements, thank you for sending them up early. We were able to review them the last day or two. Your statements will be made part of the record in its entirety. And we would like to limit your remarks, therefore, to 5 minutes each.

And I would note for the members that when we get to the question and answer period, I really want to see your questions completed by the time that 5 minute mark hits and we will let the members of the Commission respond to those.

We're going to go in the order of seniority for the testimony now, starting with Mr. Powell.

STATEMENTS OF HON. MICHAEL K. POWELL, CHAIRMAN; ACCOMPANIED BY HON. KATHLEEN Q. ABERNATHY, COMMISSIONER; HON. MICHAEL J. COPPS, COMMISSIONER; HON. KEVIN J. MARTIN, COMMISSIONER; AND HON. JONATHAN S. ADELSTEIN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. POWELL. Thank you, Mr. Chairman.

In the interest brevity, I will read a reduced version of my statement and ask that the full statement be submitted to the record.

Good morning, Chairman Upton, Congressman Markey and distinguished members of the Telecommunications and Internet Subcommittee. Thank you for inviting me and my colleagues to discuss the state of the communications marketplace and the Federal Communications Commission's agenda on which we have embarked to meet the challenges of the changing communications marketplace.

Two years ago I had the privilege of appearing before this subcommittee for the first time as Chairman and noted the enormous challenge of leading the Commission through a period of momentous change in the communications industry. Now, as then, the most formidable task confronting the Commission is recognizing and responding to the fundamental fact that each industry segment in our extensive portfolio is in the throes of revolution. There is new innovation, new markets, new competitors, and, equally important, new regulatory challenges.

Over the course of the last 2½ years, the telecom industry has faced many hardships—most of which are the result of financial and economic pressures, misaligned expectations and competitive pressures. That said, there are some bright spots that provide hope for the sector generally and for the American public specifically. On a going-forward basis, however, great uncertainties continue to plague the entire sector, casting a wide shadow over those bright spots and hindering the recovery of the sector, and in some measure, the economy as a whole.

Clearly, the telecom industry, which accounts for anywhere from 14 to 16 percent of our Nation's GDP, is suffering. By now we are all too familiar with the fact that by estimates 500,000 jobs have

been lost and approximately $2 trillion of market value vanished. Uncertainty looms large as announcements of layoffs have not slowed, as investors have generally shied away from the sector and industry players have continued to dramatically scale back capital investments. As I have often stated, the Commission must work to bring some stability to this industry. That means decisions that are faithful the 1995 Act and that withstand judicial scrutiny; decisions that focus on producing consumer welfare; decisions that align incentives for investment in facilities; decisions that walk away from past policies of government engineered competition and regulatory arbitrage.

Last week, I think the Commission had the opportunity, through the Triennial Review decision, to reverse the tides of industry uncertainty and unrest by providing a regulatory framework to stimulate long-lasting consumer benefits, sustainable competition, investment, innovation and economic growth. Although we made noble strides in the area of broadband infrastructure deployment, the Commission chose a course in some of its decisions that will cause further unrest for the industry with the ultimate loser being the American public.

I have long held that the developments and deployment of broadband capable infrastructure to all Americans is the central communications policy objective of our day. Last week, the Commission took a substantial step in our broadband agenda—focusing principally on new infrastructure investment in the traditional last mile telephone network—a vision that Congress shared is shared by the Commission.

By relieving incumbents from unbundling obligations for future broadband investment, the Commission aligned incentives to invest with the inherent risks and costs associated with broadband infrastructure investment. The result, over time, should be more broadband capable infrastructure to more Americans.

But despite our efforts to spur investment in next-generation broadband, I fear the Commission has taken two actions that will hinder the realization of the investment and the concomitant benefits it will bring to our Nation's citizens and economy. I fear that the majority's elimination of the line sharing unbundled element and its decision to abdicate its statutory responsibility with regard to the switching element flies in the face of the explicit congressional goals of bringing American public new infrastructure investment and innovation and meaningful competition, and it flaunts the admonitions of the judiciary.

The majority's decision to eliminate line sharing is of immediate concern. Line sharing has given birth to facilities-based competitive broadband telecom carriers and has provided a valuable source of input for broadband Internet service providers. The result has been lower prices for broadband users and as a result, increased demand. I fear that the majority's elimination of line sharing strikes a blow to facilities-based competition.

In addition, I fear that a result of this action will cause higher prices for broadband Internet access subscribers. Furthermore, I do not accept the argument that the elimination of line sharing provides an affirmative incentive for ILEC deployment of new broadband infrastructure. Line sharing rides on the old copper in-

frastructure, not the new fiber facilities that we are seeking to advance to deployment. For these reasons, I could not accept the majority's decision to eliminate this element.

In opening this proceeding the Commission committed itself to conduct a thorough review of the unbundling regime. This review took on greater importance in light of the bursting of the telecom bubble and subsequent economic hardships facing the telecom industry and the D.C. Circuit's USTA decision to vacate for a second time in 7 years the rules that unbundled virtually every element in the network. In light of that decision and its predecessor from the Supreme Court, the Commission has changed its charge with restructuring the list of unbundled network elements from the ground up.

It is with this backdrop that the Commission considered whether or not in which markets to unbundle the switching element. Unfortunately, a majority in essence decided not to decide at all. Instead, handing over its clear statutory obligation to 51 State public utilities commissions. In doing so, I look in vain to find a clear coherent or consistent Federal policy driving that decision. Indeed, the truth is that in the course of our deliberations we never really addressed the merits of whether a competitor was actually impaired without access to the switching elements and therefore should be unbundled. Instead, the focus of the decision was merely on giving the States subjective and unrestricted role in determining the fate of the switching element, and therefore the UNE-P platform.

The result, what nearly every industry observer calls the "full employment act for telecom lawyers" violates every principle I have ever stood for in addressing regulatory reform in this space. It is legally suspect, in my opinion and does little to reduce regulation, as required. It is a gross step back from facilities-based competition, the most proven form of consumer welfare producing competition in the telecom sector. It is harmful to the recovery of the economy, and our Nation's economy. And, most importantly, it is harmful to consumers in the long run.

The approach adopted by the majority to my mind suffers from several fundamental legal flaws. Indeed, as I mentioned above, there seems to be no logical Federal policy driving the decision. In a regime that allows for unfettered and unreviewable State discretion, one can only assume the Commission as an affinity for UNE-P which in turn can only suggest that the Commission for a third time as adhered to the more unbundling is better approach, an approach that has twice been rejected by the courts and flies in the face of the mandate.

Mr. UPTON. Time is up.

Mr. POWELL. Give me 2 minutes and I will be done.

Mr. UPTON. Well, remember your statement is part of the record.

Mr. POWELL. All right, Mr. Chairman. I will just briefly summarize.

Mr. UPTON. I give you a couple of little extra seconds in summary.

Mr. POWELL. All right, I'll take my comments in summary.

The most devastating part of this decision is nobody wins. The clear import of it is we will await many years to see what the uncertain resolution of these proceedings will be as to whether ele-

ments will be available or not. The investment community has spoken as to how it views this decision downgrading substantially the sector.

And so with this, I will look forward to your questions and hope that we would continue to have a constructive relationship with the subcommittee.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Michael K. Powell follows:]

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

Good morning, Chairman Upton, Congressman Markey and distinguished members of the Telecommunications and the Internet Subcommittee. Thank you for inviting me and my colleagues to discuss the state of the communications marketplace and the Federal Communications Commission's deregulatory, pro-competitive agenda on which we have embarked to meet the challenges of the changing communications marketplace.

I. INTRODUCTION

Two years ago, I appeared before this Subcommittee for the first time as Chairman and noted the enormous challenge of leading the Commission through a period of momentous change in the communications industry. Then, as now, the most formidable task confronting the Commission was recognizing and responding to the fundamental fact that each industry segment in our extensive portfolio was in the throes of revolution. There was new innovation, new markets, new competitors, and, equally important, new regulatory challenges.

Soon after I began my tenure as Chairman, I laid out the Commission's agenda. The theme that bound the agenda, and encapsulated the enormity of the Commission's overall responsibility, was "Digital Migration." That is, we were and continue to be at a critical crossroad in communications as technology drives us to cross over from the predominately analog realm to the digital world of the modern era. With regards to mature legacy networks, we understood the basic technology and infrastructure elements, their cost characteristics, the service and product offerings, the consumer's wants and expectations, and the role of government intervention to frame overall policy. In the relatively nascent digital world, however, the new advanced architectures and technologies are just beginning to be understood and deployed, with no clear winning technology or industry. The cost characteristics may differ substantially from those of traditional networks to which we are accustomed. The industry, the capital markets, and the Government collectively find themselves navigating the uncharted terrain of dynamic and chaotic experimentation.

In the ensuing two years, our job has become more difficult as the entire communications sector has been battered by the economy's downturn and the bursting of the dot-com and telecom bubbles. Our task to faithfully implement Congress' vision took on added responsibility as the winds of uncertainty—both financial and legal—swirled continually through the market and the courts. Indeed, on the heels of the sector's decline, the Commission had to confront the rash of bankruptcies to ensure that American consumers and other critical end-users were not significantly impacted by service discontinuances. Additionally, over the last year, the Commission and the country was faced with the scourge of corporate fraud that has been cast by corporate wrongdoers—causing further financial difficulties and WorldCom's bankruptcy, the largest bankruptcy in United States' history. Again, faced with unanticipated convulsion, the Commission enumerated critical steps in furtherance of reform and recovery that the agency, Congress, the Administration, and companies and firms within the industry could undertake.

Our collective challenge has obviously ballooned beyond merely transitioning from the old to the new, stewarding the implementation of our governing statute, and safeguarding the venerable principles of communications policy—e.g., public interest, universal service, competition and diversity. Yet, as I learned in my previous career as a soldier difficulty is a supreme challenge, not an easy excuse. In fact when I set out in my Chairmanship, I expressed a commitment to engage the "hard issues"; those that were complex, difficult and controversial, but nonetheless desperately needed to be addressed by the Commission to bring certainty and more stability to the market. The Commission began to execute this daunting agenda after long and careful planning, with last week's adoption of the Triennial Review Report and Order. Still to come we will tackle a bevy of proceedings and initiatives dedi-

cated to local competition, broadband deployment, broadcast ownership reform, homeland security, and 21st Century spectrum policy. In doing so, I will continue to be guided exclusively by the public interest, and resist the pressure to view our exercise as awarding benefits and burdens to corporate interest.

Flowing from the public interest, my guiding principles in implementing the will of Congress 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.

In the end, these proceedings will shape the communications landscape for years to come. My sincere desire is that the Commission will achieve the right decisions and promulgate rules that will fundamentally provide regulatory clarity and certainty, survive judicial scrutiny and promote long-term sustainable competition and growth to serve the public interest. With this backdrop, I will briefly discuss the health of the telecommunications sector and leave you with some of my thoughts and, in some areas, concerns regarding the Commission's first big decision of the new year—the Triennial Review.

II. HEALTH OF THE TELECOMMUNICATIONS SECTOR

Over the course of the last two and a half years, the telecommunications industry has faced many hardships—most of which are the result of financial and economic pressures, misaligned expectations and competitive pressures. That said, there are some bright spots that provide some hope for the sector generally and for the American public specifically. On a going-forward basis, however, great uncertainties continue to plague the entire sector, casting a wide shadow over those bright spots and hindering the recovery of the sector—and in some measure, the economy as a whole.

Clearly, the telecommunications industry, which accounts for anywhere from 14-16 percent of our Nation's GDP, is suffering. By now we are all too familiar with the fact that by some estimates some 500,000 jobs have been lost and approximately $2 trillion of market value has vanished. In some segments, the industry has experienced over-capacity and over-investment in certain markets and aggressive, and some argue unsustainable, pricing wars. We have witnessed accounting scandals; an acute focus on paying down the nearly $1 trillion of debt carried by telecommunications companies throughout the world; inefficient industry structures; lack of investor confidence; capital markets closing the door to new investment; and companies retrenching by aggressively cutting capital spending and jobs. Given the interconnected and inter-dependent nature of the telecommunications industry, the industry pain has been felt by nearly everyone—from equipment vendors to service providers. One looks around in vein searching for anyone prospering in the sector.

Still, as we look out at 2003, there are some bright spots for the industry and for consumers. To begin with, demand for communications service continues to rise and in turn so has network traffic, though companies are learning that revenues do not increase proportionally with demand. Yet in the wireline phone space we have actually seen declines in the growth of access lines over the last two years—for only the second time in history—the first being in 1933. In addition, digital migration is allowing service providers to deliver new and innovative services to consumers—from broadband Internet access services to wireless services to new video services—ushering in a new era of competition to the benefit of consumers.

Indeed, in the local phone space, nearly 16.7 million customers are served by facilities-based competitors, a combination of partial facilities-based CLECs (over 4 million lines) and full facilities-based carriers (over 6.2 million lines from cable operators and other full facilities-providers). In addition, a whole generation is being encouraged to "cut the cord" completely—and they are doing so, as an estimated 6.5 million customers use their wireless phone as their only phone. In the wireless space, six national facilities-based carriers are vigorously competing for the 129 million consumers who subscribe to wireless services (as of June 2002). Furthermore, long distance continues to see intense and increasing competition, with some estimates that rates have fallen 33 percent over the course of the last 3 years alone. Competition in the broadband Internet access space continues to flourish and put pressure on wireline revenues (by providing an alternative to second lines and in

limited, but growing circumstances, primary line local and long distance voice services). Over 16 million households subscribe to residential broadband Internet access and that number is growing.

Despite these gains and bright spots, substantial uncertainty continues to plague the industry. There is uncertainty about the disruptive change wrought by new technologies, and, of course, there is massive regulatory uncertainty that has sprung from repeated judicial setbacks in our regulation of local competition and the broadcast media ownership space. Indeed, in the seven years since the passage of the Telecommunications Act of 1996 (1996 Act), the Commission has yet to craft judicially sustainable unbundled network element (UNE) rules, as the Commission's first two attempts were vacated. Furthermore, The Commission faced judicial setbacks in the areas of inter-carrier compensation and reciprocal compensation. On the media side, the Commission has lost its last three cases covering five rules in cable and broadcast ownership regulation in the appellate courts, effectively toppling over the Commission's last biennial review of the broadcast media ownership rules.

This uncertainty looms large as announcements of layoffs have not slowed, as investors have generally shied away from the telecommunications industry and industry players have continued to dramatically scale back capital investments. As I have often stated, the Commission must work to bring some stability back to this industry. That means decisions that are faithful to the 1996 Act and that withstand judicial scrutiny; decisions that focus on producing consumer welfare; decisions that align incentives for investment in facilities; decisions that walk away from past policies of government engineered competition and regulatory arbitrage. We simply must get back to the economic and regulatory fundamentals envisioned by Congress. Today, the market does not rule, nor does the central planner—the courts' alone rule the telecommunications valley, as bad regulatory decisions have put judges front and center. The 1996 Act hoped to slow judicial oversight and the reign of Judge Greene, yet it has failed utterly in that regard.

III. TRIENNIAL REVIEW—ONE STEP FORWARD, TWO STEPS BACK

Last week, the Commission had the opportunity, through the Triennial Review decision to reverse the tides of industry uncertainty and unrest by providing a regulatory framework to stimulate long-lasting consumer benefits, sustainable competition, investment, innovation and economic growth. Although we made noble strides in the area of broadband infrastructure deployment, the Commission chose a course in some of its decisions that will cause further unrest for the industry with the ultimate loser being the American public.

The Step Forward—Broadband Relief

I have long held that the development and deployment of broadband capable infrastructure to all Americans is the central communications policy objective of our day. The march from analog to digital—what I have often referred to as the digital migration—is at the heart of the Commission's agenda under my leadership. In no area is the migration more profound or promising than in bringing broadband capable infrastructure to all of our Nation's citizens.

Last week, the Commission took a substantial step in our broadband agenda—focusing on new infrastructure investment in the traditional last mile telephone network—a vision of Congress that is shared by this Commission. Specifically, our decision to provide broadband unbundling relief should set the stage for long-term investment in next generation broadband infrastructure, bringing a bevy of new services and applications to consumers. By refraining from unbundling new advanced network infrastructure, the Commission aligned incentives to invest with the inherent risks and costs associated with broadband infrastructure investment. The result, over time, should be more broadband capable infrastructure to more Americans.

The Two Steps Back: Line Sharing and Switching

Despite our efforts to spur investment in next-generation broadband infrastructure, I fear that the Commission has taken two actions that will hinder the realization of that investment and the concomitant benefits it will bring to our Nation's citizens and economy. Indeed, this sentiment was expressed following the decision by Wall Street analyst Jeffrey Halpern of Bernstein Research, who said that the Commission's "intention to relieve some of the pressure on the RBOCs in order to spur investment and drive technological innovation and broadband infrastructure deployment are almost dead on arrival." I fear that the majority's elimination of line sharing UNE and its decision to abdicate its statutory responsibility with regard to the switching element flies in the face of the explicit Congressional goals of bringing

the American public new infrastructure investment and innovation and meaningful competition. Moreover, it flaunts the admonitions of the judiciary.

Line Sharing—Although few of the Commission's actions in implementing the Telecommunications Act of 1996 have produced identifiable benefits to the American public, line sharing has been a success. Line sharing has given birth to facilities-based competitive broadband telecommunications carriers. These line-sharing CLECs have, in turn, provided a valuable source of broadband transmission services to independent internet service providers, such as Earthlink. Indeed, by some estimates, as much of 40 percent of the broadband transmission inputs bought by independent broadband ISPs are procured by facilities-based CLECs. The result has been lower prices for broadband consumers, most notably in the last year—and, of course, with lower prices we have seen continued strong growth in adoption rates even in the face of a down economy. The majority's determination to eliminate line sharing through a three-year phase out that is defined by higher wholesale prices is of immediate concern.

First, the elimination strikes a blow to facilities-based competition and will likely result in higher retail broadband Internet access prices for consumers in the near-term. By limiting facilities-based competition in this space, as the majority has effectively done, the Commission has at best provided no incentive for retail DSL Internet access providers to lower prices and at worst provided an incentive for the large providers (i.e., ILECs and cable operators) to increase retail prices. The majority's action in this space not only turns a blind eye to consumers, but also drives a stake in the Bush Administration's focus on spurring demand and take-rates for broadband Internet access service.

Second, the elimination of line sharing and the resulting elimination of competition in the broadband space could very well provide a disincentive for ILEC investment in next generation architecture. If nothing else, the elimination of line sharing cannot credibly be viewed as an incentive for new infrastructure investment. Line sharing rides on the old copper infrastructure, not new fiber facilities that we seek to advance to deployment. The presence of line sharing would have provided an incentive for ILECs to invest in fiber networks faster so that they could migrate toward a less regulated environment. Instead, the majority has defied all logic by choosing a course of stepping back from facilities-based competition, stepping back from lower retail broadband Internet access prices and wholesale broadband transmission prices, and finally, in stepping back from providing positive incentives for ILECs to upgrade broadband infrastructure. One fails to see where the public interest was served in this decision.

Switching—In opening this proceeding, the Commission committed itself to conduct a thorough review of its unbundling regime. This review took on greater importance in light of the bursting of the telecom bubble and subsequent economic hardships facing the telecommunications industry and the D.C. Circuit's *USTA v. FCC* decision to vacate, *for a second time,* the rules that unbundled virtually every element in the incumbents' networks. In light of that decision and its predecessor from the Supreme Court, the Commission was charged with reconstructing the list of unbundled network elements from the ground up. In the course of our review, the switching element became the focus of the debate—with over 1,300 competitive switches deployed throughout the country.

The importance of the element, however, is not in its functionality, but in the fact that it represents the capstone of the unbundled network element platform. If the switching element is available on an unbundled basis, a carrier has the option of reselling the entire incumbent's network, at heavily subsidized rates set by regulators, without having to provide any of its own infrastructure. In short, it can enter the market without bringing anything of its own to the party. Since this proceeding began in December 2001, several carriers, most notably the major long distance companies have aggressively attempted to enter the local market using UNE-P.

It is with this backdrop that the Commission considered whether or not, and in which markets, to unbundle the switching element. Unfortunately, a majority of the Commission, in essence, decided not to decide at all—instead, handing over its clear statutory authority to 51 state public utility commissions. In so doing, one looks in vain to find a clear, coherent or consistent federal policy driving its decision. Indeed, the truth is that in the course of our deliberations we never addressed the merits of whether a competitor was actually impaired without access to the switching element and therefore the element should be unbundled. Instead, the focus of the majority was merely on giving the states a subjective and unrestricted role in determining the fate of the switching element, and therefore UNE-P.

With regard to switching, the result—that nearly every industry observer calls a "full employment act for telecommunications lawyers"—violates each and every principle I have long outlined in addressing regulatory reform in this space as it:

(1) is legally suspect, in my opinion and does little to "reduce regulation," as required by Congress; (2) is a gross step back from facilities-based competition, the most proven form of consumer welfare producing competition in the telecommunications sector; (3) is harmful to the recovery of the telecommunications economy and our Nation's economy; and, most importantly, (4) is harmful to consumers in the long run.

Legally Perilous

A majority of the Commission chose in the case of the switching element to delegate nearly unbounded authority to state regulators to determine whether a competitor is impaired without access to the incumbent's switching element. Over the course of the next nine months, 51 state public utility commissions will embark on 51 separate and distinct proceedings to determine whether economic and operational barriers to entry exist in a market defined by the state and pursuant to nothing more than federal suggestions for review by the states.

The approach adopted by the Commission suffers from several facial fundamental legal flaws. Indeed, as I mentioned above, there seems to be no logical federal policy driving the Commission's decision. In a regime that allows for unfettered and unreviewable state discretion, one can only assume that the majority has an affinity for UNE-P, which, in turn, can only suggest that the Commission for the third time has adhered to "more unbundling is better" approach—an approach that twice has been rejected by the courts and that flies in the face of the D.C. Circuit's mandate.

Furthermore, the Commission fails to adopt any meaningful limiting principle, as required by Congress and the courts, with regard to switch unbundling. The Commission places switching on the list to be unbundled in the mass market not because of an affirmative finding of impairment, as required by the statute and the courts, but because it "presumes" impairment. More remarkable, even where it "presumes" no impairment it permits some switching for the three months during which a state may rebut the presumption. No affirmative finding of impairment by the Commission as the statute requires—just presumptions and a laundry list of criteria that a state must review in an effort to find or not find impairment as the state sees fit. This is exactly the regulatory bias twice rejected by the courts.

In addition, the majority fails to apply the very impairment standard adopted by the Commission and applied to every other element under review. Instead of applying the standard to make a judgment on impairment or under what conditions economic or operational impairment exist, it opines only on "factors" that may or may not lead to impairment. Finally, I am somewhat concerned about discussions from some state regulators suggesting states could collaborate or seek guidance from other state proceedings on this issue, much like the 271 process. One fails to see how even this Commission could accept the legality of such collaboration when reviews and findings must be based on the granular state specific findings, according to the majority. For this reasons, as well as others, I fear the Commission may soon find itself in the embarrassing position of having its unbundling regime vacated for a third time.

Abandoning Facilities-Based Competition

Stepping back, the Triennial Review is at bottom about the nature of the competition that Congress and the Commission are trying to incent. It has long been my view that facilities-based competition (both full and partial) has produced the most welfare for consumers (through lower prices and differential product offerings), provides for positive investment for our economy, creates jobs and provides us with valuable infrastructure alternatives in the face of threats to our homeland. As is the case in line sharing, the Commission turns its back on facilities-based competition. By setting up a state review regime where an apparent acceptable outcome is unbundled switching (and therefore UNE-P) in perpetuity, the Commission retreats from its previously stated policy of promoting facilities-based competition.

One can see on its face why a CLEC that has access to each and every element in the ILEC network at deeply discounted rates would choose simply to resell the ILECs' network as opposed to investing in equipment, such as a switch. How could we expect a CEO to look at his board of directors with a straight face and explain a desire to expend capital on equipment when it could be rented for next to nothing? In addition, this access provides a direct disincentive to those, like cable companies, that might otherwise use their own facilities to enter the market. Indeed, one analyst stated that as a result of the decision last week to perpetuate the life of UNE-

P "cable at least would have little appetite to invest in a market where several competitors already existed for consumer voice." [1]

Harmful to the Industry; Harmful to the Economy

Equally as troubling is the impact the Commission's decision, or more accurately indecision, will have on the telecommunications industry and our economy. As an initial matter, a failure to implement a regime with any meaningful transition to invest in facilities is a clear negative to telecommunications equipment manufacturers—the historical source of research, development and innovation in the U.S. telecommunications sector and the segment of the telecom economy hit the hardest over the last two years.

Furthermore, one can expect continued regulatory uncertainty to accompany 51 state proceedings that may be litigated in 51 different federal district courts where the perceived aggrieved party will surely take its gripes. This could lead to court cases heard by each of the 12 Federal Courts of Appeal where disparate opinions very well may end up before the Supreme Court, the same court that vacated the Commission's first attempt at an excessive unbundling regime in 1999. What is the impact of the uncertainty today? The answer: Investment fleeing the sector.

On Wall Street and the venture capital side of the equation, one can already see what the continued uncertainty is doing to the sector. To be sure, CLECs seeking to devise and implement business plans in the face of uncertain and varying regulatory regimes from state to state will face a monumental task in finding new funding to support their ventures. On February 20, 2003, the day of the Commission's adoption of the Triennial Review Report and Order, the major RBOCs lost over $15 billion in market cap, one CLEC lost 43 percent, and the major equipment suppliers lost anywhere from 4 percent to 14 percent of their value. Reactions from investment analysts spoke loudly in the wake of our decisions—the entire sector was downgraded by several firms, others suggested that the resulting "enormous uncertainty about the telecom industry" as a result of the Commission's decision "represents a very high level of risk to investors, risk they can avoid by moving their funds to other industries." [2]

Unfortunately, for consumers, the telecommunications industry and our Nation's economy, the Commission's decision to create greater uncertainty and prolong ambiguity in this area will allow us to test that theory first hand.

Harmful to Consumers

Finally, and most importantly, the majority's decision to give the states the unfettered ability to continue in perpetuity the house of cards that is UNE-P is likely to prove harmful to consumers in the long run, for it is fatally flawed as sustainable local competition. This is not the low lying plateau on which the high aspirations of the 1996 Act should be planted. It is a model based on assumptions that hundreds of stars will align forever. Every state must keep every element available to competitors and every court must uphold that view—an unlikely scenario considering our 0-for 2 in the courts thus far. It is a model based on every state regulator throughout the land lowering wholesale prices so that the entering LECs can attain the 45-50 percent gross margins on local service that they claim is a prerequisite for some to enter. Furthermore, it is based on the premise that neither the Commission nor Congress will never actually apply the statute and put some teeth to the impairment standard. With each passing day, month and year, the regulatory arbitrage bubble continues to expand ever more perilously with each variable and it is sure to eventually pop, like dot-coms of old. In the meantime, facilities-based investment and competition will take a back seat to regulatory arbitrage to the detriment of every local telecommunications consumer. Let us hope that technology can do what the Commission failed to do—drive the development of meaningful economic competition to the benefit of all of the American public.

IV. CONCLUSION

Telecommunications history, like history generally, cannot be rewritten in one or two years. Indeed, we may not know whether the unwritten history in promoting competition in local telephony and broadband is truly a success for many years. Rather, in assessing our progress in implementing the 1996 Act, we must strive always to make sure that if we inadvertently take one step backward in our efforts, we take at least two steps forward soon thereafter. Not two steps back, and one for-

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[1] Credit Suisse First Boston, *Outcome of Triennial Review of UNE Rules,* at 4 (February 20, 2003).

[2] Commerce Capital Markets, *Telecom Regulation Note: FCC's Triennial Highlights,* at 5 (February 21, 2003).

ward. These next six months will be an incredibly busy and significant time for the Commission. The decisions we make 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 1996 Act's intended benefits. I am heartened by the great strides taken already in the march of the digital migration. 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.

Mr. UPTON. Thank you very much.

Ms. Abernathy.

STATEMENT OF HON. KATHLEEN Q. ABERNATHY

Ms. ABERNATHY. Good morning, Chairman Upton, Congressman Markey and distinguished members of the subcommittee. It is a distinct privilege and pleasure to come before you for the first time during my term as a Commissioner to discuss the health of the telecommunications sector.

I also look forward to listening further to your concerns, learning from your experience and answering any questions that you may have.

As I reflect on the state of the telecom market and the appropriate role for the FCC, I am guided first and foremost by the statutory direction provided by Congress. Another key guiding principle is the importance of promoting regulatory certainty by drafting clear rules and then stringently enforcing those rules. And finally, the best measure of our success will be whether consumers are benefiting from increased competition, innovation and lower prices.

On the positive side, the telecommunications marketplace is more competitive today than at anytime in history with the wireless sector enjoying the most vibrant competition. Market forces have prompted wireless carriers to lower prices sharply and to introduce a broad array of new calling plans, features and services. And as I consider last week's Triennial Review Order, I'm optimistic that the Commission's decision to exempt new broadband investment from unbundling obligations should remove any regulatory disincentives for carriers to invest in broadband infrastructure. I'm hopeful that in time this decision will bring consumers the benefits of better, faster and more robust services.

Distinctly less positive, is the status of competition in the traditional market. This market has increasingly been dominated by UNE-P competition rather than the sort of facilities-based competition that Congress and most members of this Commission have identified as the ultimate goal. Investment in new facilities has stagnated. Court reversals of prior FCC decisions have also produced a great deal of regulatory uncertainty for the service providers. In response to these court losses, I have emphasized that a critical role for the FCC in furthering the development of competition is to promote regulatory certainty. Unfortunately, instead of providing clear direction to the troubled markets, a majority of the Commission last week voted to punt this issue to the States. As Congressman Barton noted, this is not an academic exercise that we're engaged in here.

I believe that conducting separate proceedings in the 50 States followed by an endless cycle of litigation in the Federal courts guarantees a continuation of the 7 years of uncertainty that have haunted our unbundling rule. The FCC developed a substantial evidentiary record which made clear that competitors have deployed over 1300 switches nationwide. This led me to conclude that competitors should be weaned off UNE-P as a long term business strategy. While I recognize that others may differ from my conclusion, it was clearly unreasonable to abdicate our statutory responsibility by failing to conduct any impairment analysis. The Commission should have provided clear direction to carriers and to the markets, and instead it has created a regulatory morass.

Having worked for an ILEC, a CLEC and wireless providers, I know that all companies whether incumbents or new providers put investments on hold when there is regulatory uncertainty, and that slows the growth of integration and the deployment of new services for consumers.

The reaction of the financial markets to last week's decision was a telling sign that the FCC missed a key opportunity to introduce regulatory certainty. As noted by Chairman Tauzin, by you Chairman Upton, in the afternoon following the Commission's ruling carriers collectively lost approximately $15 billion in market capitalization, and perhaps worse, equipment manufactures lost billions more. I sincerely regret that while Congress and the administration are striving to develop an economic stimulus package, the Commission's decision on UNE-P has damaged our already fragile markets.

I believe that investors have pulled back because the uncertainty associated with conducting 51 separate regulatory proceedings is even worse than a single negative decision at the Federal level. While an adverse FCC ruling can be appealed in a single proceeding, advocating our statutory role in handing it over to the States produces an explosion of litigation. And while this is a lawyer's dream, it is a business nightmare.

In closing, the silver lining in the FCC's order as noted by Congressman Dingell was our decision to provide substantial regulatory relief for new broadband investment. While some incumbent carriers have stated that the UNE-P decision will keep them committing capital in the near future, I believe that over time the broadband relief package will lead to increased investment and broadband deployment which will be a big win for consumers.

As we move forward, I will continue to be guided by my core goals of adhering to the statute and promoting regulatory certainty. And it is important to remember that there are many challenges ahead for the FCC and the 5 of us have an obligation to work together to ensure we deliver on the promise of increased competition, innovation and lower prices.

Thank you for the opportunity to share my thoughts with you. And I look forward to responding any questions you may have.

[The prepared statement of Hon. Kathleen Q. Abernathy:]

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

Mr. Chairman and distinguished members of the Subcommittee, thank you for the opportunity to appear before you this morning. It is my distinct privilege to testify before the Subcommittee for the first time during my term as a Commissioner and

to discuss the health of telecommunications sector. The diagnosis I would give is mixed: Competition is thriving in some respects, but at the same time the telecommunications industry is facing enormous challenges. Investment has stagnated, companies have laid off thousands of workers, and many carriers and equipment manufacturers have been forced into bankruptcy. I will begin by providing background information on the state of competition as well as my assessment of key challenges confronting competitors. I will then explain my views on the appropriate role for regulators in this environment, including a brief discussion of key issues decided in the recently adopted *Triennial Review Order*.

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. Market forces have prompted carriers to lower prices sharply and to introduce a broad array of innovative new calling plans, features, and services. On the wireline side, competition has been slower to take hold because of the difficulties replicating the last mile. Nevertheless, the number of access lines served by competitive local exchange carriers (CLECs) continues to increase. Broadband services also have become increasingly competitive, with cable modem and DSL services expanding at a rapid clip, and with promising developments in the area of wireless and satellite technologies.

II. ECONOMIC AND REGULATORY CHALLENGES

Despite the growth of competition in most telecommunications markets, the last few years plainly have been a tumultuous time for service providers and consumers. 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 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 left providers with little guidance about the network elements that will be available at regulated cost-based rates and put at risk some current business plans that were developed around the now-vacated rules. While I am pleased that the Commission's Triennial Review Order creates a clear, pro-investment framework for broadband facilities, I am very disappointed that the majority's decision on unbundled switching (UNE-P) will prolong the paralyzing uncertainty and investment disincentives that have been plaguing the sector.

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.

Viewed from the perspective of regulatory certainty, the Commission's Triennial Review Order is a decidedly mixed blessing. On the positive side, the Order brings much-needed certainty to the broadband marketplace. After years of seeing investment chilled by questions about whether regulators would require newly upgraded broadband facilities to be unbundled at deeply discounted TELRIC rates, the Commission has put that concern to rest. The Commission made clear that, while competitors will have unfettered access to existing infrastructure—copper loops and subloops, and digital circuits over TDM pathways—incumbents will not have to provide unbundled access to new fiber capacity at higher data rates.

In contrast to this decisive, pro-investment ruling, however, a majority of the Commission adopted a UNE-P regime that is a major setback for the cause of regulatory certainty and facilities-based investment. The majority has effectively turned over to the states the entirety of the decision regarding the availability of unbundled switching. Apart from the legal flaws in this course of action (which I discuss below), the policy will be destabilizing for the entire industry. Carriers will be unable to craft sound business plans and instead will be forced to litigate the merits of UNE-P before 51 separate jurisdictions, and then take this battle to 51 separate district courts. It is hard to imagine a less stable regime.

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.

Not surprisingly, as the Commission considered new unbundling rules, my paramount goal was to ensure that our decisions would comport with the statute and with the directives we had received from our reviewing courts. With respect to the recent FCC decision on unbundled switching, I am deeply troubled that the majority's approach appears to be clearly at odds with our statutory obligations. Section 251(d)(2) of the Act directs *the FCC* to apply the impairment standard, and the Supreme Court confirmed the Act's shift of ultimate authority and responsibility to the federal jurisdiction. While I believe that the FCC may appropriately delegate some authority to state commissions to make more granular findings regarding impairment, we may not abdicate our responsibility. To remain faithful to the statutory scheme, the FCC must retain the *primary* decisionmaking authority, and we must establish clear standards for the states to apply.

The majority perhaps could have shored up its sweeping grant of authority to the states by establishing a right of appeal to the FCC, so that the ultimate decisionmaking authority resided at the Commission. But it refused to do even that. And while the majority relies on the ability of incumbent LECs to pursue appeals in federal district court under section 252(e)(6), it remains to be seen how a reviewing court can gauge a state's compliance with the federal regime when the FCC has refused to provide any specific guidance on what that regime should be.

An equally significant legal vulnerability is that the majority made no real effort to adopt a meaningful limiting principle regarding switch unbundling. The Commission has twice been reversed on this exact ground, and I fear this may be strike three. The Supreme Court and the D.C. Circuit have made clear section 251(d)(2) permits the Commission to unbundle an element only when we can affirmatively

[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).

justify doing so. Turning this mandate on its head, the majority decided that switching must be unbundled because they cannot rule out that some impairments may exist. The fact that states *may* impose some limitations, based on their subjective evaluation of various nonbinding factors, imposes no real constraint on the availability of unbundled switching. Moreover, the majority made no attempt to square its decision with the record evidence showing extensive switch deployment by competitive LECs, including a number of carriers serving mass market customers on a UNE-L basis. I do not believe that this approach is remotely consistent with the direction we have received from the court of appeals.

2. Ensure Swift and Stringent Enforcement

Another crucial element 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 adoption 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. The broadband relief granted in the Triennial Review proceeding recognizes the difference between new and legacy networks, and accordingly adheres to this principle.

For similar reasons, I also have been a strong proponent of addressing gaps in the law and developing a coherent regulatory framework for broadband *services* (in addition to the regulation of the underlying *facilities*, which we have just addressed). 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 universal service contribution 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 bundled service offerings 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.

My desire to keep pace with technology and marketplace changes also leads me to support examining our media ownership rules. 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.

Mr. UPTON. Thank you.

Mr. Copps.

STATEMENT OF HON. MICHAEL J. COPPS

Mr. COPPS. Thank you, Mr. Chairman.

Let me use the few minutes I have here just to step back a little and look at the larger topic of today's hearing, which is the overall health of the telecommunications and communications sector, which is the background for the decisions that we are all interested in talking about.

Let me say at the outset that I'm an optimist about the future of telecom and about communications technologies generally. That puts me in a minority compared many of the so called expert and analysts, but I do not mind being either being a minority or taking issue with the prevailing wisdom.

You know, it was just a couple of years ago that all the experts and analysts were jumping up and down, prosperity for telecom forever, end of the business cycles and all the rest. And then the recession hit and all those experts went on a turn of a dime from irrational exuberance to equally irrational pessimism. I think they were wrong in both the up side and the down side. Certainly the

business plans of more than a few companies were faulty, but the technologies behind them not only remained, they proliferate and I believe they are going to lead the way to American prosperity in the 21 century; broadband, wireless, digital broadcasting. Interactive media, telemedicine, telecommunting are already joining the parade. And around the corner where we can't even see yet is much, much more.

The health of this critical sector has many facets. Macroeconomic issues, capital market issues, issues related to accounting, corporate behavior and, of course, there are regulatory issues. In all these matters I've strived to maintained 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. Indeed, the term public interest appears over 110 times in the Telecommunications Act. And my public interest objective as an FCC Commission 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 whether they live in rural communities, on tribal lands, are economically disadvantaged in the disabilities communities, whatever. Each and every citizen of this great country should have access to the wonders of communication, and I really do not think it exaggerates much to characterize access to communications in this modern age as a civil right.

Much of our focus at the Commission is on competition and deregulation. Competition has the power to give choices to consumers and with more options consumers reap the benefits; better services, greater innovation, higher technology. Managing competition within and across platforms, and both are important in the statutory framework, presents great challenge to us. Facilitating competition in a rapidly converging and fast changing environment at the same time as we transition from monopoly to competition is tricky, and it is a hands-on, not a hands-off job.

As competition develops we are enabled to meet another core goal of Congress deregulation. The 1996 Act is a deregulatory act, not deregulation in one fell swoop, but over time, as step-by-step competition takes hold. Where markets function properly, we can rely more on market forces to constrain anti-competitive conduct. Where competition does not exist or market failures arise, 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 must never be deregulated away.

In today's environment we must use our current authority to reduce the risk corporate misdeeds and mismanagement or accounting degradations will injure consumers or competitors. We need to gather more data in today's environment to better inform our decision, including completing our proceedings on performance measurements and following up on what happens after a section 271 approval is granted.

We need to be increasingly focused on enforcement. Sure and swift in sending a clear message. And we must have concrete plans for protecting consumers in the event a carrier ceases operations or otherwise disrupts service.

In all of these areas we must work closely and cooperatively with our colleagues at the State level. This cooperation works. It has led to the grant of 35 long distance applications under Section 271, the majority of them in the past year.

As we move ahead to implement this decision and to consider further items, I also encourage parties to work far more collaboratively to find constructive solutions. And this is really, I think, maybe my central message in these remarks. Feelings on these issues run high. No one emerged as a hands down winner or loser in last week's decision. But now it is time to take a deep breath, to lower the decimal level, to nourish the collaborative dialog and try to pull together for the common good. Frankly, I think the state of the telecom industry intra-industry dialog has been pretty close to awful over the past year or more. All too often parties seem interested only in throwing the long ball, looking for the silver bullet solution, but more often they're firing blanks. There is no simple panacea for the ills that plague the industry. And I hope the collaborative efforts that some of our State regulators have made to bring industry together and FCC and State regulators, everybody else, will really merit the backing of this subcommittee. I can't think of anything really more important right now to start talking with one another. Takes some little immediate targetable objectives and try to make some progress there so we can then move ahead to some of the bigger issues.

My time is about up, but before I conclude I do want to mention one other matter that I do not go anywhere these days without discussing, and that is the issue of media concentration. I think that review is without doubt the most important item on our agenda this year, because I think at stake in this proceeding are core values of localism and diversity and competition, and I am concerned that we are on the verge of dramatically altering our Nation's media landscape without the kind of national dialog and debate that this issue and the American people deserve to have.

Suppose for a moment that we vote to remove or significantly modify the ownership limits. And suppose simply for the sake of argument that we make a mistake. How do you put the genie back in the bottle? And I think the answer is you do not. It is done. That is why we really have to take our time. We really have to fill out our record. And we really have to engage all Americans, because they are all stakeholders in this issue in the bottom line of that debate.

Thank you very much.

[The prepared statement of Hon. Michael J. Copps follows:]

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

Mr. Chairman, Members of the Subcommittee, I am honored to appear before you today. This is the first time that I have appeared before you in my role as an FCC Commissioner and I welcome the opportunity to share with you some of my perspectives on the great issues before us and, more importantly, to hear yours. I am a product of the Congress, having worked for many years—many years ago—on the Senate side for my friend, Senator Fritz Hollings. Let me tell you first of all how grateful I am 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 utmost seriousness.

Let me say at the outset that I am an optimist about the future of telecom and about communications technologies generally. That puts me in a minority compared to many of the so-called experts and analysts, but I don't mind either being a minority or taking issue with the prevailing wisdom. It was just a couple of years ago that all the analysts were soaring in optimism 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 more than a few 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 exactly that will happen here. While no technology will ever lay the business cycle to rest—I think we all finally 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.

The health of this critical sector has many facets. There are, among others, macroeconomic issues, capital market issues, issues related to accounting and corporate malfeasance, and of course, there are regulatory issues. As we discuss these regulatory issues, let me emphasize that, 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? This is my lodestar.

Much of our focus at the Commission is on competition and deregulation. Competition has the power to give choices to consumers. With more choices, consumers reap the benefits—better services, greater innovation and higher technology. Managing competition within and across platforms—and *both* are important in the statutory framework—presents great challenge to us.

Congress declared that the preeminent goal of the 1996 Act is "to ensure lower prices and higher quality services for American consumers." I am of the strong belief that we should not use the current economic downturn as an excuse to back away from competition. This is fundamental. Instead, we must renew our efforts to *promote* competition, just as Congress directed. 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.

Competition, just as Congress predicted, did unleash an unprecedented investment in 21st century communications infrastructure. Facilitating competition in this fast-changing environment, at the same time as we transition from monopoly to competition, is, to say the least, 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 consumer choice through more competition.

As we carry out our job of implementing Congress' statutory framework, 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 that watch so zealously over the FCC. 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.

We must also tend to the critical 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 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 gets regulated away.

We recently voted on one of the most important telecom orders on the Commission's agenda this year, the so-called Triennial Review. The Order was not the one that I would have written had I been given *carte blanche.* Then again, each of my colleagues could—and probably would—make that same statement. But now that we have worked through these issues and made the difficult decisions, it is time to make it work.

This brings me to a central point of my presentation this morning. As we move ahead to implement this decision and to consider further items, I encourage parties to work far more collaboratively to find constructive solutions. Feelings run deep on these issues. No one emerged as the hands-down winner or the complete loser in last week's vote. But now we need to take a deep breath, nourish a collaborative dialogue, lower the decibel level and, finally, try to pull together to make some progress. Quite frankly, I believe the state of telecom's intra-industry dialogue has been pretty close to awful over the past year and more. All too often, parties seem interested only in throwing the long ball in the regulatory or legislative arenas. But there is no simple panacea for all the ills that plague the telecom industries. All these expensive public relations campaigns and hurling costly ads at one another don't appear to be helping anybody except Madison Avenue advertising agencies.

Why not try—just *try*—looking for some incremental steps that can put us on the road to larger solutions? Resolution of any number of issues, maybe even including pricing, could benefit from a collaborative dialogue. In this regard, I was pleased to learn of discussions among incumbents and competitors begun at the urging of state regulators late last year. I'm told this dialogue even made a bit of progress before some of the participants decided to focus their whole attention on the Commission in recent weeks as we worked our way toward completion of the Triennial Review. My hope today is that these discussions can begin again and work toward an early problem-solving agenda of incremental, achievable, target-able first steps that could pave the way for even greater cooperation farther down the road. I hope this Subcommittee will encourage that process.

There are those who remain skeptical that such a process can accomplish anything, and they may be right, although their very skepticism only endangers those chances more. 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 or Congressional action becomes the only way out. I do know this: something more is needed in communications among our communications industries.

Moving from competition for the benefit of consumers, a second priority of the Federal Communications Commission is to facilitate universal service. The goal here, imposed by statute, is to ensure that all Americans have access to communications services. 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 communities, 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 education and commerce and 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 the law, and playing a game of regulatory musical chairs by moving technologies and services from one statutory definition to another, all without understanding the full impact of our decision.

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. 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.

As we strive to implement competition and to advance universal service, we must be ever-mindful of our preeminent charge to protect consumers. Let me lay out three steps we should take in this regard. 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 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. For example, revocation of some wrongdoer's license would send a real wake-up call to those who seek to misuse the nation's spectrum. Congress may even wish to expand our enforcement authorities, which I believe all of us would happily welcome.

Third, 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, 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.

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. This cooperation works. It has led to the grant of 35 long-distance applications, the majority of them in the past year. And I firmly believe we have seen stronger applications due to the involvement of the State Commissions. The importance of Federal-State cooperation cannot be overstated.

Before I conclude, I want to briefly mention one other matter. Indeed, I don't go anywhere these days without talking about it. The Commission is, as you know, currently reviewing virtually all of our media concentration rules. I think this review is, without doubt, the most important item on our agenda this year. In the coming months, we will decide whether to keep, modify, or scrap virtually all of our media competition rules. 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 for every community and for every citizen of our great country.

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% 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.

The elimination of some 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 34 percent fewer radio station owners than there were before 1996 and most local radio markets are 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, distinguished Members, these are some of the major issues on our agenda. There are others, too, which you may want to discuss today. I approach all of these issues with the expectation—the happy expectation—of continuing to work closely with the Congress which authorizes and enables our work. Thank you for inviting me to appear before you. I look forward to working with each of you as we build a better future for all our citizens through communications.

Mr. UPTON. Mr. Martin.

STATEMENT OF HON. KEVIN J. MARTIN

Mr. MARTIN. Thank you, Mr. Chairman for the invitation to be with you all this morning. I look forward to listening to the insights you will provide and trying to answer the questions you might have.

As you know, telecommunications industry has been responsible for much of the Nation's economic growth during the past decade. The availability of advance telecommunications is essential to the continued strength of the economy in the 21 century. Today, however, the telecommunications sector is struggling, the bursting of the .com bubble coupled with the downturn in the overall economy have had a profound impact on the industry. Investors are reluctant to risk capital in the technology sector, telecom and technology companies battle to get back on their financial feet. Carriers have postponed the purchase of equipment and infrastructure necessary to deploy advanced services to consumers. Manufacturers have suffered the consequences. And most importantly, hundreds of thousands of employees throughout the Nation have lost their jobs.

In our just concluded final proceeding we at the Commission faced an important but difficult task. As always, our role as Commissioner is first and foremost to implement the Telecommunications of Act of 1996 and its deregulatory and market-opening provisions. And giving the timing of our review, we had to do so against the backdrop of a depressed telecommunications sector.

Last week's decisions regarding the future of local telephone competition was the most difficult of my tenure at the Commission. Throughout the decisionmaking process, I believed we needed to craft a balanced package of regulations, one that would help revitalize the industry by spurring broadband deployment while also preserving local phone service competition. Consistent with the 1996 Act where a facilities-based competition exists, we should deregulate. Where markets are not yet open, regulations should continue to ensure that competitors can provide service to consumers. Competition first and then deregulation.

I believe the order we adopted last week achieves such a principled and balanced approach. It ensures that we have competition and deregulation. We deregulate broadband where there is competition from cable making it easier for companies to invest in new equipment and deploy the high speed services that consumers desire. We preserve existing competition for local telephone service, the competition that has enabled millions of customers to benefit from lower telephone rates. And we accomplished these goals in a manner that is consistent with the statute and the rulings of the

courts. I believe these steps will benefit consumers and the industry.

I have long believed that the Commission should make broadband its top priority. It is critical to create a regulatory environment that encourages new investment and the deployment of new broadband infrastructure. I commend Chairman Powell for his leadership on this issue and for bringing these contentious issues to their resolution.

I also appreciate the leadership shown by this committee, in particular Chairman Tauzin and ranking member Dingell, Chairman Upton and Telecommunications Subcommittee ranking member Markey. We watch closely the debates you have had and we noted your concerns. The order we adopted last week captures the spirit of what I believe this committee was working toward; facilitate broadband deployment but maintain the market opening provisions of the 1996 Act necessary to ensuring price competition in local telephone service.

As this committee has noted, the markets for voice and broadband are quite different. Cable operators and DSL providers compete vigorously for residential broadband customers. In fact, unlike in the voice market, phone companies are not the predominant providers of residential broadband service, cable operators are. Approximately two-thirds of all broadband consumers subscribe to cable, not DSL. Yet the incumbent phone companies, not the cable operators, are the ones that have had to unbundle their networks to competitors. Phone companies, like cable operators, should have the proper incentives to invest the capital necessary to 21 century broadband capabilities available to all American consumers. This in turn would allow more consumers to experience the benefits of next generation service and applications that new broadband networks can provide.

The Commission's triennial review brings us closer to that goal. It provides significant regulatory relief for new investment allowing for deployment of infrastructure to provide the broadband and video services of tomorrow. It removes unbundling requirements in all newly deployed fiber to the home. And it also deregulates the fiber and new packet based technologies used for broadband services today.

The Commission's decision also adjusts the TELRIC or "wholesale" prices for all investment in equipment, even those used to provide telephone service. As a result, where phone companies must allow competitors to use their network, they will be able to charge the higher rates for the use of any new equipment.

In sum, companies desiring to push fiber further to the home and deploy new infrastructure will have that opportunity. And more consumers will have the ability to enjoy fast speeds and exciting applications of true broadband.

Today millions of consumers now have a choice of local telephone service providers. Competition is finally taking hold in the business market. But in the residential market, competition is more tenuous. Many consumers still have only one option for their local phone provider, and even where consumers have more than one, those options are dependent on the equipment of the incumbent's network.

The Commission's decision works to preserve and encourage local competition by maintaining the ability of competitors to access elements of the incumbent's network through incentive to provide service, consumers will continue to receive the benefits of competition. Such an approach is crucial if we are to ensure that all areas throughout the Nation continue to have access to the benefits of competitive choice.

The 1996 Act requires competitors have access to pieces of the incumbent's network when they are impaired in their ability to provide service. The court of appeals has made clear that in analyzing impairment, uniform national rules may be inappropriate. Rather one needs to take into account specific market conditions and look at specific geographic areas. The Commission's order follows these admonitions putting in place a granular analysis that recognized that competitors face different operational and economic barriers in different markets.

For example, the barriers competitors face in deploying equipment and trying to compete for residential customers in Manhattan, Kansas are different from the barriers faced to complete for business customers in Manhattan, New York. As a result, our order calls for States to make these market-by-market analysis as the courts have called for. I believe stateS are better equipped to know what equipment is in their local central office than a bureaucrat in Washington.

In the course of the debate surrounding this proceeding, some of my colleagues wished to end the unbundling of all residential switching immediately. I believe such action would be inconsistent with recent court decisions and the state of competition in many markets. To declare an immediate end to unbundling in every market across the country would prevent competitors from providing service where the incumbent remains necessary. In those markets, residential phone competition would be killed over night and such an approach would also ignore the court's mandate for a more granular analysis.

If I could just then conclude.

I believe in a limited government and that competition, not regulation is the best method of delivering the benefits of choice, innovation and affordability to consumer. The 1996 Act puts in place a policy that requires local markets be opened to competition first and then provides for deregulation. The Commission's decision last week faithfully implements this policy and it develops a balanced approach.

Thank you for inviting me to be here today. And I look forward to your questions colleagues.

[The prepared statement of Hon. Kevin J. 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 you know, the telecommunications industry has been responsible for much of the nation's economic growth during the past decade. The availability of advanced telecommunications is essential to the continued strength of the economy in the 21st century.

Today, however, the telecommunications sector is struggling. The bursting of the dotcom bubble coupled with the downturn in the overall economy have had a profound effect on the industry. Investors are reluctant to risk capital in the technology sector. Telecom and technology companies continue to struggle to get back on their financial feet. Carriers have postponed the purchase of equipment and infrastructure necessary to deploy advanced services to consumers, leaving manufacturers to suffer the consequences. And most importantly, hundreds of thousands of employees throughout the nation have lost their jobs.

In our just-concluded Triennial proceeding, we at the Commission faced an important, but difficult task. As always, our role as Commissioners is first and foremost to implement the Telecommunications Act of 1996 and its deregulatory and market-opening provisions. Yet, we needed to do so against the backdrop of the depressed telecommunications sector.

Last week's decision regarding the future of local telephone competition was the most difficult of my tenure at the FCC. Throughout the decision making process, I believed we needed to craft a balanced package of regulations that would help revitalize the industry by spurring new investment in next generation broadband infrastructure while also maintaining access to the network elements necessary for new entrants to provide competitive service. We needed to create a regulatory environment that would help renew investment, promote competition, and deregulate where competitive forces prevail, thereby enabling competition to provide consumers with the benefits of greater choice and lower prices.

I believe the Order we adopted last week achieves a principled, balanced approach. It ensures that we have competition and deregulation. It adopts clear rules and immediate regulatory relief for broadband deployment and new investment; it removes the obligation to unbundle switches for business customers immediately; and it provides a detailed roadmap for eliminating the remaining unbundling obligations for network elements. The decision also preserves existing competition for local service—the competition that has enabled millions of consumers to benefit from lower telephone rates.

I believe in limited government. I believe that competition, not regulation, is the best method of delivering the benefits of choice, innovation, and affordability to consumers. The 1996 Act puts in place a policy that requires local markets be opened to competition first, and then provides for deregulation. The Commission's decision last week faithfully implemented this policy. Where facilities-based competition exists—for example, from cable modems in the broadband market or CLECs in the business market—we have provided deregulation. We also have preserved existing voice competition where competitors are impaired. That is what the law and the courts require.

DEREGULATING BROADBAND AND ATTRACTING NEW INVESTMENT

I have long believed that the Commission should make broadband its top priority. It is critical to create a regulatory environment that encourages new investment and the deployment of new broadband infrastructure.

Today, cable and DSL providers compete vigorously for new residential customers. In fact, cable operators are the predominant providers of residential broadband; approximately two-thirds of all broadband consumers subscribe to cable, not DSL. Yet it has been the incumbent phone companies—not the cable operators—that have been required to unbundle their network to competitors.

Incumbents, like cable operators, 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 more consumers to experience the benefits of next generation services and applications that new broadband networks can offer.

The Commission's Triennial Review decision brings us closer to that goal by providing significant regulatory relief for broadband and new investment. It removes unbundling requirements on all newly deployed fiber-to-the-home, allowing for deployment of infrastructure to provide the broadband and video services of tomorrow. It provides significant regulatory relief for new hybrid fiber-copper facilities, deregulating the fiber and the new packet-based technologies used to provide broadband services today. In fact, our decision essentially endorses and adopts in total the High Tech Broadband Coalition's proposals for the deregulation of fiber to the home and any fiber used to deliver new packet-based technology.

The Commission's decision also adjusts the TELRIC, or "wholesale," prices for all new investment in equipment, even those used to provide telephone service.

Companies desiring to push fiber further to the home and deploy new infrastructure will now have the opportunity. And more consumers will be able to enjoy the fast speeds and exciting applications that a true broadband connection offers.

PRESERVING LOCAL COMPETITION

The Commission's decision also works to preserve and 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 continue to receive the benefits of competition. Such an approach is crucial if we are to ensure that all areas throughout the nation continue to have access to the benefits of competitive choice.

The 1996 Act requires that competitors have access to pieces of the incumbents' networks when they are "impaired" in their ability to provide service. The Court of Appeals has made clear that in analyzing impairment, "uniform national rules" may be inappropriate. Rather, one needs to take into account specific market conditions and look at specific geographic areas. The Commission's order follows these admonitions, putting in place a granular analysis that recognizes that competitors face different operational and economic barriers in different markets. For example, the barriers competitors face in deploying equipment and trying to compete for residential customers in Manhattan, Kansas are different from the barriers faced to compete for business customers in Manhattan, New York.

Although some of my colleagues disagreed with certain aspects of this analysis, this disagreement primarily concerns the switching network element for residential customers. We all agree that states should play a significant role in determining whether impairment exists for transport. We all agree that states should play a significant role in determining whether impairment exists for loop facilities. And, we all agree that incumbents should no longer be required to unbundle switching for business customers.

In the course of the debate surrounding this proceeding, some of my colleagues wished to end the unbundling of all residential switching immediately. I believe such action would be inconsistent with recent court decisions and the state of competition in many markets. It is true that a significant number of residential telephone customers now receive service from a CLEC, but the overwhelming majority of these customers is currently served through an incumbents' switch. To declare an immediate end to the unbundling of all switching in every market in the country would ignore the Court's mandate for a more granular analysis and effectively end residential competition. Instead, the decision treats residential switching as we do other network elements, removing unbundling obligations after an analysis of the local market to determine whether competitors are impaired.

The Commission must faithfully implement the Act and be responsive to the courts. Our decision in the Triennial proceeding addressed 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.

CONCLUSION

In sum, the FCC's Order achieved a balanced approach that provides regulatory relief for incumbents' new investment in advanced services while ensuring that local competitors will continue to have the access they need to provide service to consumers. I believe these steps will benefit consumers and the industry.

Again, thank you for inviting me and my colleagues to be here with you today.

Mr. UPTON. Thank you.

Mr. Adelstein.

STATEMENT OF HON. JONATHAN S. ADELSTEIN

Mr. ADELSTEIN. Mr. Chairman, Congressman Markey and members of the subcommittee, thank you for calling this timely hearing on the health of the telecommunications sector.

We've heard lots of heated debate over this, and lots of different ideas from members of the subcommittee today over how to restore the health of the sector, and rightfully so. It critical to our national economy, not just to the telecommunications sector alone. The issues the FCC is now considering go to the heart of what Congress intended to accomplish in the 1996 Telecommunications Act. And the importance of getting the answers right is underscored by the huge economic challenges now facing the industry.

As my colleagues and members of the subcommittee have noted, we're facing over half a million jobs that have been lost in this sector. Capital expenditures are plummeting. Equipment manufacturers are engaged in unprecedented layoffs. All this threatens the quality of our telecommunications system which can degrade if investment in the network declines. Ultimately consumers will suffer, service quality goes down or if they cannot get access to the latest technologies at a reasonable price. The FCC must promote competition and investment so that consumers can benefit from the most advanced technologies at reasonable prices.

As the newest member of the Commission I am relying on some key principles throughout my deliberations on these issues. First and foremost, my role is to implement the law as written by Congress, not to impose my own policy preferences on it. It is imperative to reach decisions also that are judicially sustainable. So many of the members of the subcommittee have noted because the courts are the final arbiter on this.

Second, the Act is designed to promote many forms of competition. Both intermodel and intramodel competition can provide strong pressures that will drive down prices, improve services and offer consumers more choices.

Wireless technology has also offered great new avenues for competition. Many argue persuasively that facilities-based competition is the strongest and provides the most benefits for consumers. We must encourage this and all types of competition that Congress anticipated and envisioned in the Telecommunications Act.

Third, the Act envisions deregulation in areas where competition has firmly taken hold. Deregulation follows competition under the Act.

Fourth, the Act envisions State commissions as our full partners in its implementation. Our decisions reflect Congress' directive that we are to achieve its goals with their assistance.

Perhaps most importantly, we are here to protect the public interest, as Commission Copps noted, which means watching out for consumers. The Telecom Act was meant to ensure that everyone has access to the best network in the world and at reasonable prices.

I hope I have adhered to all of these principles in my recent decision on the Triennial Review. Clearly we have got to restore the health of the telecom economy. As a member of the Commission I will do all I can consistent with these principles to do so.

Now this hearing touches on one of the two foundational pillars of the Act that drive deployment and service quality, competition. Its twin pillar, universal service, ensures that deployment will reach even those areas where the marketplace falls short. Ultimately Congress' goal was to ensure that all Americans have access at affordable rates to high quality telecommunication services including advanced services, which brings me to a top priority of the Act and a central focus of mine as a result, which is to speed the deployment broadband across this country.

The Act makes clear we must extend the benefits of the latest technologies to all Americans whether they live in the inner city, in rural areas or in the suburbs. It does not matter where they live. We are going to get at everywhere as quickly as we possibly can.

I think our entire economy will benefit if we can speak broadband deployment. It could help restore telecommunications as an engine for economic growth. It can fuel turn on not just for that sector, but for the growth and productivity of the entire economy.

We have correctly chosen a market model to drive deployment, but that choice behooves us to take note and to take considered action when investment slows to a halt, as it has in our telecommunications markets. This is especially true considering that secure broadband networks are crucial for our national security in light of the events of 9/11.

So I believe at the bottom we must bear consumers in mind in all of our decisions, whether they involve unbundled network elements, broadband, universal service or media ownership, which is an enormous proceeding that we are about to undertake. Congress intended all Americans to have access to telecommunications services and eventually advanced services at affordable rates. And I believe that Congress gave the FCC the tools it needs to obtain these goals through universal service, competition and subsequent deregulation.

Thank you for the opportunity to testify. And I look forward to your questions.

[The prepared statement of Hon. Jonathan S. Adelstein follows:]

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

Mr. Chairman, thank you for calling this timely hearing on the health of the telecommunications sector. I look forward to hearing from you and all the members of the subcommittee on this issue, as well as any other issues of concern affecting the industry.

We have seen a lot of heated debate over the health of the telecommunications sector, and rightfully so. The performance of this sector is critical to our national economy. Issues that currently are under consideration at the Federal Communications Commission go to the fundamental core of what the 1996 Telecommunications Act means—and what Congress intended to accomplish with it. What is the state of competition in this country? What remains for the FCC to do to open markets? And where is existing competition sufficient to warrant deregulation as envisioned by the Act?

The importance of getting the answers right is underscored by the huge economic challenges now facing the telecommunications industry. We have seen more than half a million jobs lost in the past 18 months. Capital expenditures are plummeting. Equipment manufacturers are engaged in unprecedented layoffs. All of this threatens the quality of our telecommunications system, which can suffer as investment in the network declines. Ultimately, consumers will pay the price if service quality goes down, or they cannot get access to the latest technologies for a reasonable price.

The Federal Communications Commission must create a stable and clear regulatory environment that promotes competition and investment in our telecommunications infrastructure so that consumers can benefit from the most advanced technologies at reasonable prices.

As a new member of the Commission, I am relying on some key principles to guide my deliberations. First and foremost, my role is to implement the law as written by Congress, not to impose my own policy preferences. In following the statute, it is imperative to render decisions that are judicially sustainable, since the court is the final arbiter of whether a decision comports with the law.

Second, one of the two basic thrusts of the Act is to promote competition. The Act envisioned many forms of competition, both intramodal (among traditional wireline providers) and intermodal. Both types of competition can provide strong competitive pressures that will drive down prices, improve services and offer consumers more choices. In the wireline arena, some competitors are facilities-based, while others compete through resale at negotiated prices, and others through the UNE system. Many have argued persuasively that facilities-based competition will provide the strongest form of competition that is most beneficial to consumers, still it is the

Commission's role to encourage all types of competition Congress anticipated. Wireless services also 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.

Third, the Act envisions deregulation in areas where competition has firmly taken hold. Deregulation follows competition under the Act, not vice versa. Once the presence of meaningful competition allows the FCC to modify or repeal rules and regulations, however, 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.

Fourth, the Act envisions State Commissions as our full partners in its implementation. 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.

Finally, we are here to protect the public interest. The Telecommunications Act of 1996 was ultimately written for consumers. It was meant to ensure that everyone has access to the best network in the world at reasonable rates.

Clearly, there is room for improvement in the telecommunications economy. As a regulatory body, the Commission can certainly lead the way in bringing the stability and certainty to the market that will translate into faster economic growth. As a member of the Commission, I will do all that I can, consistent with the principles outlined above, to adopt decisions and regulations that will lead to an improved and healthier telecommunications industry.

This hearing touches 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, I learned the importance of including rural America in this equation. 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.

One of the other top priorities of the Act 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 for not only the telecommunications sector, but also 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.

Commission decisions should reflect an understanding that Congress enacted the Telecommunications Act of 1996 for the good of consumers. Congress intended all Americans 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.

Thank you for the opportunity to testify today.

Mr. UPTON. Thank you all.

The FCC is required by Section 251D(2) of the 1996 Act to prescribe national rules for network elements. Triennial Review Order instead gives the State regulators the authority to determine which network elements must be made available and which do not. In addition, the Supreme Court and the D.C. Circuit Court of Appeals required that the Commission establish a limiting standard for the availability of network elements and did not require blanket access to those network elements.

I'd like each of you to comment in terms of what your belief is with regard to the Triennial Review Order as to whether its squares or does not square with the dictates of the statute and the courts.

Mr. Powell, I know you talked in your testimony about that this flies in the face, it flaunts the judiciary, but as we look to the future and the possibility of 51 different court reviews going back to the 1996 Act, I'd like you to comment how this fits with the dictates of that statute.

And maybe, Mr. Martin, we'll just start with you and we'll go right down the panel.

Mr. MARTIN. I think it does square with the dictates of Section 251 and the court's requirements as they've been interpreted back to the Commission.

The most recent decision, the USTA decision before the D.C. Circuit requires the Commission to take into account greater granularity in its setting up of standards. I think the actions the Commission took last week were setting up national standards that could be applied, but that that application would still be done on a case-by-case and market-by-market analysis, and that we deferred to the States to end up trying to implement those national standards, not just on the switching elements but on transport and on other elements as well.

So I think that the Commission was attempting to adopt national standards, provide guidelines and limitations but at the same time having an analysis geographic and a market-by-market analysis that would be done by the States.

Mr. UPTON. Mr. Copps.

Mr. COPPS. Well, I think it does square. I would agree with what Commissioner Martin has said. The Supreme Court has, it is true, said that the FCC has jurisdiction but it never said that the decision must be made solely by the FCC. We are in the process here of trying to provide Federal criteria and factors and then asking the States to apply the facts in their own local settings and standards. So I think that way we will get more precise line drawing and be more responsive to some of the things we have heard from the courts.

Mr. UPTON. Chairman Powell.

Mr. POWELL. Mr. Chairman, I personally and professionally think the decision is substantially flawed legally on a number of points. But I think I would emphasize the central one, which is I have heard a lot of people talk about it is not time to deregulate.

The statutory provision is about what gets regulated in the first place.

And one of the things the courts have chastised the Commission about is this attempt to presume the availability of everything and have the burden of the statute be to prove that it is not time to take that element away. I mean, what the court said is that the Commission must build the list from the ground up. And for every incremental decision it makes as to what it puts on, it must then find to a high level of granularity and rigor that it belongs on the list.

In this decision with respect to switching, it is presumed impaired. The Commission has not the granular prerequisite finding to make that presumption, which makes no mistakes is the default of the land unless proven otherwise. I can understand the sentiment that wishes everything is unbundled until proven otherwise, but that is just not the statute as written nor as interpreted by the courts. And I think it is in this fundamental way that we have erred for a third time.

Mr. UPTON. Ms. Abernathy.

Ms. ABERNATHY. Mr. Chairman, as I think was clear from my dissent, I believe that Congress mandated a Federal scheme for unbundling, and I don't think that was what was adopted by the FCC. The Act spells out the terms of a partnership with the States under 251D(2) and the Commission is directed to determine what network elements should be made available.

Now, once we impose limitations, I think that we may delegate to the States authority to make more granular findings, and that's comparable to what we did with the transport piece of the item. But mind you, there was no finding at the Federal level supported by the record about whether there is impairment with regard to switching. And therefore, I dissented and I think it is a fatal flaw.

Mr. UPTON. Mr. Adelstein.

Mr. ADELSTEIN. Mr. Chairman, you referred to Section 251D(2). I happened to bring a copy of it with me. And I think it is clear that the statute directs that if competitors are impaired without access to a particular UNE, that it must remain available. And that was the challenge before the Commission was to determine whether or not switching, for example, or transport was impaired and whether it needed to remain as a UNE.

The FCC did, as I agree with you, give a primary role to the FCC in determining what are proper UNEs. I also agree with Commissioner Abernathy that we are given authority under the statute to delegate that to the States that agree that we need to.

Congress clearly envisioned a role for the States. As a matter of fact, Section 251D(3) of the Act is entitled Preservation of State Access Regulations, which makes clear that it is under our authority to have them have a role, and I believe it was envisioned as a partnership by Congress that there be a role for the States in this. And our general counsel has advised me that there is authority for us to delegate to the States a certain role in determining whether or not a particular element is required to be unbundled.

Mr. UPTON. I think I will come back to that on the second round. But Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman.

For 100 years we had regulatory certainty in the United States. The Bells had no competition. Now what did that lead to? Well, it led when I arrived on the committee and right into the early 1980's, almost every American had a black rotary dial phone still in their front parlor with a very short cord on it, as well, so that your parents could hear what you were saying. And the reality was, is that the Bells used to testify that everyone could buy their phone from anyone, it would destroy the entire network across the country. It couldn't take the pressure. The government said no. Competition.

On long distance, anytime anyone was on the phone for a long distance call, run to the phone, grandma's on the phone. It is long distance. Hurry. It is too expensive. The government said no, we're going to force the Bells to have competition.

On cell phones they had a guaranteed license across the whole country. What did they do with it? Well, they said in 1980 by the year 2000 we would have 1 million customers for cell phones, and it would be analog. The government said we are going to introduce a third, fourth, fifth and sixth competitor into the marketplace. Then it went digital. Every American now has one in their pocket. And the prices have dropped to the point where it is effectively now competing for business and long distance and the local marketplace.

And in 1996—1996 even though the Bells had invented DSL in the labs 10 years before, not one single person had DSL in this country. And we passed the Telecom Act. Now 80 percent of all Americans have broadband going past their home. Now only about 20 percent subscribe to it because it is too expensive, because we have a dupoly. But that is a tremendous success story, and only because we passed the Telecom Act of 1996.

So, ladies and gentlemen, the question now is should the Bells be relieved from the pressure of having more competition, more pressure to innovate, which they do not understand unless there is competitive pressure or should we relieve the pressure upon them? In my opinion in the broadband decision the Commission hit the telecom trifecta; it is bad for jobs, it is bad for innovation, it is bad for consumer prices.

According to the FCC press statements, the FCC relieved the Bell companies of the unbundling requirement for fiber fed lose when the Bell companies invest in new technologies such as packetized switches. But they announce they're not going to invest. And they permit the CLECs to continue to have access to the so-called TDM based 5 loops at a DS1 or 3 level of capacity, yet remembering that it was competitors who initial drove innovation in this marketplace. The problem is that the FCC decision will have the effect of freezing mores law and law and substituting the Bells' law, we want more. They do not believe in innovation. They believe in more monopoly. Most customers, especially the business company customers want higher and higher capacity and the presence of competitors pushes this demand up and up forcing the Bells to keep pace.

Under the FCC decision, especially in the business marketplace, the CLECs will not be able to take advantage of the next leap in technology and create competitive alternatives as the CLEC will be

frozen and their access to today's technology. Without accepting your premise, Mr. Chairman, that phone companies and cable companies will actually compete in the residential marketplace, which I believe is folly, please explain why you believe it is good policy to reverse our competition experience in the business marketplace and strand small and medium size businesses to a deregulated remonopolized Bell company and no viable alternative platform is left in this sector of the market?

Mr. POWELL. I appreciate the opportunity to ask that, because I think it is a pretty compelling story.

If you look out over the country today, the vast majority of the network does not include the kind of facilities we are speaking about. They are not constructed, they are not in the ground, they are not available to anybody and are serving any consumers. So we talk about one of the central communication policy objectives in this country as it should be to get our network onto digital fiber based networks to allow us to provide this services and digital services future. That's also in the statute as one of its major goals and objective, best embodied in 706.

I believe there is two central ways a policymaker can look at that question. One, are there are regulatory barriers that can be relieved to help stimulate construction in investment of the network, and can competition do it? I happen to believe that both are valuable tools. But I believe when you look at this space it is hard to be a competitive stimulating force using an infrastructure that is not even constructed yet. It is hard to imagine competition within the network that is not built being the source of stimulating investment to build it in the first place.

I think that in the case, in this unique case of fiber deployment to which the country has a high value that requires massive amounts of new construction, the most viable tool for the stimulation of that investment was a deregulatory one, and that there is competitive threats but they are going to come from people who have alternate facilities to use in order to stimulate that investment——

Mr. MARKEY. Mr. Chairman, did you keep Friday Wall Street Journal headline, Regional Bell Giants Back Off on Promise to Invest in Broadband Despite Winning a DSL Ruling? Isn't it the very fact that there is an absence of competition which your ruling on Thursday created, the very world that the Bells wanted to go to where they are not forced to innovate because they know now that they have much more of a captive marketplace?

Mr. POWELL. I just don't agree. I mean, 5 years ago I looked——

Mr. MARKEY. Even the Bells talked——

Mr. POWELL. Mr. Markey, 5 years ago I learned that if we make policy based on the emotional reactions of any industry segment or their promises or their wishes we are engaged——

Mr. MARKEY. The Bells do not model emotions. They do not have a emotions, all right. They don't innovate, they don't have emotions——

Mr. POWELL. I do not know they don't——

Mr. SHIMKUS. Mr. Chairman, a point of order on time. If we are going to do the policy on time, then members have to comply with the request.

Mr. MARKEY. Okay. I agree. Thank you.

Mr. UPTON. Mr. Tauzin.

Chairman TAUZIN. I, too, Mr. Chairman, want to present a Wall Street Journal entitled today Bye-Bye Baby Bells. And it is right to the point, makes the case. That when a Bell company loses a local dialing customer to AT&T it still collects the wholesale price from AT&T, albeit one set by regulators. I might have below costs. So every time that happens the Bells lose money. They get less cost for covering for AT&T than it cost them to provide the service themselves. But AT&T naturally targets the most profitable Bell companies and does so by using cheapo access through an infrastructure that all the other Bell companies have to pay for.

Now let us talk about consumers, members of the Commission. Mr. Jenkins points out that for the Bells last week's ruling with an intimation of the dreaded death spiral wherein all the good customers leave and only the money losing ones remain. That's a great telecommunications world to live in where the Bell companies are left with folks who can't pay the bill, poorest of their customers and all the good customers are bye. You see the problem; the customers AT&T is being bribed to lure away are exactly the ones who bear a disappropriate share of the freight of the old system. That's the mousetrap a pro-regulatory Commission has created.

Now, the sad truth, Mr. Martin, I think you'll agree with me, is that this Commission, the one you serve on as Chairman, is a much more deregulatory minded Commission than the Reid Hunt Commission or the Bill Canard Commission. The Reid Hunt Commission which came up with UNE-P. And I love your statements about limited government and deregulatory approaches. But what you've done in this ruling is to pun your nose at the Supreme Court and instead of using the authority of a deregulatory commission to end this awful system, while AT&T can pick the pockets of the Bell consumers as they try to cross the bridge into the new markets of broadband. Instead of ending that system and doing the granular analysis the court in DC ordered you to do, you instead turn this whole decision process to 51 regulatory minded commissions. You say to us you want limited government, less government regulation and yet you've taken a deregulated commission which had the mandate from the court to deregulate here and you've given that authority to 51 regulatory minded State commissions.

And I read your speeches, Commissioner Martin, and they baffle me. I am going to quote from the January 14 speech. "The Commission must minimize further questions and avoid creating greater uncertainty of prolonging ambiguity in this area to put off decisions that have the greatest impact in the marketplace to another day will only aggravate current market conditions."

And in speech in September you also said "The Commission can contribute to market stability by establishing a more stable and reliable regulatory environment. Rod proceeding that remain pending for an extended period can contribute to uncertainly."

Now, if you really believe that, if you said this in January in these speech and then in September, why in earth would you continue the uncertainty by giving to 51 regulatory minded commissions the authority the Supreme Court said rested with you, a deregulatory commission, to put an end to some of these silly rules

whereby one shareholder company, AT&T and WorldCom, can pick the pockets of Bell company customers the way the UNE-P rules allow them to do so, even where there is no impairment, where there are hundreds of switches available owned by AT&T and WorldCom and other CLECs to service those customers without parking these switches and using the Bell company switches at below costs? Explain your statements to me in January of September with your vote on the Commission, please, Mr. Martin.

Mr. MARTIN. I do think it was important for the Commission to go on and take action on this issue, which I think it did. And I think that it was important for us to set up a national framework, and I think it was also important for us to take into account the D.C. Circuit's decision that we needed to put forth a framework that would allow for greater granularity and distinguish between the customers who were overpaying and therefore subsidizing and those who weren't overpaying and subsidizing the network. And I think it is setting up a framework that allows the States to do that is the——

Chairman TAUZIN. I am going to run out of time. I want you to read the Supreme Court, and I want you to comment. Maybe Chairman Powell will comment on it, too.

The Supreme Court said, this is the Scalia decision, an Iowa Utilities Board, that the 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 matters addressed in the 1996 Act it unquestionably has. If there is any new Federal regime, if it is to be guided by Federal agency regulations, the States should be guided by those 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 "suppressing strange." And it went on to say this at bottom is a debate about whether the States will be allowed to do their things, which you have allowed them to do in this rule, but about whether it will be the FCC or the courts to make these decisions.

What you have done in your decision in my opinion, and please comment if you can and Mr. Powell I would like your comment before I pass on, as to how what you have done does not fly directly in the face of what Judge Scalia said; that the Congress took the decision about this regulatory framework away from the States in 1996 and gave it to you. And the only question now is whether the courts are going to make these rules or whether you will. Haven't you said in your ruling this week that you are going to leave it up to the courts? Fifty-one different decisions, 12 different circuits another Supreme Court case. Isn't that the result of what you have done?

Mr. Martin.

Mr. MARTIN. Mr. Chairman, the Supreme Court case you were quoting from, the court you have taken from, was actually where it was upholding the Commission's wholesale prices that I think you described as below cost as not being a taking. It was saying that those were not below cost. It was actually upholding the Commission's Federal rule that had developed broad——

Chairman TAUZIN. Nevertheless, it said it was your decision not the States, did it not?

Mr. MARTIN. It did, Mr. Chairman.

Chairman TAUZIN. It did unquestionably say that?

Mr. MARTIN. It did. It said that it did and it was upholding the Commission's framework where it had developed a broad formula that was then applied on a state-by-state, market-by-market basis to come up with exact TELRIC prices. The same kind of formula we are talking about applying in this circumstances on the switching.

Chairman TAUZIN. We terribly disagree with that.

Mr. Chairman, would you answer that same question?

Mr. POWELL. The quote you read comes out of the Iowa Utilities case which quite ironically, the industry participants were opposite sides on this very question.

Chairman TAUZIN. Right.

Mr. POWELL. It was the long distance companies that were arguing it was a Federal regime and it was the BOCs insisting on States.

The quote that I think you are referring to is in a footnote in the opinion which Scalia is, interesting enough, having the exact same debate with other members of the court——

Chairman TAUZIN. Right.

Mr. POWELL. [continuing] as to whether States rights or traditional State authority is being violated, and he is responding for the majority quite aggressively to the contrary.

I find it interesting, just note, that the 1996 Act is 750,000 words of Federal law that tries, perhaps at too minuscule a level at times perhaps, even but tries to completely set out terms and conditions extensively and give the Commission full implementation, including the original local competition of rules of given 6 months to do, including these rules.

The two prior times the Commission has done this, Chairman Hunt and Chairman Kenard, it seemed to have no problem the national responsibility and executing the national rules. But when the merits of that were in favor of unbundling, it was okay. When the merits might be toward less unbundling, somehow it is a State granular question.

I think that at a minimum I would agree with my colleagues and defend their point that we have the authority to delegate some responsibilities to the state. But we don't an obligation to do so. That is a discretionary decision. And I think under delegation law you have to be sure that the Federal authority that is delegating retains ultimate authority. In this case there is no review, there is no subsequent FCC ability to change or disrupt the decisions that are made, and I think that is another basis on which it has a legal failing.

Mr. UPTON. Mr. Boucher.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman.

I made known my views with respect to your decisions of last week during the course of the opening statement, and so rather than dwell on those matters during this question period, I am going to take the opportunity of your presence here today to talk about a couple of other very important telecommunications issues

that are other matters with which you are concerned, and we are also concerned, and I think today it is appropriate to address several of them.

First of all, I would like to talk with you about telemedicine service and what needs to be done in order to make it more available in more places in rural America. Almost a year ago, in April 2002, the Commission issued a notice of proposed rulemaking looking for ways that the rural health care support mechanism could be streamlined and enhanced in order to make services more available to health care facilities in rural America while staying within the existing budget framework and keeping the existing cap in place.

I responded to that notice with extensive comments, making specific recommendations on ways that telemedicine service could become more available to more facilities through appropriate Commission action. I know that many other people also responded with comments to your notice. But now almost a year has gone by and I am just hoping that you can put this issue forward on your agenda and reach a decision with regard to these much needed regulations within just the next couple of months.

As I said in my opening statement, I have numerous hospitals and clinics in my district that want to provide the convenience and cost savings to their patients that telemedicine affords. Frankly, the current rates for telemedicine service are beyond their reach. With the adjustments that have been recommended to you, staying again within your budget framework and your budget cap, services can be extended to these facilities in my district and to hundreds if not thousands of other facilities across rural America.

I would just ask you, Mr. Chairman, if you share my interest in the subject, and I believe you do. And assuming that you do, if you can give us some indication of when the Commission might be able to assemble a regulation and act on it in a positive way?

Mr. POWELL. Thank you, Mr. Boucher. I share your enthusiasm and deep passion. We have talked about this.

One of the things that I realized in the wake of 9/11 was we continued to see that the rural health care program was quite underutilized. While the schools and library program gets the headlines and gets a lot of the attention, gets a a lot of the focus, we thought that the rural health care program and the telemedicine program has had enormous benefits and in the wake of 9/11 we thought could have very serious benefits was being under-utilized.

We undertook an examination to determine why. What we discovered was there were a lot of people not taking advantage of the program, that the eligibility criteria as well as some other technical problems were leading to that. So we initiated the proceeding, you know, out of that understanding and that passion.

I am regretful that it is not done. I think that, you know, this area and time is not on your side. Every day is another day of risk. It has not been given a lower priority. I can only apologize that resources and issues particularly with the Triennial and the 271s have not allowed us to give it as much attention as it deserves. But I pledge to you, and I can talk to you more off line as I have a better sense of what the actual timeframes are, that we will continue to move ahead and try to get this done as soon as possible and soon as it deserves.

Mr. BOUCHER. Well, thank you, Mr. Chairman. I appreciate that response, and I will look forward to our future discussions on that subject.

With respect to another issue, the Commission has an opportunity to facilitate a broad range of program access to consumers as a part of your ongoing broadband regulatory classification proceeding. Companies that own transport and also are either affiliated with or directly own a content provider have the very convenient ability to use their transport mechanism in order to discriminate in favor of their own content or their affiliated content to the disadvantage of the unaffiliated content provider. I think that kind of discrimination is wrong. I think that the transport provider should not slow down access to the competitor's site. I think the transport provider should not use his position in order to degrade the quality of receipt of a program or other transmission from the competitor's site. And I would assume that you would also agree that that kind of conduct is wrong, it is anti-consumer and should be unlawful through Commission regulation.

I would simply ask you, Mr. Chairman and other members, if you would care to comment on this kind of conduct and the potential for it to occur and if you would be willing to consider as a part of your broadband regulatory classification proceeding, adopting a provision that would not allow this kind of discriminatory conduct to occur?

Mr. Chairman.

Mr. POWELL. Thank you, Congressman.

This issue, as you articulate it, is a classic anti-competitive anti-trust issue and, indeed, depending on the nature, extent and the motivations could easily constitute a violation of the anti-trust statutes and certainly would be actionable in that sense.

I have always been concerned, as I think my colleagues have demonstrated, that when you have integration of both content and distribution you certainly have a heightened possibility of an anti-competitive event. Indeed, I think it is that same logic that led this Commission to extend the program access rules in the context of cable, a rule that attempts to guarantee that continued unfettered—not completely unfettered, but continued vigilance about the access of vertical integration of content.

I think the same issue is right to identify and stay vigilant about on the broadband side. I do not know that I have yet seen sort of a compelling record that we have a clear and demonstratable problem on this issue, but I have seen and have empathized with the potential for it.

And I don't know yet whether I can answer confidentially that I think it is right for this particular proceeding. But I will tell you within our own Commission we have some working group folks working on looking at that issue, meeting with companies like software companies and content providers who brought this issue to our attention trying to understand the nature of the problem and trying to see whether it is timely or what there would be for an effective regulatory response.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

Thank you, Mr. Chairman.

Mr. UPTON. The gentleman's time expired.

The Chair now recognizes the gentleman from Texas, Mr. Barton.

Mr. BARTON. Thank you, Mr. Chairman.

I am not going to reiterate my opening statement, but just to give you an analogy. It seems to me if you go back and look what they did at electricity deregulation, State of California 4 or 5 years ago, they maintained local rate retail rates, they regulated them, actually required a price discount, but they deregulated wholesale rates. So when they got a problem in the wholesale market because they did not have enough supply coming in, it took the whole electricity segment in California down the tubes. And right now the State of California is on the hook for about $20 billion.

And what you all voted on last week 3 to 2 seems to me very similar to what the State of California attempted to do in their electricity markets 5 or 6 years ago. It just does not pass the smell test.

But having said that, My first question is just a general question. The Chairman can answer, any of the other members.

Commissioners Adelstein and Copps both said that they didn't have enough information before they voted on the Act that they did not see all the details. So my first question is were there details available? Did the Office of the General Counsel or anyone else at the Commission have a legal analysis, and was it presented to the Commission before it made the vote last week?

Mr. Powell.

Mr. POWELL. Mr. Barton, I can assure you that in the course of this extensive and aggressive deliberation there was substantial advice offered by the General Counsel about the various litigation risk of approaches. I personally, having been a Commissioner that has been there 5½ years, and a lawyer, and seen the failings in the dialog with my colleagues personally represented my own concerns and anxieties about the legal risks associated with the decision.

I think it is fair to say that the final decision on this item came together late. And being a member not in the majority ultimately I no longer had control over what the specific cuts were on the items to which I dissented.

Mr. BARTON. Well, is it true to say that some of the details have not been worked out yet and that people who voted in the majority could disagree on what those details should be? Since you are not a part of the majority, I might let Mr. Martin, Mr. Copps or Mr. Adelstein answer that.

Do you all know what you all voted on, and do you have a gentlemen's agreement on what the details are going to be? Anybody in the majority.

Mr. MARTIN. On both the broadband piece and as well on the local competition piece there are details that are being worked out. We voted on a framework and on the understanding that we had, which was put in writing and worked on it by the staff. But the final language of the order is not yet ready in that they are trying to draft it in compliance with that now. But that is applicable on both of them.

Mr. BARTON. Do you all have a memorandum of understanding, so to speak, that you all agreed upon before the vote?

Mr. MARTIN. The——

Mr. BARTON. I'm not being facetious. I have no clue how Federal commissions make decisions and whether you are even allowed to do it. But I know when we vote on things around here, you know, we share specific details and I will talk to Mr. Markey. And he will tell me I am crazy and then he will talk me, and he thinks I am crazy. But eventually we agree on language before we vote.

I mean, did you all have something that you all agreed on before you voted?

Mr. MARTIN. Yes. The staff put together a memorandum that captured the essence of the language that everyone had agreed to, as I said, on both the broadband side and on the competition side.

Mr. BARTON. So you do not think there is going to be any different expectations on down the road? You think you all got it right and everybody is going to be happy and just all this outrage that you are hearing is just stuff us fussbudgets who were here 7 years ago and we did not get it then and obviously we still do not get it?

Mr. MARTIN. I would not guess that everyone was going to be happy. That certainly has not been the——

Mr. BARTON. No. When they understand as well as you understand, see, that is my point. Since I do not understand yet, but I am hopeful that when I do understand maybe I will agree that you are correct. I doubt that, but it is a possibility. So——

Mr. COPPS. Can I just add one comment?

You know there is one way you all could help us. We labored under restrictions and constraints of something called the Governmental Sunshine Act. Now that sounds wonderful. Everybody is for government and the sunshine. It puts a formidable constraint on the ability of the 5 people at this table to talk together. In fact, it downright prohibits our talking together.

So you take an item like this, which is some 400 pages long, there was never once in this process time when we could sit down the 5 of us and say "Here is where we think we are. Let us share some basic philosophical overview of this and then work your way toward the granularity of details."

I do not know of any other institution other than independent Federal regulatory agencies that are forced to operate under a system like that.

Mr. BARTON. But you can meet, but if you do it, you have to do it in the open.

Mr. COPPS. That is right.

Mr. BARTON. You would rather have some ability to do it behind closed doors?

Mr. COPPS. That is right. This is correct.

Mr. BARTON. Okay.

My time has expired, Mr. Chairman.

Mr. UPTON. Thank you.

Mr. Wynn is recognized for 8 minutes.

Mr. WYNN. Thank you, Mr. Chairman.

I would also like to thank all the Commissioners for appearing before us today and for your testimony.

Mr. Martin, the FCC has the authority to do the kind of granular analysis that was required. Is it your view that the FCC cannot do this, and if that is so why do you feel that way?

Mr. MARTIN. I certainly think that the type of granular analysis where you are actually going to be examining the specific market conditions on a market-by-market basis would be better done by the regulators who are closer to that situation; the State regulators in many instances have the benefit of regulating the retail rates, for example, of those consumers and are analyzing the market conditions on a market-by-market basis. So I think they are closer to that situation.

Mr. WYNN. So it is fair to say you do not believe that the FCC can competently do that?

Mr. MARTIN. I think it would certainly be difficult for the staff to do that on a nationwide basis.

Mr. WYNN. Is that your view, Mr. Copps?

Mr. COPPS. I think theoretically we would have the authority to do that. But I think the courts have been pretty plain that when you are seeking the kind of granularity that parties to the various court proceedings always seem to want to come out of these proceedings that you have to go to that level to get that kind of granularity.

Mr. WYNN. Mr. Powell, I believe you disagree with that position?

Mr. POWELL. I disagree in this regard. I think it is fine to sort of exactly say there could be details that only could be done at the State levels, and indeed I agreed with respect to other portions of the order that that was appropriate. But nobody has ever demonstrated to my satisfaction what those specific things that are so uniquely granular are that can only be done at that level.

And I think the holy crusade that was fought over switching is being dressed up to some degree in these level of granular details. Many of the details that people cite to me in an attempt to persuade me about this are things that are squarely in the control of regulatory authorities in the first place. They are not marketing impairments. They are not specific to the local conditions that are economic impairments. They are things that State regulators already regulate; the price of co-location, nonrecurring charges. I think that it flies in the face of the D.C. Circuit to have the government set certain prices and then cite those as the basis for impairment to put something on the list.

And so for me personally, and I respect my colleagues if they disagree, but I never was demonstrated to my satisfaction that we actually had identified what those things are that were uniquely local. And that is why I find it ironic that in recent days we hear lots of discussion about the States putting together regional collaboratives in order to address this. Well, that just flies in the face of the premise. How is it that it is only so granular that it is only within the borders of the State but we will not put together consortiums of large swaths of the country to do it?

Mr. WYNN. Okay. Thank you.

The other question I had, and anyone can respond to this, what do you believe is causing the delay in the expansion of facilities-based competition? I mean, because that seems to be what we are evaluating here, facilities-based versus maintaining UNE-P. And

well why has not facilities-based expanded and is it ever going to if you maintain UNE-P?

Mr. POWELL. Congressman Wynn, I will take a shot at that.

I actually am of the view that facilities-based competition is moving at a much more substantial clip than most of the market than this attempted intermodal competition that is being engineered by the regulatory side. I think the most significant competition that consumers have seen and can taste and touch and feel have been in the areas like wireless and cable, and other areas that control their facilities in a meaningful way.

I think within the equation of facilities-based competition using the facilities of the incumbent it is just an enormous regulatory morass. And if you think about it, every last component or input of this local regulatory experimentation is being regulated in 51 jurisdictions and then being appealed to the courts. So 7 years into this statute we don not even have the rules yet for unbundled network elements, and many of our most fundamental judgments have been overturned 1, 2 or 3 times.

So there is no clear stability yet about the terms and conditions by which, you know, those markets are facilitated.

Mr. WYNN. Is there anything to suggest that with this rule we are going to move closer to an expansion of facilities-based competition or are we looking to basically remain sort of the status quo?

Mr. POWELL. Well, I know we all disagree about this, but in my opinion I do not think there is anything I can point to that I see promotes the direction toward facilities.

And I would like to emphasize something that I think it is often, you know, sort of misstated or demagogued. We are not talking about no use of the incumbent's network. Whether I believe that was a right or not, the statute would never permit me to do that. We are talking about whether the entrant has to bring anything of its own to the party. Not whether it has to bring something, whether it has to bring anything. And under the UNE-P approach and the approach that we have put into place, it is clear that for a very long time you do not.

Mr. WYNN. Okay. Thank you.

Now——

Mr. COPPS. Could I just add a quick comment?

Mr. WYNN. Sure.

Mr. COPPS. I think it is clear that in the final analysis the ultimate arbitrator determining the future of facilities-based competition is the economy itself. The overall health of the economy. But I think you have to look at these other strategies, whether it is resale or UNEs, whatever, in kind of a time context and as providing kind of a lifeline or a way station as we all move toward where we want to move, which is facilities-based competition. But the times have not been very encouraging of that kind of build out.

Mr. WYNN. Thank you.

On the question of the retirement of copper lines, is it correct that the ILECs would have to get State permission in order to retire a line? Is that——

Mr. POWELL. Well, I have heard this raised by a number of people, and I'd welcome the opportunity to clarify that.

I think that it is easy to misinterpret the press statement on this point. It was not, as I understand it, the Commission's intention to create an affirmative obligation to have the state's permission to retire copper in order to use fiber facilities. I think all the Commission was noting is that within States there are sometimes statutes about processes you have to go to disservice something. The Commission was not introducing a rule that you had to have State permission; it was only alluding to the fact that there would be such processes that might be effected there. But it did not attempt to put in a new requirement or even embrace the requirement.

Now, moreover, carriers will always have the ability to provide that voice capability over the new fiber and thereby delist the copper anyway. So we will try to make that more clear when the actual order comes out.

And I yield to my colleagues if I have——

Mr. WYNN. Let me just ask, since my time is running, Mr. Martin, did you say that the ILECs would be able to charge the rates that they wanted under this order, because that was not my understanding, but I thought I heard you say that?

Mr. MARTIN. No. I said that the order also had some instructions for adjustments on the TELRIC pricing model as it applies to new investment going forward.

We talked about changes that could be made to depreciation rate.

Mr. WYNN. Did you say that they could charge higher rates?

Mr. MARTIN. They would be able to for the wholesale prices for new investment that they make. Not on the investment that has already occurred.

Mr. WYNN. Good. I am about to run out of time.

Mr. Powell, I along with many of my colleagues are very concerned with the current ownership limits. We raised them in 1996 from 25 percent to 35 percent. I do not want to cast dispersions or suggest things that may not be true with respect to your views. Would you share your thoughts on the ownership limits and the process that might result in raising them?

Mr. POWELL. Sure. I think it is important to understand that what I think we are pursuing is trying to correct the failed mechanics by which we established the media rules. You know, I do not have that much of a passion about exactly how they come out.

In many ways, I am doing what this Congress ordered us to do, which it said you will review these rules every 2 years, no if, ands and buts about it. And you shall eliminate or modify rules that you believe are no longer in the public interest. That began in 1998. The Commission's first effort at that was disastrous. It went into the D.C. Circuit and we lost—we are 0 for 5 on media rules. One of the reasons is the Court is saying that there is a presumption in that statute that obligates to validate the merits of a rule using rigorous and empirical evidence or get rid of it. And if you do not get rid of it, we are going to get rid of it for you.

So as I picked up my obligation as chairman to do the second biennial, we are faced with trying to develop a system and an approach to media ownership regulations that will be faithful to what you directed us to do every 2 years, and the way the court has interpreted our obligation to do that.

You know, Commissioner Copps talks about, you know, what if we are wrong and you cannot put the genie back in the bottle. What if we are wrong and the courts are the ones who eliminate all the rules? You are not going to put that genie back in the bottle, either. And I think that what we are trying to do is really work on the way we do biennials, taking a fuller account of the kinds of market evidence that the court said you had better have an explanation for.

I think every member of this Commission is unanimously committed to the goals I have heard talked about; localism, diversity, competition, stay at the forefront of our guidance in these proceeding.

Will some rules fall? Maybe. Will some rules be modified? Maybe. May some new rules be introduced? Maybe. All of which the Congress said you have an obligation to consider in making your judgment. So that's what we're really doing.

How the rules come out, I have not prejudged them and I do not have a hard and fast view about what each rule's ultimate conclusion will be. But I know that the record that we have to development and the empirical analysis we have to do is harder than anything we have done before in defending our rules. And the burden is to defend them. Because if I really wanted them to go away, I would not do that at all and I would just let the D.C. Circuit knock them out one by one.

Mr. WYNN. Thank you.

Thank you, Mr. Chairman.

Mr. UPTON. Mr. Shimkus used the defer rules. He's recognized for 8 minutes.

Mr. SHIMKUS. Thank you, Mr. Chairman. And I know my friend, Mr. Markey, will be watching me like hawk, so I will try to get my questions out rapidly.

Consumer interest, we talked a lot about that. Many of you know, and Commissioner Adelstein, you were at the rollout for the E-011 Caucus which we did by camera with Senator Burns, Senator Clinton, myself and my colleague Congresswoman Eshoo. And there is a part in this whole enhanced 911 debate that is involved in this area.

I commend you for having Mr. Hatfield do a report which I have a copy of and I have read. I want to encourage my colleagues to do two things. One is read the report. Two, join the caucus.

In the findings and recommendations, third, the basic comment is that there is 3 phases to enhanced 911. We have the cellular companies, we have the local exchange carriers and we have the PCAPs or the call centers. So the question is very simple, and I would like to ask Commissioner Abernathy, Commissioner Martin and Chairman Powell, Mr. Hatfield observed that the existing wire line E-911 structure is seriously antiquated. He says that the existing wire line E-911 structure is built upon not only an outdated technology but one that was originally designed for an entirely different purpose. He notes that it is an analog technology in an overwhelmingly digital world, yet it is critical, as I said, to the chain on enhanced 911.

So the question to you 3 Commissioners how is the current order going to encourage the necessary investment in the current wire

line structure particularly with the consumer focus on enhanced 911? And why do we not go with the Chairman first and then Ms. Abernathy and then Mr. Martin?

Mr. POWELL. Thank you, Mr. Shimkus.

Just so I understand, the current Triennial of the decision, what impact it may have on——

Mr. SHIMKUS. Correct. Yes, I have not per se, but I——

Mr. POWELL. That is okay. I understand.

Mr. DINGELL. Concise.

Mr. POWELL. I am not so sure I have the answer. But I think what you point out is that one of the things that we have run into in the deployment of enhanced 911 capability is that the ILECs will remain an instrumental part of that in that they provide some of the critical trunking that allows some of these services to work. And there have been some disputes over the cost, particularly associated with who is obligated to pay for that infrastructure and how are the costs going to be shared.

I do not know whether I can draw a direct parallel to the decision, but of course as you look at the limited pile of revenue and expenses that companies have to invest in changes, whether they be broadband or E-911 functionality, I suppose you could make an argument that if this has a continued detrimental effect on revenue, budgets and expenditures it will only put more financial pressure on the ability to make new investments to help enhance 911. But I honestly have not personally studied that or know whether it is even a credible concern, but that would be the theoretical concern that we would need to look at.

Mr. SHIMKUS. Thank you.

Ms. Abernathy.

Ms. ABERNATHY. Thank you.

When I was working on this years ago when I was at Airtouch, one of the problems when we were doing wireless E-911 is we just fundamentally failed to appreciate the critical role that the wire line carriers would play. And we worked closely with the wireless bureau and with the Commission in coming up with rules, but at no time did we pull into the dialog the wire line providers. We also worked closely with PSAPs.

I think what you have seen is that all of a sudden now we are coming up to D-day for deployment and we are finding that the wire line players were never part of the dialog nor part of the commitment, and so we are having to move in that direction and engage them and show them why this is such an important obligation on their part. Because if the connection that they have to provide between the wireless parties and the PSAP, if that connection fails, then all of the investments that have been made by the other parties go down the tubes. And, in fact, you do not have location capabilities for consumers.

Mr. SHIMKUS. Mr. Martin.

Mr. MARTIN. I think that one of the other aspects that we were talking about with Congressman Wynn a minute ago about the change in our rules as it relates to any TELRIC pricing that would apply for any new investment going forward to the extent that any of that was being sold, similar to services or equipment was being sold on a wholesale basis would obviously have an impact on the

new investment that might be required in the context of E-911 capability as well.

But I also think that the Hatfield report just highlighted the importance of the local exchange carriers will continue to play in E-911 and the importance of their upgrading their equipment that will make the entire network capable of receiving it even from the wireless side.

And just finally, also the importance of the PSAPs being able to make sure that the funds that are being collected for E-911 are actually being used to make sure that they are implementing the rules as they are required. Some of the States have collected funds and not had that going in that direction even though——

Mr. SHIMKUS. Okay. Well, I don't want to go in that. But let me know go in reverse order with those answers.

What in your last order would incentivize a competitive carrier to invest in a robust—now this is a competitor, this is CLEC. What in this order is going to incentivize the CLEC to invest in a robust facilities-based network necessary to have the redundancy required that we are asking for in enhanced 911?

Let us go with you, Mr. Martin, first please.

Mr. MARTIN. The pieces of the network that end up being used for the enhanced 911, the CLECs provision in the services currently is going to be over the use of the incumbent's facilities.

Mr. SHIMKUS. So there is nothing to incentivize them to build out to facilities-based in your recent order?

Mr. MARTIN. On E-911 services there is nothing in particular on the most recent order that would encourage them to be providing E-911 capability.

Mr. SHIMKUS. Thank you.

Ms. Abernathy?

Ms. ABERNATHY. I think there is nothing in this order that will incentivize CLECs. I think the seduction of TELRIC pricing creates a disincentive to rational business behavior, which would be to invest in some facilities. So I think in this instance there is no incentive.

Mr. SHIMKUS. Mr. Chairman.

Mr. POWELL. Yes, Congressman. I would agree that I do not think there is a lot, except do think that the order makes clear that certain kinds of transport will be off the list if there is competitive supply. So in markets where you have some competitive supply already, a CLEC is going to be obligated to either use competitive supply, which does not necessarily get at your question, or self provision, which might.

Mr. SHIMKUS. I want to thank you for that.

Part of the report also said that there should be congressional champions, and I think that is why the congressional enhanced 911 caucus was formed, to do that, to bring attention here. And we had a great reception and a great press conference. And it is going to cause us to look at enhanced 911 very carefully in all the State quarters involved. So, again, I want to encourage all my colleagues. I think it is a critical aspect that I would encourage them to join with us. If there is anything about consumer protection, it is rolling this out.

There is a lot of friends in this room, and a lot of friends in the fight. Locating people on a cellular phone, their location is critical for saving lives. And in the business model you have to have capital to invest in new technologies. And when you drain capital from one area, you do not have capital then to expand in maybe other areas. And that was my connection. I do not have the answer. Hopefully, we will move forward.

And with that, maybe I should wait until I go down to zero. But with that, ranking member Markey—Chairman, I yield back the balance of my time.

Mr. UPTON. Noted the gentleman yields back 5 seconds.

The gentleman from Illinois, Mr. Rush is recognized for 5 minutes.

Mr. RUSH. I want to thank you, Mr. Chairman.

Commissioner Copps, when we introduced the Tauzin-Dingell legislation last year, which is like your decision and the decision of the Commission, removed unbundling obligations for the Bells advanced facilities, I introduced an amendment that held the Bells to a strict time line for broadband deployment to ensure that they use their new regulatory freedom to benefit all Americans, including residents and undeserved or low income areas.

My question is why did not the Commission impose such a build out requirement on the Bells? And without such a requirement, what assurances do you have that the Bells will deploy more broadband facilities, particularly in the undeserved areas where they are so sorely needed?

Mr. COPPS. Well, I do not have a lot of assurance on that, nor do I think I would have the possibility at the Commission to win a majority for that kind of a charge. And maybe that is something that would have to come to Congress and be dealt with in legislation.

But we have every year an exercise that the Commission calls the Section 706 process to look at the progress we are making regarding the reasonable and timely deployment of broadband. And I think we have to really take that with utmost seriousness and really ask some questions that we have not asked before. And I think when you start talking about broadband, although the term seems to be going out of style digital gap, some question in my mind that there is a digital gap not just in rural America but in the inner city. And we can argue back and forth whether deployment is reasonable and timely. I would come down on the side in those areas it is neither reasonable nor timely and that we need to put that very much forward on our list of priorities at the Commission, even as you are attempting to put it very much forward on the priorities of the U.S. Congress.

Mr. RUSH. Chairman Powell, do you have a response?

Mr. POWELL. I think I would largely agree, only to say that your question, I am very familiar with your amendment. It is very unclear to me the Commission would have legal authority to obligate in quite the way that you were able to do as a matter of legislative law. I cannot say that I have studied that ostensively, but for the Commission to direct construction of facilities along a time line in certain markets I think would be a strain to come up with an authoritative basis on which we would have that authority. So I think

there is sometimes a partnership in which the things that we cannot do, you know, we do have to rely on Congress to do.

Mr. RUSH. Okay.

Chairman Powell, do you believe that the current national television broadcast ownership cap is promoting either great diversity of voices in terms of serving the needs of minority communities or promoting greater minority ownership of broadcast properties? If we as a nation are really serious about greater opportunities for minority involvement and all their facets of the broadcast business, should we not be exploring more direct means to achieve that results, such as the tax incentives like those in the bill recently introduced in the Senate by Chairman McCain, and which I am also preparing to introduce a House companion bill in the next few weeks?

Mr. POWELL. Well, Congressman, I applaud you, will do anything I can to help. I have for 5½ years believed that the most critical problems facing minority interests in the development of alternatives in the media marketplace was most preeminently access to capital. And I think that the tax code is often used to subsidize high public values for that purpose, and I have always thought that the one policy that I have seen when I look over the history of the country that actually seemed to achieve what it professed to achieve was the minority tax certificate program that preexisted. Now, I think there were flaws in that program, and I think that I worked with Senator McCain and others to try to remedy some of those flaws and make it more broadbased and sustainable judicially. And I think that it has done that. But I think that that is what we need to do. I think that will have a much greater impact.

You know, I should not try to duck your question about the 35 percent ownership rule. I can only say if it was meant to do that, it sure has not proven very productive. I mean, the decline in minority ownership and the limited amount of opportunity has taken place in the face of the rule. And I think that when this issue matters a great deal to me personally. And, you know, when I look and study that we run more in more often than not to capital formation challenges and for a minorities who are often new entrepreneurs who do not have the kind of legacy networks in an industry that is pretty clubby and pretty old. And so—not in age. My apologies to any broadcasters.

And I think there are just more productive directions to try to achieve the goals we do. And then I think that—you know, whether I agree with them or not, and I should confess publicly that a lot of the court decisions in the area of minority ownership and affirmative action I do not personally subscribe to. But I am still constrained by them. And I think that cases like Adaran and Richmond v. Grossnan and stuff have been terribly constraining to a government policymaker to go at these problems more directly.

So I think things like access to capital, tax certificate policy, other kinds of policy are more productive directions for those objectives.

Mr. RUSH. Thank you, Mr. Chairman. I yield back.

Mr. UPTON. Thank you, Mr. Rush.

Mr. Walden is recognized for 8 minutes, taking advantage of the deferment rule.

Mr. WALDEN. Thank you, Mr. Chairman. Is timing is impeccable.

Chairman Powell, I accept your apology, as the only licensed broadcast owner here in the committee, I do not perceive myself to be old or stoogy, or whatever it was you just said. And I declare a conflict, and will as I serve on this committee.

But I think your point about access to capital, especially for minority ownership, is clearly a huge problem. And I would welcome the opportunity to work with my colleague on that initiative, and would be happy to join you on that effort. Because I think that it is truly the best way to facilitate more diverse voices in the marketplace.

While I'm on that topic, because one of the issues before this subcommittee is your rulemaking proposal on ownership and the various rules, having been in the radio business nearly 17 years now I have witnessed an extraordinary change and an extraordinary level of new competition for the same set of ears that I try to appeal to. Whether it is XM and Sirius, cable audio channels, satellite delivered audio channels, AOL-Time Warner, Internet channels, the advent of peer-to-peer file sharing where it is all music and it gets out there. You see what is happening with private recording devices where they can skip ads on TV now and the effect that is having on over the air broadcasters and others. And all of them, and the addition of LP FM as it is beginning to come out, and I know you are opening the door—a short window for translators as well, again.

It is an enormously different market than it was in 1934 or 1996. And I hope as you look at the concentration rules, while there may be some problems with vertical concentration where you own the rights to the station and everything else that goes on your market or conceivably could come there; that is almost a fair trade issue as opposed to a license issue in my mind. But you will take into account that it is a very competitive marketplace with far more radio stations in each market and TV than there were in my father's generation, and indeed when I entered this business. And that we have to be able to compete against a competition that never existed before to be able to survive as the free over the air broadcaster that services the community.

With all due respect to my friends at XM and Sirius and others, satellite delivered broadcasters don't give one hoot or holler about whether the local school is closed today in my community. That is my responsibility. But I compete against them for audience share. So I hope you will keep all that in mind.

Ms. Abernathy, I was especially intrigued by your testimony as I read it yesterday flying out here from the west coast. And on page 4 you talk about 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. And I know in other testimony there is discussion about we lost half a million jobs and billions of dollars in capital. And I know after this recent ruling, you know, the stock market did not smile on the Bells. Can you, and each of you maybe, give me some idea if you float part of this back out to all the States without a clear definition from the Commission, at least not that we have seen yet on impairment and with no real appeal process back to the Com-

mission, how long is it going to take 51 entities to decide plus the court cases and is this yet another crushing blow to moving forward with the capital necessary to continue to build out the facilities?

Ms. ABERNATHY. I think absolutely it is. I mean, the problem whether you are for UNE-P or against UNE-P, there is no clarity here. Now, I happen to think we should transition off of it and wean the carriers off of it to a more rational business structure. But in this scenario what you are doing is you are saying there is no certainty at all. Do not build a business model around it. Do not invest in new infrastructure. And instead, even for some of the CLECs who have not had to engage at the State level, have not had to hire lawyers to do lobbying at the State level, we are now saying that you are going to have to go state-by-state and then, of course, there will be appeal from those decisions. And there will be a tremendous amount of uncertainty. And I believe there will also be States who will not meet the 9 month deadline for trying to get this done. So we will see waivers and extensions.

So this does not create the kind of environment where Wall Street looks at these companies and says "Okay, I know what your business plan is going to look like in 2 to 3 years, and I know how you are going to make money, and here is some capital."

Mr. WALDEN. Mr. Chairman.

Mr. POWELL. Well, I will try as best I can to address your question about time lines with the big caveat is that one of the consequences of this approach is that it will vary dramatically across the country. But even assuming a State finished in the 9 months that the order affords them, which I do not have that much optomisim for—I do for some of the marquis States who are well resourced, have the kind of expertise and make this priority. And the State commissions are very burdened, too. They do energy dereg, they do gas, water, a lot of other things. So I don't know what their priorities are.

But in the best case, the lead States are likely to finish maybe in 9 months, or probably more likely a year. I think there will be a substantial number of States who are still struggling with this if the Commission permits it. Now, according to the order as I understand it, it comes falling back to us if they do not finish it in 9 months.

But those cases are appealed to Federal district courts. Why is that important? Because Federal district courts tend to be pretty backed up and to even get a case docketed is usually a year before you are even docketed. That is not hearing the case. It takes a year before you will even be put on the schedule. It might take another year for the case to be resolved. You cannot assume that they will all come out the same way. Some will be remanded, some will be continued. If they are finaled, they will be appealable to one of the 12 courts of appeals of the United States, which usually are going to take another year or 2. And then, you know, if there is a split in the circuits, they reach different decisions, you are going to have a petition granted, that is probably another 1½ years. It could easily be even in an optimistic scenario 4 years.

I would only offer, and I do not mean to argue it will be only be, but that is very likely. I give you the only example I know of the 271 process.

The Act just passed its seventh anniversary and we have completed 35 States, and 20 of them were done in the sixth year. That is with the process that comes directly to the Commission. That is with a process that tells the Commission it must rule in 90 days, period and that decision is final. That is where guidance can be uniformly shared across States and from the precedent set by the FCC, and that is a 7 year process.

I cannot possibly imagine how this one is going to be dramatically more efficient than that one, given that there are many more criteria, much less precedential review by the Commission, much fewer timeframes.

So, again, I mean my greatest criticism, to be candid, is I could understand a disagreement on UNE-P or not to UNE-P, but I think in many ways we have chosen the worst of all possible courses, which is we do not know for that kind of timeframe.

Mr. WALDEN. Mr Copps?

Mr. COPPS. Yes. Well, let me just make a quick comment, Mr. Chairman.

We do have some timeframes in here, 90 days and 9 months. Hopefully, that will move it along. And then it depends if you go to court and who is going to take you to court. And I do not know if that is going to be the folks who are declined the lack of regulatory certainty or who it is going to be, but I suppose no matter where we came down on this we would be going to courts.

But, you know, I do not want to take all the hits on this decision for creating tremendous regulatory uncertainty. I have comments on this in the past. I think the Commission stands kind of guilty of creating regulatory uncertainty in a lot of different areas, other than this, and I hate to see this one singled in on as the only candidate. I think we are doing on broadband, for example, is creating not in this decision so much, but in the cable modem decision and in the Title 1 pending wire line decision, I do not think the markets have a clue of how we are going to come out on that or when we are going to come out on there, or if we move things to Title 1 what are going to be the stipulations imposed on people who are operating under Title 1. So I do not want to take the only bullet that is fired here on creating regulatory uncertainty.

Mr. UPTON. Thank you.

Mr. Davis recognized for 8 minutes.

Mr. DAVIS. Thank you, Mr. Chairman.

I look forward to working with you, Chairman Powell, and your qualified colleagues as well.

I would like to ask again a question about published reports with respect to the intention of at least some of the Bell companies not to deploy broadband in any immediate or significant fashion. In developing the ruling we have been discussing today what assumption did you have as to the impact of your broadband relief would have on their willingness to proceed with broadband deployment?

Mr. POWELL. I think, first and foremost, we did what the statute requires, which is to make a candid assessment of whether new architecture is necessary and would be impaired without it.

One of the things we observed in this segment of the market is the vast majority of competitors were using facilities rather than fiber to be competitive; that is there was copper available and they were able to use aspects of the network to provide the services and speeds they offered. And one of the assumptions was do we believe competitors are impaired without access to the future availability of fiber. And at least for myself I concluded no because there were alternative facilities that provided adequate services for them, at least at this moment in time. Now, this review is done every 2 years theoretically.

I think there is a consideration guided by the statute and Section 706 that says the Commission should stay attuned to trying to remove barriers to investment in new architecture of advanced telecommunications services.

I personally believed that there is a huge disincentive to undertake the expensive activity of constructing new facilities if they were immediately available to people who would be able to compete for you for those services. I think it is not that different from copyright law or patent law that allows an innovator or the one who assumes risk some reasonable amount of time to profit from those risks taken before making it more generally available. That was at least the theory.

I would like to emphasize very strongly if there is one thing I hate about this industry is its constant passion play between billion dollar self-interested actors.

Now I have never once accepted the representations of any company in making the assumptions on which they do. I try to base it on sound economic judgments which should promote the most positive incentive. Sometimes that happens to coincide with their lobbying effort. That does not mean that I buy it wholesale. I have yet to ever see one that was persuasive.

So it does not surprise me. I am as disappointed as anyone on this committee by some of the statements. I think it is fair to say that the BOCS, but not all of them said that. Qwest was very, for example, careful to say something different. But I also think it is a lot of crying, there is a lot of crybaby reactions to a bitter decision at the end of the day, and I have heard a lot of those.

I still do not think that when they go back in the board room and they look at their fiduciary responsibilities to shareholders they will be able to ignore completely the opportunity that the decision provides, no matter what their lobbying shops will say about the consequences.

Mr. DAVIS. Appreciate your candor, Mr. Chairman.

Would any other Commissioners care to comment on this particular point?

Mr. COPPS. Well, I think in addition to some of the statements which have been made, which I think are unfortunate, there might be a larger and a more historical context in which to look at this. There was a study done recently, and I hope I do not misquote it, by Mr. Hassett at the American Enterprise Institute. And he made the point that a good bit of the investment that has gone into broadband has come from the competitive community. And, indeed, it was his conclusion after looking at the fact that a lot of the ILEC

investment made in broadband was probably stimulated by the CLEC investment made in broadband.

So in addition to the statements we are looking at right now in the passion of the moment, I think we need to look at historically at investment patterns from the ILECs into broadband.

Ms. ABERNATHY. Thank you, Congressman.

I think that they will do what is in their best interest, and that is what I fully expect. So when I analyze this issue I ask myself what is most rational in order to remove disincentives to investment. And then they either will based on business incentives invest or they will not.

I believe that the competitiveness of the cable product as far as offering broadband will create markets where this kind of investment will make sense. And where it does, I will not be standing in the way forcing them to sell it off at discount prices.

So I am comfortable with our decision, and I do believe that we will see some investment, perhaps not as quickly as we might have liked.

Thank you.

Mr. MARTIN. I would just say that there was an underlying assumption in the decisions that I made. There was obviously a hope that the broadband investment would follow the decision. And I'd certainly echo the comments of the Chairman and the other Commissioners that were disappointed by the fact that the public comments that have said that that might not follow.

Mr. DAVIS. Chairman Powell, I believe you have stated that the additional development of cable and Internet sources of news information has added to the multitude of voices in the marketplace and perhaps as a basis to revisit the restrictions that are currently set on diversity of ownership within the broadcast industry, is that correct?

Mr. POWELL. Yes, as far as it goes. And in many ways what I am stating is exactly what has been stated back to us by the cases in which we were overturned in which when we ignore the availability of alternative outlets we are quickly chastised for not taking those considerations into account.

Mr. DAVIS. So here is my question. I have looked at the top five Internet news sites according to Nelson, November 2002, MSNBC, CNN, AOL News, Yahoo and ABC. These are all owned by the same people who are the major sources of broadcasting news information now. So my question to you in terms of your analysis of the need for diversity, are these different voices or are they the same voices?

Mr. POWELL. They are both depending upon who you are talking about. I think Yahoo is a distinctly different voices than any of the networks. I do not know that Yahoo owns any television properties that I am aware of. I think there are many other sources of news and information on the Internet that are not owned by people.

I understand, the point about top 5, but let me just even concede that to you. I mean, I think that is a red herring. We have not argued that somehow Internet has supplanted traditional television, and that is the reason. I think your argument is correct, but it goes to how much weight that should be given. Maybe minimal at this

point in time, I would be the first to agree to that. But it cannot be ignored either I think or we are at judicial peril.

But I do not think that that is the one that is most groundbreaking in terms diversity. If you look at the vast majority of the broadcast rules that are under review, they date back to the 1970's. How about just cable? Cable, which 86 percent of Americans now subscribe to or direct broadcast satellite, which is a substantial portion of that, I think it is completely irresponsible not to take into account the availability of sources of information, entertainment and news that have been introduced into the market in cable since the 1970's and the 1960's. And I think that is the most compelling additional infrastructure.

Mr. DAVIS. Commissioner Copps, would you care to comment on this point? I have a few seconds left.

Mr. COPPS. We need to better understand the changing nature of competition. It is true that there are more radio stations, but certainly there is less radio competition. We know for a fact we have 34 percent fewer radio station owners in February of 2003 than we had in 1996. Yes, we do have more channels on television, but 90 percent of the top stations are owned by the giant broadcast companies. The top 20 sites on the Internet are owned, pretty much, by the same players. So we need to take a really close look at this.

And, you know, there are so many dimensions to it. And I do not want to get us caught in a situation like we are in today up here when we do our media concentration decision and come up here and try to explain. We had better make sure that we have teed up and talked about all of the options that might be proposed for this. If somebody is going to propose changing the 35 percent rule to go to 35 or 40, or 45 percent, we had better have a study that goes out and looks at the results of that rather than just trying to pick a figure out of thin air and say let us go with us and vote on it. Because that will survive neither the granularity test of the courts nor the good judgment of the American people.

Mr. DAVIS. Thank you.

Thank you, Mr. Chairman.

Mr. UPTON. Thank you.

Ms. Wilson.

Ms. WILSON. Thank you, Mr. Chairman.

Mr. Adelstein, I wanted to ask you a question about build out requirements. Do you agree with me that the FCC's decision on broadband essentially mirrors the Tauzin-Dingell Bill but without the mandatory billout requirements? And in light of the Bells' public statements denying any intention to deploy broadband, do you believe it would be prudent for Congress to step in and impose such requirements?

Mr. POWELL. Thank you for the question. I do believe that this bill does in many ways mirror the Tauzin-Dingell deregulation that was envisioned by that bill. And, in fact, I think that the opinion of the majority in this case gave the Bells everything that they asked for on broadband. And it is disappointing. I shared the disappointment with my colleagues that they have made public statements that they will not invest despite having earlier said before

the proposal was unveiled that if that was the case, that they would have made major investments.

I share the view of the chairman that there is not clear authority on the part of the Commission to require those kind of buildout requirements. So it would take an act of Congress, as was contemplated under the Tauzin-Dingell Bill to require that kind of a buildout. And would welcome and be willing to implement any such legislation were Congress to enact it.

Ms. WILSON. Commissioner Martin, I had a question about line sharing and your position on line sharing and the FCC's rules.

I guess what may be the best way to put this is how will residential consumers of broadband expect to benefit from the elimination of line sharing?

Mr. MARTIN. There was no rule that I was actually more concerned about and the implications of what the Commission ended up doing. I actually had—there is probably no company that I met with more than Covad, one of the primary users of line sharing, who I had met with repeatedly about my concerns on the rule.

But I think that in the end if we are going to be faithful to the implementation of the Act and along with the court decisions that have come down, the D.C. Circuit decision that came down last spring, of all the rules that it talked about it it was most critical, actually, of the line sharing rule and of the Commission's previous, I think it called itself blinding to cable competition in the residential broadband market space. And it said that the Commission had to take into account the availability of cable as an alternative for high speed Internet access in trying to determine whether it was justified to keep its line sharing rule in place. And I think that we needed to end up taking into account the cable competition that is there going forward.

So I think that the consumers will still have access through either cable competitors and through the incumbent I'll find a bundled service of offerings, and through competitors who are still able to use the line for both voice and data services, and also for a bundled alternative as well.

But I think that the Commission's impact on consumers of its immediate rule, I do not know. I think the Commission tried to do its best to blunt any negative impact by having a very long transition, which I think it was one of the things that the Commission was trying to do.

Ms. WILSON. Chairman Powell, you may have answered this in response to other members' questions, but I would like to hear it from you and what your reaction is to the Bell company executive statements since last Thursday that they will not deploy additional broadband infrastructure, and particularly in light of I think this undermines the public policy basis for moving or for removing the unbundling requirements for fiber loops. And I wonder what is your response to them?

Mr. POWELL. Well, I think I would say two things. One, I would echo the view that I expressed a moment ago that we will see. I think that we are still in a period of sort of bidder reaction by all parties to the decision, and I am not convinced that what we are seeing is not a statement that has been run through management and the board of directors in making actual investment decisions,

but are the public affairs reactions to a decision to which they are desperately disappointed.

I happen to believe that at the end of the day if this is a green field of regulatory freedom that provides an opportunity for new services and new revenues, the economics will be more compelling and no matter what their initial emotional reactions are, there will be a positive opportunity.

But I also want to seque to something that I think that we threw off the balance in this decision. To go back to your first question, you have got to be careful not to make it too good for somebody. And when we took out line sharing, that is one of the things we did.

Line sharing is provisioned over copper facilities. Not the new stuff we are trying to get built, but the old stuff. It would have provided the kind of continued competitive stimulation that would make it sort of like a magnetic poll. You know, the unregulated positive and the regulated negative with a competitor in the field. And you would have had much more stimulation to move to the advanced architectures we are trying to incent. That incentive has been completely ripped from the market.

And to your point, I do not see a single thing good for consumers on this part of the decision. I know what will happen. One, we are probably going to kill off the companies that use it in the retail space. But just as quickly you will see an increase in broadband prices, which is the demand problem that so many talk about. And not just in DSL, because DSL leads the price movements in cable. Why? Because cable has 30 to 40 percent margins already. If DSL goes up, it is pretty easy for them to match without having any consequences. And they will. I just fear that we are going to have an increase in broadband prices as a result of the line sharing decision.

Ms. WILSON. Thank you, Mr. Chairman.

Mr. UPTON. Thank you.

Ms. McCarthy.

Ms. MCCARTHY. Mr. Chairman, Mr. Deutsch has asked that he go ahead of me. He is ranking on another committee. With your permission——

Mr. UPTON. No problem.

Mr. Deutsch recognized for 5 minutes.

Mr. DEUTSCH. Thank you, Mr. Chairman.

Thank you, Ms. McCarthy. I really appreciate that.

In terms of, you know, the decisions on the broadband, I guess one of the questions I would have is last year in our legislation we specifically said that before you unregulate broadband there should be buildout through rural communities, redline communities. Obviously, you did not do that.

From the policy perspective, if any of you could respond, I mean how much did you look at the ability to try to make that happen, I mean so the tradeoff of universal service at the same time as deregulation? And was that something you could have done, did you want to do if you had more authority, would you have done? I mean, was it something you discussed, Mr. Powell?

Mr. POWELL. I cannot say in the hypothetical what I would have done. I mean, it is not something that we discussed. And I think the reason is we——

Mr. DEUTSCH. Hold your breath.

Mr. POWELL. Well, I do not want to burn up your time certainly.

Mr. DEUTSCH. That is fine.

Mr. POWELL. We generally do not spend that much time on stuff that we are pretty clear that we do not have legal authority to do. So I do not think that much time was spent on the idea of an affirmative buildout obligation. The Commissioners did deliberation.

Mr. DEUTSCH. Yes. Anyone else want to jump in?

Ms. ABERNATHY. The one point, Congressman, that I would add is that when you are talking about the smallest LECs in rural America, in the truly rural parts where you see a lot of USF dollars, those LECs generally are exempt from unbundling. So they have no unbundling obligations. And what we have generally seen in those markets is that the USF dollars have been a tremendous help in insuring that they are doing broadband buildout, which is why I think in New Mexico in some of the smaller areas you tend to see more broadband than in the larger markets. Because they have access to USF dollars, they do not have competitors coming into those markets that would require them to sell it off at discount prices. And so they are able to deliver to their customers sometimes better services than you might get in the larger areas.

Mr. COPPS. You know, I do not think we should be too categorical in saying that we have to have legal authority for buildout. I cannot give you a precise definition of what authority we have, but I do know we have Section 706 that talks about the reasonable and timely deployment of broadband. And it charges us to take advances and to take steps to deploy advance services such as broadband. And I think what we really need to be doing is having an explanation of what steps we could actually take within the constraints we presently operate under. And I rather suspect there is probably a little more wiggle room there than some people think.

Mr. DEUTSCH. So if I can follow up, I mean that as a direct contrast to what Chairman Powell just said. I mean, am I hearing you correctly? You are saying you might have some authority to do something——

Mr. COPPS. I am just telling you how I interpret Section 706 which talks about the reasonable timely deployment of broadband and enjoins the Commission to take steps to encourage it. Now, how far that can go and what you can actually mandate a company to do, I do not think we have sufficiently explored. But I think we ought to be exploring it because I think there is no higher priority than we have than——

Mr. DEUTSCH. Yes. I mean, is that something that is as the Commission you folks are going to do? I mean, do you see this sort of—you know, I mean just the balance not being quite the way, at least for House perspective, it is something we ask?

Mr. COPPS. Well, you have my vote to do it.

Mr. DEUTSCH. All right.

Mr. POWELL. I think that is interesting. We can sit around and talk about it, but 706 in my—I do not need to spend a lot of time, is not in my opinion a substantial basis for——

Mr. DEUTSCH. Let me—because I will probably have a chance maybe just one other question or one other line of questioning, and that really deals with how you looked at the system in terms of saying to unregulated as the idea that it is a duopoly at this point in time. And I guess, you know, just in terms of the analysis from the staff level, you know, the duopoly that comes to mind is really the cellular duopoly that was really sort—by any, I think, analysis was really a failure until you had other competitors in the market. I mean, in terms of both price competition, technology competition it was a failure. And when you got more than two in is when you saw the technology change, digital and these dramatic price reductions.

Now, it sounds as if, you know, you are relying upon the duopoly issue. And I think to some extent it seems like a false issue at many levels because, you know, cable systems in the community I live in were never build out to huge industrial areas, commercial areas, and yet that is the argument you are making. So I am trying to get some sense of how you looked at that. You know, what type of analysis, what type of—you know, real empirical or theoretical backup to the premise of basing your argument on a duopoly analysis?

Mr. POWELL. Well, at least speaking for me, I do not think it was based on a duopoly analysis or comfort. The duopoly is a sufficient number of competitors to provide competitive services to consumers.

This problem is somewhat unique than a traditional competitive problem. This is about how do you get facilities that currently do not exist built and who is going to build them. And who is going to pay for them to be built.

And I am an anti-trust lawyer who believes in competition as passionately as anybody. But I think that it only—only so far as is legitimate. To the extent that you're relying—I do not know that I follow the argument that a competitor who would use an infrastructure that is not even constructed yet is providing the competitive threat to construct the network in the first place.

This country may years from now if it has a digital architecture all over the country that is providing services to the country, maybe the Congress will determine that it should make all of those facilities open to new competitors as well. But we're in this unfortunate position at this point as a Nation that we don't even have this architecture. And many other countries in the world do. And it is beginning to be a significant disadvantage for the United States of America in terms of new and productivity growth. So I am not content with duopoly, but I also think that the problem is not about competitive services on a mature infrastructure. It is finding the right incentives to get somebody to undertake one of the most massive construction projects of greatest importance to American consumers in the history of the country.

Once upon a time when we wanted to do the telephone, we monopolized with government sanction the whole system. I hope we do not do that again. But it is a recognition that at some point you have to have the scale and the resources to build it.

Mr. DEUTSCH. Thank you.

Mr. UPTON. Mr. Pickering is recognized for 8 minutes.

Mr. PICKERING. Thank you, Mr. Chairman.

And before I go to questions, I would like to give some context to my questions and to where I believe we are and the decision that the FCC has just made where we are from a committee, from a congressional point of view. And to commend those who have played a very important role in bringing us to this point.

Chairman Tauzin and the ranking member, Mr. Dingell, should be commended for promoting the broadband bill that in many ways was adopted by the FCC in their recent decision and order.

Chairman Upton and his leadership.

The committee did not address the UNE-P. They addressed the broadband provisions, which were adopted by the FCC. That legislative debate and legislative pressure influenced your decisions. So this committee and the leadership of the committee should be commended for what they did in bringing that about.

Now, in many ways I disagreed with that legislation, and have remaining questions about the decision reached by the FCC. But you can not deny that what has just been adopted was debated in this committee, in this House and the leadership of this committee should take great credit in their work and their effort. Nobody can deny that.

For the Commission, you have acted. There is tremendous pressure upon you from competing interests and those interests will always disagree, even though if we take into context that much of what you adopted was the industry position, the Bell position over the last 2 years of new wires/new rules, old wires/old rules. It is basically what you have adopted in the UNE-P order and in the broadband exactly what was proposed over the last 2 years.

As I look at the 3 objectives of what we have tried to carry out from the 1996 Act, and that is to incent capital investment, that is one objective.

Two, promote competition, maintain and preserve competition; that objective.

Three, do a market-by-market, state-by-state analysis of how we are emerging in competition and investment. And if you look at those three objectives, I would say that the Commission's action met all three. Now they did it in a very dynamic tense at times disagreeable context, but that is actually the best part of politics and policymaking. It is always a part of it. We should expect no less. And that dynamic tension of divergent views actually I think in this case has rendered us a balanced decision and good policy. I think we will see good incentive for investment in broadband, the green field as Chairman Powell mentioned.

I think for emerging competition, and where are we today thanks to the FCC? Thirty-five States have approved and the FCC has approved 271s. In those States which represent a vast majority of Americans now have choice for long distance, and they now have choice in local competition.

Ten million people have signed up for an alternative local providers. Tremendous significance in local competition and tremendous significance in long distance. We no longer have the distinctions in most of the country on distance service. It is all distance, no distinctions, no segregation and that was a key objective of the Act which is now being accomplished.

Soon there will be 41 States, most of the country, almost all of the country within the year will have a choice between local providers and long distance providers, all distance service at roughly $50 to $60 for both. Tremendous savings for consumers. Tremendous accomplishment.

We do not need to lose that sense of accomplishment in the acrimony of the decision that is being made.

Chairman Powell, you should be commended for tremendous leadership. Your No. 1 priority was broadband. It has been adopted, as was this committee's.

To Chairman Martin, let me commend you for being a strong voice for States and for competition, as well as for investing in capital. I think dynamic tension actually caused a good decision, a balanced decision.

And what I would like to do is to talk about some of the questions as we go forward on other issues, but to again focus on those three objectives and how we go from here with the FCC decision and the drafting of the rule. And as we look at other decisions in broadcast and in wireless issues that could effect not only the wire line competition, but competition in general.

Chairman Powell, in the discussion today much has been made over how confusing this could be from a regulatory uncertainty point of view with 51 States, with the litigation. The reality is no matter what you decided there was going to be litigation. No matter what you decided there would be regulatory uncertainty because of that litigation. The only way that we could avoid that is to take away due process, to take away appeals, to expedite appeals review, to consolidate all appeals, to take it straight to the Supreme Court. Now that is one way to eliminate regulatory uncertainty because of litigation, but I think it would be a very dangerous precedent across the country if we did that. We have considered that before, but we decided that would be too dangerous of a precedent.

The reality is that whoever in the competitive playing field, long distance or the Bells or the States, do not get what they wanted, they would litigate. And the same thing that happened in 1996, even though everyone agreed on all sides of the 1996 Act, they all fought the regulatory battle. And as soon as the regulatory decision, they went to court. And there is nothing that is going to change that reality. Nothing we can do, nothing you can do, nothing the industry should not do. This is the American way.

And, unfortunately, we cannot change that. We can accept it and realize that we may want something today, but that process takes time. We are changing a 100 year telecom policy and with 6 or 7 years we have made tremendous progress.

Mr. Chairman, let me ask a question on the—I have used up almost all my time instead of asking your question. But this is my question. In 1999 you dissented in the unbundling requirements, particularly as it relates to the impairment of switching. And in that dissent you said a preferable option would have been to provide some time limited ability for State commissions that perceive their markets are different to remove elements from the national list based on showing consistent with this decision and resisting of rules. If you said that, and I want to give you a chance to say

whether that is consistent or whether there has been a reason for change or somehow out of context from your position today. But if you said that it should be in participation and in partnership with States in 1999, do you disagree with that today?

Mr. POWELL. One, I do not think that is what I said. That is a footnote in another wise larger dissent. It was a criticism of the Commission's decision even then to make national impairment findings that were not based on anything other than I think the footnote says "highly generalized assumption." And it was a criticism of the Commission's refusal to let States take something off a list once it had put something on the list.

Now that all said, to the extent you read it differently I was dead wrong. And with the experience and wisdom and time and an intervening court case, I would reach a completely different decision today, as I did. I do not think that is the fair reading of it, but if it is a "gotcha" exercise, I assure that I now distant myself wholeheartedly from the footnote and the 4 or 5 intervening years of experience I have had certainly convince me that that would be an erroneous and is an erroneous decision.

Mr. PICKERING. Mr. Chairman, my time is up.

Will we have a second round?

Mr. UPTON. We hope to.

Mr. PICKERING. Okay. Thank you.

Mr. UPTON. I know there are members on both sides of these walls and ready and willing to come back at their proper time.

Ms. McCarthy.

Ms. MCCARTHY. Thank you, Mr. Chairman.

And I thank the Commissioners for being so patient with us today.

Mr. Markey's comments about the black phone got me reminiscing as I was sitting here these many moments, having grown up in rural Massachusetts where there was not just a black phone, but it was a party line. So you had other restrictions besides that "Hurry up because grandma's calling."

But I'm a midwesterner now from the great State of Missouri, Harry Truman's home State where he coined the phrase "I'm from Missouri, show me," and we are sort of the show me State when he was in the legislature there.

And then we have another kind of coinage out in Missouri which is "if it ain't broke, don't fix it."

So today I am listening to my colleagues and to you, and I am very impressed with both the questions and your responses. And I know it is hard to make the perfect bill. I was a legislator for 18 years in the Missouri House before I came here. So crafting legislation that is perfect is near to impossible, and I think we all know as hard as we tried on the Telecom Act, that you and your wisdom and courts in theirs would try to fix anything that was broke in that law.

But I have listened today and still not sure I understand what is broke. Let me use my district as an example. Because consumers in my district have 4 choices for high speed Internet. Now, they do have SBC and then we have two cable companies that service the entire area. We have Birch Telecom and Covad. And so those 4 choices provide consumers with many options on service and prices,

and speeds. And so I am wondering, you know, last Thursday's decision well actually out in my community limit our choices now to just two; either one of the cable companies whoever is serving them and then SBC. And I do not think that it is the intent of the Commission to reduce competition because, you know, that is something we have all talked about as one of the good goals of the law we put in place.

So I am just kind of curious. Because Commissioner Copps, you mentioned inner city and a concern that you have about competition and service there. In Kansas City what has happened to that black phone Mr. Markey talked about, that stationary land line into a home in the inner cities is gone. And for most of my inner city constituents they have got a cell phone, that is their phone. Their only phone. There is no land line. Okay. Their choice was a really great deal on this cell phone and that is what they live with, and that is their access to the outer world.

But if we are going to be about bringing broadband into their lives, we have also limited them, I think, somewhat with the decision that has been made and future ones that might be made while we have been—you know, the companies and foundations have been good about wiring schools and libraries so people can have access to Internet, there is still a huge gap in my central and inner city community of Kansas City on the ability to have access to the world.

And I think about our children who will never know that black phone that Mr. Markey and I grew up with. But they do need to have the ability to access the world.

And in your decisionmaking as you pursued what you thought would be best for competition, pricing and access, at least in my community it is becoming more limited. And I wonder if you would share your thoughts with me about how you plan to address or maybe have addressed in the order that I have not read reaching out to those very communities that will find themselves priced out of a very important telecommunication option?

Thank you.

Mr. POWELL. Congresswoman, indeed starting where you began with your comments as to the loss of competition and the scenario outlined, I could not agree more. I think the reason that that competition that you alluded to is going to be lost is because the Commission voted to eliminate line sharing, which is the principal way that a company like Covad uses to compete in the retail Internet broadband space. They do not have access to. They are not able to be a retail competitor in the same way that they were before.

So I would simply say with respect to the situation you outlined that I think I agree. And I think it is why I dissented from that aspect of the decision. Because I think line sharing actually has brought the kind of consumer welfare we often talk about abstractly. I could see it, I could measure it, I could understand the philosophical underpinnings that made it work. And I thought it deserved to stay.

I think that aspects of broadband questions are somewhat different and more abstract where you do not have anybody providing service yet or that you are trying to stimulate the deployment of the railroad tracks so somebody can bring those trains to people.

And I think sometimes those are different economic equations than ones that have begun to mature somewhat more.

So, you know, I will just leave it at that. At least as you expressed the concern, I would share the concern and say that I think we have unfortunately hurt that possibility.

Ms. MCCARTHY. Mr. Chairman, I know I have gone over my time, but may he have a moment?

Mr. UPTON. Go ahead.

Mr. COPPS. Well, I would just say that when we are talking about line sharing and broadband, and I was not pleased the way it turned out with either one of those. I think that if you look at the two of them, probably the decision on broadband cuts off a lot more in the way of competition than the one on line sharing, serious though that is. And I really am worried in the direction that we took on the broadband what we are doing for competition and our ability to reach out to the inner cities and to rural America, too.

You know, you hear all this talk about new wires and new rules, I am just—sometimes I worry a little bit that maybe we are going to end up with no rules and old monopoly. And I do not think that is going to get us to where we want to go from the standpoint of deployment to those hard to reach and not always very profitable customers.

Ms. MCCARTHY. I thank you for your sensitivity. I thank each and every one of you for your participation here today. I hope you will keep in mind this very issue that we are discussing and tackle it. You are going to have many challenges. I do not envy you your jobs. I some days wonder about mine. But I wish you well in that, but I appreciate your sensitivity to this need. Because it is really the future of a country. If we do not have that ability to make sure everybody has access to the knowledge they need, then we will all suffer as a country.

Thank you, Mr. Chairman, for your patience.

Mr. UPTON. Mr. Stearns.

Mr. STEARNS. Thank you, Mr. Chairman.

Just before I start my questions, I just want to say something in defense of Kevin Martin. I know, Kevin, that you perhaps do not know this, but The Wall Street Journal has been handed out and everyone has a copy up here. So your face is in front of all of us. And I do not want you think that anything is personal. That we all have a lot of respect for you. We know your leadership in many areas and we are here to discuss the issues, and it is nothing personal. And we just want to—I as one member just want to be positive about you and say that we appreciate your participation and regardless of how it goes, that we just have a great amount of respect for you.

Mr. Powell, in Section 202H as determined by the courts requires that any modification or retaining of media ownership regulations must be based on solid factual record. You have got a long record here. I have got, you know, about 12 different actions that you have taken, including FCC Commission's 12 empirical studies. Now you have 15,000 comments received in these 12 empirical studies, do you believe that the Commission has a record necessary to complete the review by this spring, I guess the question is?

Mr. POWELL. I think that we do, yes.

Mr. STEARNS. Okay. On September 13, 2001 the Commission adopted its notice of proposed rulemaking on newspaper broadcasts cross ownership. You mentioned in a January 16 statement this rule is one that might need modifying. Now given that this rule is over 3 decades old, do you support lifting the provisions limiting the granting of a broadcast license based on the operation or control of a newspaper?

Mr. POWELL. I cannot commit to what the ultimate outcome of the proceeding is. I do not want to prejudge that proceeding, but I do believe that is one of the rules that would require extensive justification to remain valid in the biennial review.

Mr. STEARNS. Anyone else? Mr. Martin, maybe want to give your comments, too, or any other of the Commissioners?

Mr. MARTIN. I also, I cannot commit obviously to the final outcome of the proceeding, but I do believe that that is one of the rules that we should take action on. And I have been concerned that there has been no action actually taken yet on the newspaper broadcast rule which was originally put into place, as you said, almost 3 decades ago. Many of our other rules have been relaxed in some form or another, and I think at least some recognition of the changes that have occurred in the marketplace in response to the newspaper broadcast rule is warranted at this time.

Mr. STEARNS. Okay.

Mr. COPPS. Can I go back to your——

Mr. STEARNS. Sure.

Mr. COPPS. I am going to go back to your previous question. I have to respectfully disagree. I do not think we have anything approaching the kind of record that we have to have in order to move forward in the very near term future with voting on the elimination or the change of the ownership rules. This is still primarily an inside the beltway issue. This is not an issue that has engaged the majority of the American people who are impacted seriously and directly impacted by the kind of entertainment that is coming our way. We need to know how that has changed and who is control of it. I think the whole Democratic dialog, and I do not think I am being histrionic about this, is at stake here. And we have to take this issue out. We have to go to other venues and other markets and look at the reality. What is the realty of diversity and localism, and competition in a specific market in February 2003 compared to what it was in 1996 or 186, or 1976? Because we are, we are playing around here with something that is very fundamental to the future of the American people. I understand this is a biennial review. But I think you had better look at it kind of as the mother of all biennial reviews for broadcast and media. Because I think the direction we set here is going to set the stage for a long time to come.

Mr. STEARNS. No, I understand. Let me just ask Mr. Powell, you know I have in front of me all the things that has been done, and we have the 15,000 comments received by the FCC, the 12 empirical studies. But maybe Mr. Powell, you might just run through a lot of the things that have been done, which I think has opened up to the public and opened up to the professionals an opportunity to give their comments.

So, Mr. Copps has indicated that it is a very important issue and there has not been enough dialog, there has been not enough opportunity to discuss it, you might give some of the things that you have done just for the record.

Mr. POWELL. Well, for the record I think this is one of the most extensively developed records in the history of the Commission.

Mr. STEARNS. It looks that way to me.

Mr. POWELL. It is as extensive as any that I have seen in 5½ years; 15,000 comments. And I should note for the record almost all of them are from individual citizens and not from companies. Suggesting that we do not hear from the public, most of that 15,000 are individual comments from the public.

We have never had comprehensive empirical studies in an effort to measure what really takes place out in the country and in the economy as we have had this time. We did so because the courts suggested. You might just simply do a comparison to the previous Commission's record when it chose to maintain the rules and see how it compares to ours. There were no empirical studies of any significance. There were nothing like the kind of comments we have solicited. There has been nothing like the kind of analytical work that is going on in the context of this proceeding, I would submit in almost any proceeding involving any of the rules in the history of the Commission than the ones that are being developed here.

Commissioner Copps' views are genuinely held. He enjoys these public hearings. They do have some value. Indeed, we agree. We are having one tomorrow for a full day in Richmond, just for that purpose. It will be one of several that I personally have participated in and my colleagues have participated in. But, for God's sake, at some point it is time to be a Commission and act.

And you can develop record until you are blue in the face, but at some point people expect you to make a decision. And I believe that the record is in place. It certainly will be in place to make thoughtful and defensible decisions by the timeframe that we have outlined. And I think when you reach that point, your fiduciary duty to the Congress and to the public is to act and not continue to draw process out for its own ends.

Mr. STEARNS. I would say amen to that.

So let me close, Mr. Chairman. Just thank Mr. Powell for his continued willingness to accommodate the public by allowing them to provide their comments.

Mr. UPTON. Mr. Stupak.

Mr. STUPAK. Well, thanks, Mr. Chairman.

You know, I was here when we did the 1996 bill on telecommunications, and in looking at the decision last Thursday, parts of it I certainly agree with, and other parts I do not. But if I go back to Michigan, if I may, I think the Act has worked well there.

You know, in Michigan the public service commission has recommended to the FCC that Ameritech be granted permission to provide long distance service. This recommendation is based on the fact that SBC has finally opened up the market, and Michigan in fact is among the State leaders and a number of lines are used by competitors.

I have argued in the past that SBC should not get the benefit of deregulation because it was such a poor service provider in Michigan. And since then, in all fairness to them, they have really stepped up, they have improved their service. And the argument now is that to turn back the competitor's access to the Bells voice networks at this point would roll back the competition that has been so beneficial. So in Michigan I actually saw the Act working the way it was intended to do.

I mentioned earlier it was $43, we got it down to, I believe it was like $19. So I think that has been working fairly well.

So while I agree with the rationale and the majority's voice ruling that a localized market and geographic analysis is necessary in order to determine the best way to achieve competition in the voice market in this country, but it seems to me that at the very least if the assumption is that sufficient competition will exist with cable, there should be some analysis that cable competition in fact exists in the market before eliminating the other competition to the Bells.

So Commissioner Adelstein, maybe you can answer. Would such an analysis not be beneficial with respect to the broadband arena as well? You did it with voice, why not with the broadband then?

Mr. ADELSTEIN. Well, I think that is an excellent question.

On the voice side, I think the decision was between more choice and lower prices for consumer and fewer choices and higher prices. And I'll opt with more choice and lower prices every time.

Mr. STUPAK. Well, in rural areas we see all the time whenever we deregulated, it leaves us with less choices and more costs. And I do not care if it is trucking deregulation, the telephone, whatever it is. So when we come to at least broadband, should we not at least do that analysis with respect to rural areas that have such unique needs?

Mr. ADELSTEIN. Well, I think this committee did a good job at talking about buildout requirements for rural areas, as was discussed earlier in the hearing. I come from South Dakota,

Mr. STUPAK. Right.

Mr. ADELSTEIN. And we have real issues with rural buildout as well. And I think there is a lot of ways to deployment. I mean, competition is a great way to drive it. Universal service helps in rural areas. And we need to really look at the broadband in terms of how it is going to impact rural areas. I think that is an area that does deserve further attention.

Mr. STUPAK. Commissioner Powell, you indicated you had 15,000 comments in your last answer to Mr. Stearns. Did you receive any comments from the Bells that they would invest in those areas if unbundling requirements were removed? Did they make any pledges that they would do that, or have you received any comments along those lines?

Mr. POWELL. Just to clarify my response with regard to the media ownership proceeding?

Mr. STUPAK. Sure. I'm sorry.

Mr. POWELL. The 15,000 comments.

Mr. STUPAK. But you still get comments——

Mr. POWELL. Oh, sure, we got lots of comments.

Mr. STUPAK. More than one, I am sure. But did you get any commitments from the Bells to really, you know, deploy in the rural areas?

Mr. POWELL. We do not ask for commitments in exchange for the policy choices we make. There are thousands of pages in which people talk about the incentive for investing in certain markets over the other. I am sure I could find you examples of things that they said would be likely as a consequences of these changes. But, no, I would not say that I have commitments by anybody as to what they would do, no matter how the case came out.

Mr. STUPAK. Well, did the Bells give you any commitment or any comments about their intentions if you granted them broadband relief to get it into rural areas?

Mr. POWELL. The Bells, as has the high tech community of Silicon Valley, as has equipment manufacturers like Corning, Lucent and Nortel all argued with some force that they believed that the incentives were distorted for the next generation development of glass and fiber infrastructure that would be the next generation of services. It was not exclusively a Bell proposition. Indeed, it was probably argued just as forcefully by the high tech broadband coalition and by equipment suppliers who desperately want an opportunity to build that network.

So, yes, they argued it, so did others. And that was a portion of what we considered, but certainly was not exclusively what we considered.

Mr. STUPAK. You know, we had a hearing back on April 25, 2001 on the Tauzin-Dingell Bill back then, and Mr. Paul Mancini from Southern Bell Corporation, SBC, came in. And we talked a lot about that. And there were commitments then. Like we are going to do 80 percent, we have this new program called Pronto. But then when pushed on it, and I can always submit this for the record if need be, it was pretty obvious to us that while they may do 80 percent in very remote areas, here is what Mr. Mancini says on page 122 of the hearing. "In very remote rural areas the economics probably make it very difficult for either cable or telephone company wires to serve these areas. As one of the other speakers said, in some areas it may be more cost effective for satellite and wireless to serve those areas. We are looking at partnering with some of those satellite and wireless."

And so I asked him whether—actually cable is doing that in my area now in upper Michigan. So I guess while there is always this intent and they will do 80 percent, we always seem to be in the last 20 percent. How do we get that last 20 percent covered?

Mr. POWELL. It is a difficult question. But I would love to take an opportunity to make some things clear about the rural equation, the rural problem.

First of all, it is important to remember that a lot of rural parts of America in this country are not being served by the BOCS. I mean, we keep acting like the incumbent is always the BOCS. Indeed, in the vast majority of a lot of these rural jurisdictions the ILEC, the incumbent, is actually a local rural telephone company. These rules are to their benefit as well. These are the ones who have invested capital and spent time investing in rural American much more than in BOCS or anyone else have, and they are bene-

ficiaries of this, too. And I think they, more than anyone else, have demonstrated their commitments to those areas.

Second, I think it is important to put on the record that UNE-P has not demonstrated its attractiveness to rural areas. Indeed, if you actually look at the competitive statistics, the vast majority of rural America has not been entered into by unbundled platform providers, instead resellers go into those markets. The reason is because even under UNE-P the loop cost, the cost of the line forms a huge part of the expense. And it is still too expensive.

Rural America is a singularly unique problem for wireline infrastructure. It is why we have universal service. It is why we need to address it as a special case. It is why I think Congress rightfully debates things like tax credits and broadband incentive plans. Because I think there are market shortcomings in those markets. But I think the notion that, you know, the Bells or some of the traditional carriers, or even UNE-P carriers who are bundling and going after the high percentage customers who are the ones who are the salvations for those markets I think are wrong. I think we have to look at the unique needs of the carriers that have actually made a commitment to serve.

Mr. STUPAK. But under last week's decision you basically gave the Bells what they said they would do under Tauzin-Dingell where they would expand out to the rural areas, but now I read all these press articles saying well we cannot do it because we did not get enough. How much is enough and when is it going to come?

Mr. POWELL. Well, it is not for me to defend what they said they would do or not do.

Mr. STUPAK. Sure.

Mr. POWELL. But, you know, I think they say that generally. But whether we thought that this was the key to solving broadband in rural America, I would be the first to say I do not think that that was the motivating expectation in the decision.

Mr. STUPAK. Oh, I——

Mr. POWELL. I mean, you know, I think none of us can lay great credit to any of the choices we made, even though we disagree wholeheartedly that any of the things any of us have expressed is the complete solution for the problems of rural America because it is just singularly unique. And these rules are much more broadly applicable to the country as a whole.

Mr. STUPAK. Thank you.

Mr. UPTON. Thank you, Mr. Stupak.

You all have been very patient with us for almost 4 hours. We are going to take a 5 minute recess. And we will come back with Mr. Whitfield.

[Recess.]

Mr. UPTON. I think we are ready to resume.

And next on the list is the gentleman from New York, Mr. Fossella.

Mr. FOSSELLA. Thank you.

Mr. UPTON. Eight minutes.

Mr. FOSSELLA. Chairman, members of the Commission, in regards to the switching element. In your opinion what discretion will the States have in determining the unbundling of the switching element? And second, describe what process or processes the

State would go through to make a decision and what if any ability does the FCC have to overrule and/or weigh in on the state's decision?

Mr. MARTIN. With regard to the state's rule in the switching element, I think they will be able to take into account the specific characteristics that are going on in their markets. For example, whether or not switches have been able to be deployed and used for business customers in relative geographic market. They will be required as we determined that there was some operational impairments as it related to a hot cut process, such that the carriers made sure that they were not impaired in their ability to move copper lines that are serving residential customers over to the switches that they were deploying. So I think the States would be involved in both those operational issues and in the analysis of some of the economic issues, taking a look as one of the factors whether or not switches have been deployed to use for business customers.

Mr. FOSSELLA. Is there anything else anyone else has to add?

Mr. ADELSTEIN. I would just add that the order—we are not able to go into all the details under the rules that we have as to what is going to be in there. But it does give them clear and objective factors to use in the States in determining whether or not an impairment exists.

Mr. FOSSELLA. With respect to that, does the statute require affirmative finding of impairment by the Commission to be unbundled? Does the statute require that, Mr. Chairman?

Mr. POWELL. In my view the statute is quite clear that at least for the Federal jurisdiction to put an item on the list it must make an affirmative finding that you are impaired without it. And that impairment finding has to be consistent with the direction of the D.C. Circuit's case.

Mr. FOSSELLA. I am assuming everybody else agrees with that, or if not—everybody agrees with that?

Under what conditions, economic or operational, do you think in your decision or ruling does the impairment exist, and in what form?

Mr. MARTIN. Most specifically I think the Commission focused on the operational impairments that would be involved in using switches, particularly for residential customers. The record, there was quite an extensive bit of record evidence talking about the problems that competitive carriers would have in trying to use their own switches in the service of mass markets in which unlike business markets where you can make a wholesale switch of a customer and all of its lines all at once over to your own switch; with mass markets it would be an ongoing opportunity to be trying to market and pick up new residential customers. In those circumstances it created additional operational barriers to be able to try to put in place a process to process those customer requests and those moving of lines over on a periodic bases. So I think the primary focus of the Commission's impairment finding as it related to residential switches would have been the operational impairment, however there are some other issues as well.

Mr. FOSSELLA. So you are saying that you are not presuming there is an impairment, or are you saying there is an actual impairment?

Mr. MARTIN. No. There is a presumption that there is an impairment based upon the operational issues that are involved in the record. Then we have asked the States to be resolving those hot cut issues by adopting some kind of a batch cut process, saying that that does create an impairment today. Asking them to resolve that, and then during that process also take into account some of the other factors that are in the record to determine whether in a given specific market there are any of those other factors that would also create either an operational or economic impairment.

Mr. FOSSELLA. Is there any discretion or ability for the FCC to review or change the state's decisions or is it more of an unfettered, unreviewable action that is going to be ultimately adopted by the state?

Mr. MARTIN. Well, the Commission would have adopted some of the frameworks that would end up being applied by the state, the same as we were doing in some of the other circumstances in some of the other elements of the network that are in question as to whether or not they need to be impaired. The States would have a role in determining those as well, and then of course if the State doesn't act, then that would come back to the Commission after that.

Mr. FOSSELLA. The State does not act?

Mr. MARTIN. Does not act.

Mr. FOSSELLA. But if it does act, you cannot change that?

Mr. MARTIN. Right.

Mr. FOSSELLA. Is that clear?

Do you think that this ruling and ultimately if it finds its way to court, will be vacated for a third time? Anybody have an opinion on that?

Mr. ADELSTEIN. We designed it in such a way that it would not. We made every effort to make this legally sustainable. We worked very closely, and are continuing to work closely with the Office of General Counsel to ensure that it is structured in such a way as that it can be sustained in court.

Mr. FOSSELLA. So you do not believe it will be vacated a third time?

Mr. ADELSTEIN. Well, I want to predict what the courts are going to do, but we certainly designed it with sustainability in mind.

Mr. FOSSELLA. I am assuming everybody shares that view unless I hear otherwise?

Mr. POWELL. No, I can't share that view. I would agree that you cannot be confident in predicting the court, but I think in very many fundamental ways there are significant legal errors made that are clearly and very potentially reversible error.

Put it this way: In many ways this is identical to the UNE remand order of 1999 except that it allows more. That same decision and that same bias in 1999 got overturned. I am not quite so sure what is significantly different in this order from that one in that regard.

Ms. ABERNATHY. I would agree with the Chairman. I think that Section 251D(2) of the Act directed the Commission to determine what network elements should be made available, that has not been here. Under the order that was adopted you could have the

same facts presented in different States and come up with completely different conclusions regarding impairment on switching.

Mr. FOSSELLA. Okay. And more so I can understand I guess the fundamentals of what is at stake here from an economic point of view, and I will use Commissioner Martin as an example. Suppose you go into manufacture candy bars and you have invested significant capital to create this wonderful factory and generate candy bars. The bottom line is your costs are, say, $.75. You determine to sell them in the retail market for $1. Then you find and discover that there is a regulatory empowered by the Congress that regulates candy bars. And one of their missions is to promote competition. And they come to you, to the Martin Candy Bar Company and they say, "You know what? There is another big entity out there that we want to be a competitor of yours. And one way in which we have determined to promote competition is for you to allow them to use your product at .75 or in some cases less than .75, so they in turn can resell it in the market."

I am just curious, (a) it is applicable to what we are talking about here, and (b) I guess more important is if indeed that was the case, what would you do, Mr. Martin, as CEO of this candy bar company, what would you in turn feel is the right thing to do, what in turn would you go back to the regulators or through the Congress ultimately to say "I support this position and I agree with your efforts to support promote competition" or "This seems to be wrong and you should take steps to mitigate this wrong or change it."

Just out of curiosity, what position you would take?

Mr. MARTIN. Well, I am sure if I were the CEO of the candy bar company I would not like the fact that I was being told to sell anything at any given price. I also think, though, that sitting at the Commission my obligation is to implement the law that was passed by Congress. In 1996 the Act required that pieces of the incumbent's network to which competitors would be impaired if they did not have access had to be unbundled, and that it had to be unbundled at a regulated price.

There are two different aspects of the issue. One is what is the price and whether or not that access is required under the 1996 Act. And I believe that that is the question of whether access is required is a question of whether or not you are impaired to be able to provide service. And I think that that is what this order attempted to address.

Mr. FOSSELLA. So you do not see any fundamental problem with the underlying premise of compelling a private entity to sell below cost?

Mr. MARTIN. I think that the underlying premise of compelling the companies to sell pieces of their network at a discount was a part of the 1996 Act. And our job as a Commissioner is to implement that. I think that was a part of the complex proceedings that were designed to open up the market to competition and still allow for deregulation. And I think that was what the 1996 Act embodied, those two purposes.

Mr. FOSSELLA. Thank you.

Mr. UPTON. Mr. Dingell.

Mr. DINGELL. Mr. Powell, let me name several very fine, very large corporations. AOL-Time Warner, News Corp., Clear Channel, Disney, Viacom and General Electric. These firms control the lion's share of not only content production, but also distribution. Is this not so?

Mr. POWELL. It is largely so, but a lot of the distribution is controlled by large broadcasting groups in addition to them.

Mr. DINGELL. Okay. But it is nonetheless true. We now confront then these companies control 6 television networks, they control cable news services, they control the largest ISP in the world. They control scores of newspapers, magazines, book publishers and a great many television and radio stations.

Now, we can eliminate media ownership rules. How are we going to assume that these companies will not then be able to acquire other assets and continue to consolidate?

Mr. POWELL. We will not eliminate all the media ownership rules, and what we will endeavor to do is that the goals that you outline continue to be protected under whatever rules we do ultimately leave in place.

Mr. DINGELL. See, I do not know what you have in mind, so I cannot tell you what you have in mind. I can only tell you that if you eliminate these rules, you will permit them to engage in further consolidation. If you cut back on the media rules, you will still permit further consolidation perhaps less or different.

Now, I understand that your studies include no forward looking economic models that contemplate whether mergers will occur or not and what effect they might have on competition. Is that true?

Mr. POWELL. There is an extensive number of studies that cover a number of areas. I do not recall whether that——

Mr. DINGELL. But your studies, Mr. Chairman, the ones upon which you relied?

Mr. POWELL. I do not recall whether they predict whether a company will merge. Part of that is behavior, which is very difficult to predict on an economic model anyway.

Mr. DINGELL. Okay. But your economic models do not include that as a measure or a method for contemplation.

Now, having said that, how is it that we are to assume then that there will not be further mergers, acquisitions and consolidations?

Mr. POWELL. I do not think in any market you can assume that, but you would also assume that it will be reviewed by competent authorities before being approved.

Mr. DINGELL. So do your studies give us anything in the way of forward looking models that contemplate the impact on consolidation, on diversity of news and information or its impact on localism?

Mr. POWELL. Yes, I think they do. They do not——

Mr. DINGELL. Do they?

Mr. POWELL. They do.

Mr. DINGELL. I understand they do not.

Mr. POWELL. Well, I believe that they do. They do not economic predictions of whether people merge, but they make an assessment of current concentration and the level of diversity in different markets to determine whether there might be or would be harms to consumers by different combination.

Mr. DINGELL. I have a feeling that you have put some qualification. You used the word "kind" and not "future." Am I correct on that?

Mr. POWELL. Kind?

Mr. DINGELL. Yes. And not future when you described what they would be doing.

Mr. POWELL. What the studies attempt to do is do a comprehensive empirical evaluation of the size of markets, what concentration levels has existed, what our historical experience has been when people were permitted to come together and when they weren't. And to that extent I think they do provide insights on predicting what would happen by different rules.

But I cannot, and you were correct to say, point to some econometric model that will tell me exactly who will merge and what the consequences will be.

Mr. DINGELL. Well, I am not asking you to produce that. You cannot produce that. But you can tell us the consequences of it if you have a particular level of merger. I am going to submit you some further questions on this point for purposes of the record.

Now, you proposed then to leave in place the anti-trust laws and enforcement under the, for example, Sherman Act. This requires that there be evidence of actual misconduct, does it not?

Mr. POWELL. No, it does not. The Sherman Anti-Trust Act has two major provisions, some of which apply to collusion and the kind of things you are referring to, but a significant part of it is about revealing transactions and whether they would have an anti-competitive effect. Those merge reviews are predictive. They do exactly what you are suggesting, which is attempt to predict what would be the anti-competitive effects or not of a particular combination.

Mr. DINGELL. My time is running out. But I would note that the Sherman Act requires that there be, first of all, that you take action on the basis of structural things, i.e., that this creates a monopoly or tends to create a monopoly, or that there is some behavior by the person involved which tends to create a monopoly.

And, Mr. Chairman, I ask that I be permitted to proceed for 1 additional minute.

Mr. UPTON. Without objection.

Mr. DINGELL. Is that not correct?

Mr. POWELL. That is correct. And that latter part you alluded to is what I was alluding to as well.

Mr. DINGELL. So now your powers under the current Telecommunications Act and the FCC statutes that you administer is prophylactic so that the FCC evaluates the possibilities that particular transactions might harm the public interest in some way, is that so?

Mr. POWELL. That is correct.

Mr. DINGELL. The two then are quite different. So let us state cases like FCC v. WNCN Listeners' Guild and FCC v. NCCB. The Supreme Court has given considerable deference to your ability to use its expertise to make predictive judgment. Is that not correct?

Mr. POWELL. Well, I do not disagree.

Mr. DINGELL. But if you throw away your powers to address many of these things, you will not then have these powers under the Sherman Act?

Mr. POWELL. Well, Mr. Dingell, I do not think I agree that we are contemplating throwing away our powers. I think those cases refer to the public interest standard——

Mr. DINGELL. You can say that you are not, and I will be content that you are not, but I do not think you can tell me that in this particular meeting. Because that is a source of constrain.

I have even heard that you have asked your staff to devise a mathematical formula to assess whether or not there is an excessive concentration of media ownership in a given marketplace. Is that correct?

Mr. POWELL. We are doing work like that, yes.

Mr. DINGELL. Okay. That is important to the question of whether or not there be a reduction in your authorities to address the question of media ownership, is that not so?

Mr. POWELL. Yes.

Mr. DINGELL. Mr. Chairman, I ask that the record be kept open so I can submit a few additional questions.

Mr. UPTON. Without objection I would just note to all members here that we are going to keep the record open until the end of the week. Any member wishing to ask a question, we will submit that as a committee.

And I would yield at this point to the gentleman from Kentucky 8 minutes. Mr. Whitfield.

Mr. WHITFIELD. Mr. Chairman. Thank you.

And I want you to know that I never intend to be the last member to attend a hearing again.

But I also welcome the Commissioners here today.

During the discussion today there has been a number of references to court decisions, and in one of the statements given it says the court of appeals has made clear that in analyzing impairment uniform national rules may be inappropriate.

In that decision did they say maybe or did they say would be? I mean, did they mandate that in analyzing impairment that uniform national rules would be inappropriate?

Mr. ADELSTEIN. Mr. Whitfield, I can answer that. I will actually read you from the D.C. Circuit Court opinion on the case, USTA case. It said "The Commission chose to adopt a uniform national rule mandating the elements on bundling in every geographic market and customer class without regard to the state of competitive impairment in any particular market. As a result UNEs will be available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of the sort that might have been the object of Congress' concern."

So the court was basically chastising the Commission for having made a national finding rather than making a market-by-market analysis.

Mr. WHITFIELD. Okay. But I am trying to determine whether or not it was unequivocally clear that uniform national rules would be inappropriate?

Mr. POWELL. No, not in any way shape or form.

Mr. WHITFIELD. Okay.

Mr. POWELL. I mean, it is important to remember what the court is criticizing is that the Commission has made an impairment find-

ing without evaluating granular facts. I do not see anything in the opinion that would not suggest that if we could evaluate the appropriate level of granular facts, you could do that in a national level.

Mr. ADELSTEIN. Well, I would say that it is almost impossible to read that without understanding the D.C. Circuit was clearly uncomfortable with the Commission's decision.

Mr. WHITFIELD. I know we can argue about the semantics of these legal opinions. But I get the impression that there was no clear mandate that uniform national rules would be inappropriate. Is that your understanding, Mr. Martin?

Mr. MARTIN. I think that there was a mandate that the Commission had to take into account the granularity at a greater level. I think there is no question the D.C. Circuit was telling the Commission to take into account variations that occur from market-to-market and including from geographic area-to-area, from residential to business customers.

Mr. WHITFIELD. So you feel that in order to do it the proper way you had no other choice except to let the State commissioners do that, is that correct?

Mr. MARTIN. I think that was the best choice to end up doing it, yes.

Mr. WHITFIELD. Okay. A second question, and this reminds me a little bit of the railroad industry because in the railroad industry we are always talking about trackage rights, using someone else's property. And I have read in a number of articles that AT&T would probably not go into a local loop situation unless the regulators set a price that would guarantee them at least a 45 percent gross profit margin. Have any of you read that or are you familiar with that? Have you heard anything about that?

Mr. MARTIN. I read that in the article this morning that I think was referenced earlier from The Wall Street Journal, but I did not read that as a part of the proceedings in the record that they need to have a 45 percent——

Mr. WHITFIELD. So as far as profit margins for various companies, that was not something that you considered at all, is that correct?

Mr. POWELL. No, but Mr. Whitfield, the number comes from the company's own representation to the stock market.

Mr. WHITFIELD. Okay.

Mr. POWELL. That quote is frequently bantered around as a statement made by management to the investment community about the conditions by which they would enter markets. That is where that comes from.

Mr. WHITFIELD. Now under your order did you require that AT&T go into every local market?

Mr. POWELL. No.

Mr. WHITFIELD. Can the RBOCs leave any market that they want to leave without regulatory approval?

Mr. POWELL. No.

Mr. WHITFIELD. So basically what we are saying here is that AT&T can voluntarily enter those markets that it chooses to enter and that they will make that decision based on a 45 percent gross profit margin. Now, would you have had the ability or could you

have legally have made sure that the RBOCs had a profit margin at a certain level? Would you have been precluded from doing that?

Mr. POWELL. I think we would be precluded because the retail rates charged in local markets are in the control of State commissions. And whatever return is permitted is permitted as a matter of State regulatory authority.

Mr. WHITFIELD. Okay. But in essence here it does seem like that one entity can make a decision that they are not going in unless they have a 45 percent return on gross profit margin, while another entity that has already invested money has no assurance of any kind of return. Would you agree with that statement?

Mr. POWELL. I personally would say that that statement is correct. Now, in fairness the TELRIC methodology tries to provide for compensation and a reasonable profit, but there is nothing that suggests that the carrier can at its discretion have more commercially reasonable requirement.

Mr. WHITFIELD. Would you agree with that statement, Mr. Martin?

Mr. MARTIN. I do not think there is any obligation, there is any legal obligation for any of the competitors to go into a market. So, yes, there is no obligation so they are going to have the opportunity to choose which markets they want to go into.

Mr. WHITFIELD. But my statement was you have one entity that has already invested in the infrastructure. You have another entity that will go in places where they are guaranteed a 45 percent gross profit margin. You have the other entity that has no assurance of what the profit margin will be.

Mr. MARTIN. I do not know, the second premise of your question, of whether or not the one entity will only go in with a 45 percent profit margin. That may very well be what they have reported to Wall Street, but I do not know that.

Mr. WHITFIELD. Well, whether or not they do or not, they have the ability to ensure that their profit margin is 45 percent. And the RBOCs do not have the opportunity to ensure any profit margin. Would you agree with that?

Mr. MARTIN. Well, the local incumbent carriers, no. There is no way that we can guarantee—the regulator guarantee. And their local rates are actually regulated by State regulations would take into account the profit margin——

Mr. WHITFIELD. Now, when Mr. Markey was talking about fair competition, does that sound like fair competition to you?

Mr. MARTIN. I think it has be put in the context of the 1996 Act in which the local markets and the Bell companies have been the monopoly providers of those local services, and in which those markets were—a part of the 1996 Act is those markets whether they are going to be provided open to competition through various means. And one of those means was the innerconnection and using of the incumbent's facilities at a regulated rate.

Mr. WHITFIELD. Well, you know there are aspects of this that are controlled at the national level. You could have, had you chosen, directed all State regulators to ensure that every company received a profit margin of at least X amount. You could have done that, could you not? You would not have been precluded from that, would you?

Mr. MARTIN. No, actually, I am not sure that we could end up doing that under the Act. I think that——

Mr. WHITFIELD. What provision in the Act would prevent that?

Mr. MARTIN. Well, I think that the TELRIC pricing methodology allows for some profit margin, but the States were the ones who actually set those prices.

Mr. WHITFIELD. But could not you direct the States to set a certain profit margin? Could you direct the States to do that, the State regulators?

Mr. MARTIN. I do not think we could direct them to set an overall profit margin. The only margin that we can impact directly is in the context of the TELRIC pricing methodology which prices the wholesale. But we could not demand an overall profit for the companies for those regulated entities.

Mr. WHITFIELD. And I would just make one other comment. How many of you would agree with the statement that as it relates to local service, this decision will make it more difficult for the RBOCs to raise capital? How many of you would agree with that?

Ms. ABERNATHY. I agree with that statement.

Mr. WHITFIELD. Mr. Chairman?

Mr. POWELL. Yes.

Mr. WHITFIELD. Mr. Martin?

Mr. MARTIN. Well, you are asking whether or not the RBOCs will have a more difficult time raising capital?

Mr. WHITFIELD. I am just saying with this decision will it be more difficult for them to raise capital?

Mr. MARTIN. Not versus the date before the decision. I think the overall prospect of the overall decision still had significant deregulatory relief on the broadband side.

But do I think that vis-a-vis taking away competition? Yes, I think that this decision probably did have an——

Mr. WHITFIELD. So you do not think it would be more difficult for them to raise capital?

What about you, Mr. Copps?

Mr. COPPS. No, I do not.

Mr. WHITFIELD. You do not?

Mr. COPPS. No.

Mr. WHITFIELD. And Mr. Adelstein?

Mr. ADELSTEIN. I think it is hard to predict how the markets would react. But I do believe that the broadband side would be a positive for them, on the switching side it would be negative.

Mr. WHITFIELD. Thank you, Mr. Chairman.

Mr. UPTON. Mr. Green.

Thank you, Mr. Whitfield.

Mr. Green is recognized for 8 minutes. Do you want to yield?

Mr. GREEN. I would like to yield just so I can follow the Chairman.

Chairman TAUZIN. And if the gentleman is kind enough to yield, but the Speaker has called me to a meeting and I appreciate his indulgence. I would ask unanimous consent the gentleman be accorded an additional 4 minutes so that I can use his time and then yield the balance to him.

Mr. GREEN. Thank you, Mr. Chairman. Yield.

Mr. UPTON. Without objection.

Chairman TAUZIN. I thank the gentleman.

Mr. Powell and members of the Commission, I want to call to your attention a so called confidential document that has come to our attention. It is a document written apparently by James Bradford Ramsey, General Counsel for NERUC, the National Association of Regulatory Utility Commissions. In this document, which is marked "confidential, do not circulate outside of NERUC, the most important things for everybody to do" there is a statement on the last page "that success will depend on the FCC drafting staff. The approach is easily sustainable" I courts in think, "but the order has to be drafted the right way."

And then this goes out——

Mr. UPTON. May I interrupt the Chairman just one—could we make a copy of that for all members?

Chairman TAUZIN. Yes. I will have to read from it first. I will make a copies for all members.

"Most important thing for everybody to do. Call, and write a note if you can to Commissioner Martin and his assistant Don Gonzalez has gone out on a limb for a strong State role. He and Dan should get a direct expression of thanks from each of you on this issue."

"Key points. After you thank him, you should talk again about the critical need to preserve State flexibility across the board on UNEs to add and subtract from the list (they are still editing this part of the opinion). It is my understanding that we will be given flexibility to add switching back in, but at least as of today there is language in the order that would otherwise undermine and have State authority to add anything else like say line sharing back into the list. Strictly speaking we are still in 'sunshine' until the text of the order comes out. But I would work a general expression of concern about the State role across the board re: adding back in into any thank you. Might also ask questions about whether they have all costs for the deregulated broadband services including suitable overhead allocations sent to Part 64."

I call this to your attention and ask you, Mr. Martin, are you getting those kind of calls?

Mr. MARTIN. No, I have not been getting those kind.

Chairman TAUZIN. So you have not received any calls saying thank you, by the way please write the order the way we would like it written?

Mr. MARTIN. No. I have gotten calls saying thank you. Actually, I have not even gotten calls. I have attended the NERUC meetings that were occurring here and some State commissioners individually came up and said they appreciated my efforts to make sure they continued on.

Chairman TAUZIN. Do you know whether Mr. Gonzalez is receiving calls even though the sunshine rule is on, advising him or thanking him but with a caveat we sure appreciate you write the rules our way?

Mr. MARTIN. No, I do not know.

Chairman TAUZIN. Well now let me ask you now, in the last round of questions you indicated that last week's decision established a national framework for determining when switching would have to be unbundled. A national framework like the TELRIC methodology that you alluded to in our earlier questions would en-

tail specific and objective criteria set by the FCC and then used by the States to engage in a factfinding exercise to determine whether the FCC's criteria has been met as opposed to allowing the States to set their own criteria subjectively. That framework, by the way, is exactly what the FCC created for transport. And my question to you is specific. Are you committed here today that the switching framework will entail specific objective criteria set by the FCC and then used by the States under factfinding to determine whether that criteria has been met?

Mr. MARTIN. The factors and the framework that the Commission will have in relation to the switching will involve specific and objective criteria similar to what would be done in the transport context, although——

Chairman TAUZIN. You say similar. What is the difference?

Mr. MARTIN. In the transport context, as I understand the way the Commission's order would end up being implemented, the fact, for example, if there were a certain number of carriers on a transport route, that that would be dispositive. The State would then have no discretion beyond just counting the number of carriers.

In the case of switching there other factors that they could take into account and the presence of two or three competitors, for example, providing switching to business customers for example are supposed to be given substantial weight cutting against the fact that the switching was made available.

Chairman TAUZIN. So in other words——

Mr. MARTIN. It would be dispositive.

Chairman TAUZIN. [continuing] the difference between your transport order and this so called national framework with switching is that you have given the States subjective ability rather specific and objective criteria? In other words, if they find the presence or the lack of presence of something, that is not dispositive? You have given them the right to say how much value that has. You have given them subjective ability as opposed to specific and objective criteria, is that correct?

Mr. MARTIN. Yes. We have allowed them to take into account other criteria as well. For example, the——

Chairman TAUZIN. Well then how is this a national framework if the FCC is going to allow each commission on the State level to determine which criteria they want to use to make a determination? How is this a national framework?

Mr. MARTIN. I think you were asked and the reference in the earlier part of your question alluded to the TELRIC pricing methodology. In that methodology as well the Commission had various factors that were to be considered——

Chairman TAUZIN. But they entailed specific and objective criteria, as I understand TELRIC. And are you telling me that this switching rule will be as specific as the TELRIC rule was in terms of the state's ability to enforce it?

Mr. MARTIN. I do not know if it will end up being as specific. I think that, obviously——

Chairman TAUZIN. It will be less specific?

Mr. MARTIN. I do not know whether it will be as more or less specific from that. I will involve some criteria and there will have objective factors in that, like the number of switches that are avail-

able, whether they are being used as sort of residential or business customers.

Chairman TAUZIN. But those will not be dispositive? If a local commission wants to ignore those criteria and go to some other criteria, they will have a right to do so?

Mr. MARTIN. They have the right to take into account the other criteria that we outlined.

Chairman TAUZIN. So in effect it will be quite different from a national specific and objective criteria regime? Each State can set up its own criteria, make its own decision? We could have different rules applying in different States, is that right?

Mr. MARTIN. No. I think that they will still have to take into account the same criteria that we have outlined that any State essentially will have to——

Chairman TAUZIN. Well, this is what this memo from NERUC is all about. It is all about them lobbying you cleverly and thanking you. Lobbying you for as much flexibility as possible the lack of specificity and criteria as possible so they can add things back in, so they can literally re-regulate in the face of your decision you told me to have a national framework, that they can regulate differently state-to-state, that they can do what they want to do with much more flexibility and objective and rather subjectively they can do what they want to do. That is exactly what NERUC is saying they are going to do their best to kind of influence and Mr. Gonzalez on to get as much flexibility and therefore the right to add as much new regulatory authority as they can possibly add to it because you have left the door wide open for them to do that by giving them the right to pick what criteria they want to give weight to.

And I am asking you, are you going to let that happen?

Mr. MARTIN. I certainly do not think, and I will do my best not to let the States hijack this process. I think that this has been a—and I haven't seen the memorandum that you are referring to.

Chairman TAUZIN. I will make you a copy of it.

Mr. MARTIN. But I certainly do not want to let the States hijack this process. However, I do think that the Commission will be setting out objective and specific criteria that the States will end up being able to consider. And that I think that they will be required to consider going forward.

Chairman TAUZIN. We are going to watch that very careful.

Thank you, Mr. Martin.

Thank you, Mr. Chairman.

Mr. UPTON. Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman.

Mr. Martin, I want to follow up what my colleague Congressman Whitfield's last question was about investment.

I read in your testimony that you believe that last Thursday's decisions by the Commission would spur new investment in the telecommunications sector. But the day after the decision was rendered, Wall Street chopped $13 billion in value off the telecommunications sector. Is it still your opinion that the Commission's decision is going to spur investment, and I would like to know specifically where in the sector you believe the investment will go toward, particularly whether it be the local RBOCs, the re-

gional Bells? Because I know they lost value because of the Commission.

Mr. MARTIN. I think that the decision last week that the Commission rendered hopefully addressed some of the concerns that have been portrayed by some of the companies about incentives for investing in new broadband infrastructure. And I think that there have been a lot of concerns that have been raised over the last year and maybe even 18 months both at the Commission and elsewhere about the potential regulatory disincentives that our framework had for new investment. And I think that the Commission did a significant job in trying to provide regulatory relief for new investment in deciding that unbundling the fiber all the way to the home would no longer be required and changing our unbundling rules for fiber and hybrid fiber copper systems or changing the TELRIC incentive for any new investment, I think those are the kind of incentives that the Commission attempted to address last week that would provide additional incentives for investment going forward.

Mr. GREEN. Well, obviously, with the market responding the way it did, it is going to be hard for those companies to get that investment in the capital markets with the loss of that value immediately afterwards. So, obviously, we disagree.

I would like to ask Chairman Powell's opinion of that. Do you think the decision last Thursday will spur new investment in telecommunications systems, and particularly in light of what happened in the stock market over the next 2 days?

Mr. POWELL. No. Candidly, in my own personal judgment I do not think that it will. And, again, I do not think that is because alone of the debate about what the substantive results are. It is the fact that if there is one thing capital abhors as a matter of risk, it is clear uncertainty. And I think that, yes, things have been uncertain for a while and it was anxious in anticipating that this decision would bring clarity to that. And I think that we have unfolded the process, and I understand the arguments for the support of that. But I do not agree with them that we have unleashed a process that I think has introduced more uncertainty and risk in a way that the capital markets cannot and will not cope with.

The market loss as you are describing, I would like to note for the record are not just the RBOCs. It was a massive loss for RBOCs. You know, even some of the IXEs went down in the early wake of the decision. Equipment suppliers, you know, Nortel, Corning, even people who should have benefited in some small parts, you know, were slaughtered even worse. Covad, the leading provider of line sharing dropped 43 percent in the same day. It is not a resounding endorsement, at least by the capital markets of the decision.

Mr. GREEN. And I guess that is some of our concern because, you know, the goal is to be able to have investment into the market to make up for what we lost because of the dot com failure.

Let me, before I get to my next question, I guess in watching what happened at the Commission, I felt like the Commission instead of regulating were being Members of Congress. Because we are the only agency in our Constitution at making an elephant a giraffe. And when I watched what the Commission did last week, it was almost like a Frankenstein. It took an arm and put it where

a leg was at, and vice versa. And it just seemed like it is going to be difficult to make it work.

Commissioner Martin, let me read a quote to you. "I believe the Government particularly commissions should place a higher priority on facilities-based deployment and competition. In the past the Commission adopted a framework that may have discouraged facilities-based competition allowing competitors to use every piece of an incumbent's network at super efficient price. Under such a regime new entrants have little incentive to build their own facilities and since they could use the incumbent's cheaper and more quickly."

Do you agree with that sentiment?

Mr. POWELL. I do. I think that was taken from a speech of mine, and actually what I said in the following sentence was that I also thought that the Commission should be addressing those with rules that would not favor CLECs or ILECs, that we should adopt rules that would relate to co-location, that we should adopt rules that would relate to provisioning of those network elements for competitors to be able to use. And that the particular problem as it related to unbundling was focused most notably on new investment.

Mr. GREEN. Well, again, looking at last Thursday's decision it did not unbundle those networks to the extent they are still being able to compete on other lines for super efficient prices by the UNE rate.

Let me take for example AT&T that had a $45 billion in revenue during the past year and if you phased out the unbundled network element platform, then AT&T would with other competitors be forced to deploy their own facilities in order to compete in their own marketplace, is that not correct?

Mr. POWELL. If they were forced to——

Mr. GREEN. If they had to have their own facilities-based now almost 7 years after the Telecom Act is passed forcing them to go to facilities-based as outlined in your statement from last September, but the Commission's decision last week did not allow that or did not, you know, it is not facilities-based encouragement I guess?

Mr. POWELL. I think that it is ultimately facilities-based encouragement in the sense, as I mentioned before, on the broadband side it is certainly encouragement for investments in new infrastructure. But even on the competitive side I think we did put in place a framework for how those unbundling obligations will be phased out slowly over time. But ultimately as a Commissioner we were required under the Telecommunications Act to ensure that if there was impairment, that the competitors would have access to that equipment. And that while I do think we need to do all that we can to make sure that we are putting in place the regulatory framework that encourages new investment, to the extent that a competitor was impaired, the Act requires us to give access to the incumbent's infrastructure to the extent the competitors are impaired.

Mr. GREEN. What in the decision was—Mr. Chairman, I thought I had 8 minutes, or 12 minutes. Chairman added 4 to my 8 since I did not——

Mr. UPTON. Thank you. After this question we will go to Mr. Engel. We are expecting a vote on the House floor very shortly.

Mr. GREEN. Okay. Thank you.

It just seems unfortunately when I looked at what happened with the stock market and, again, watching this for a number of years, I think the Commission's decision will not incur AT&T or any other, they will still use other facilities instead making theirs facilities-based. I think in 1996, and a great many of us voted for that Act, intended the competition but the goal was to get the facilities-based competition and we are not there. And it has been 7 years and I do not know if the Commission last week helped us get there any quicker.

Thank you, Mr. Chairman.

Mr. UPTON. Thank you. Mr. Engel recognized for 5 minutes.

Mr. ENGEL. Thank you, Mr. Chairman. I had this bad dream. I keep waiting to speak and then someone jumps in. And I figured just when it would get to me, there would be a vote on the House floor, and I suppose I should bring some levity into it my asking Mr. Copps how come his name plate is higher than everybody else's. I do not know if that is some kind of conspiracy.

Thank you all for coming, and thank you for your perseverance. It is not easy when you come before our committee. But, as you can tell, our chairman is very fellow and the members very much concerned about it.

I want to take the opportunity to thank Ms. Abernathy. We had a very good meeting the other day, and I want to thank you for coming for.

And I know that Mr. Adelstein and I have lunch next week. I do not know if he is paying or I am paying, but if any of the rest of you want to pay, you can have lunch with me anytime.

And Mr. Powell, it is good to see you again, and everyone as well.

And, Mr. Martin, when Mr. Stearns was praising you at the start of his speech, I thought, oh, he is going to move in for the kill. But I thought it was relatively mild.

A couple of hours ago Mr. Wynn——

Mr. TOWNS. Would the gentleman yield?

Mr. ENGEL. I will certainly yield.

Mr. TOWNS. I would like a lunch with Chairman Powell.

Mr. ENGEL. Well, his father grew up in my district, so he should have lunch with me first.

Let me say that Mr. Wynn about 2 hours ago I think it was asked a question about media ownership. And I wonder if I could just revisit that quickly.

We know that the old 35 percent there was no magic number the court said, how did you get 35. I am wondering if each of you are any of you can tell me if you would support a broadcast media ownership cap that is higher than 50 percent? If you have formulated your opinions on it yet? I am wondering if any of you would care to comment on that?

Mr. COPPS. I would not want to prejudge any outcome. But whoever was pushing an idea like that would really have to demonstrate the public interest benefits to be derived from it.

Mr. ENGEL. Is there anyone who would advocate it? Anybody advocate higher than 50?

Mr. POWELL. I would just say, you know, this is what we are trying to figure out. It would depend. I mean, I think that it is inter-

esting that in the cable ownership context we advocated a number more in akin to these 35 percent numbers. The court struck it down and it opined about numbers as high as 60.

I do not necessarily subscribe to that. Because I think what they are really saying is you had better have a darn good theory for drawing the line more aggressively than we suggest.

I do not think that it would be appropriate to say yes, I support a number really high. I will support whatever I think the record can defend.

Ms. ABERNATHY. Congressman, I think the one point I would add is that just in the wire line arena, I assume companies will do what is in their own best interest always. And so I think that they are inclined to consolidate as far as we would let them. So as we are looking at our rules, we will need to have a comfort level about how much concentration is okay. And I do not know where that is yet. I am still looking at the record. But I am going to approach it with a presumption that they will go as far as we will let them, because that is what is in their own best interests and that is what we have seen in every market. And I think that is normal. Not necessarily a bad thing, but shame on us if we do not take that into account as we are adopting rules and regulations.

Mr. ENGEL. Thank you.

The announcement last week, the UNE-P announcement, the FCC's announcement last week the capital markets have not in my opinion responded well to those announcements. When you look at it, it is not only the telephone companies that are adversely effected, but also the manufacturers.

Certain portions of the network are inexpensive, relatively inexpensive and easy to install such as switches. But as of a year ago our calculations show there were roughly 75 CLEC circuit switches in New York State owned by 34 different carriers. And there were also a similar number of CLEC packet switches. So I am wondering if anyone can comment on why the FCC found that a CLEC would be impaired if it did not have unbridled access to incumbent LEC switching capabilities? I am wondering if you could give me the rational on that?

Mr. MARTIN. I think one of the things that we looked at last week and that the record demonstrated was that there were distinctions of taking advantage of the switches that you might put in place and distinctions between residential and business customers or mass marketing customers and a large business enterprise.

In other words, when you sign up a business customer and you are going to put in your own switch, you will be able to put a whole set of lines over into place and use that switch with a whole significant number of lines. For example, a business customer, they have 200 lines all at once. So you only have to send a technician in on 1 day to move those lines over for on 1 day and you move all 200 lines at once.

If you were trying to take advantage of kind of a mass marketing operation where you would then be required to periodically be signing up particularly residential customers and then you would have to be sending in technicians frequently to be able to do that and make that hot cut process work and cut over. I think it is those

kind of operational issues and so—that make a big distinction. I think that is what the Commission focused on significantly last week in its decision.

I also think that one of the reasons why that is what we focused on so significantly is we actually were instructing the States to try to address that issue by adopting that kind of a batch cut process. In other words, allowing the aggregation of individual mass marketing customers up to a certain level that you can justify sending a technician in and moving those lines over, just the same as you do on the business side. And I think that is one of the things that the Commission was trying to address.

Mr. COPPS. Can I make just a quick comment? The matter of the investment and the expectations of Wall Street and everything has been brought up a number of times.

You know, I do not really know what it is in the final analysis that spurs investment. I do not even know if these companies do want to invest. Somebody made the comment earlier on "Hello Washington, Wall Street calling." And I think that is fine insofar as it goes but I do not think it is entirely the end game when we are talking about something like this. And I do not know what the expectation of the analysts were from this proceeding. I do not know if they were realistic, if they expected somehow that we were going to have this moment of dawn and clarity and there would be no legal challenge after that. I mean, maybe some of them were thinking that way. I do not know. If they were, they were way off the mark.

But when I think when we try to discern all the motivations for investment, we are pretty shaky ground.

Mr. POWELL. Congressman, I would like to note something that has not been said here today, which I think your question shines the spotlight on it.

Unfortunately, when we do these exercises, a lot of it has to be predictive. Would a competitor who is not yet there be impaired under 12 different economic criteria which we try to crunch and evaluate and now I guess States will try to crunch and evaluate? But what could be the most powerful evidence that you could do it yourself? It should be the fact that other people are there doing it themselves.

And I think that, you know, it is very easy to get swirled around the switching element. But of all the possible elements that are in issue nobody would disagree that the one most likely to be able to be self-provisioned is switching. It is belied by the fact that there are hundreds and thousands of them deployment throughout the country. Even the large IXCs who fight most for this decision, almost all of them have substantial switch presences in markets across the country because they provide long distance service using them in points of presence.

And I think at some point, you know, sort of regulatory prediction sort of leaves the realm of reality. I mean, there it is. Why is it that somebody is impaired if it can be done?

I think it is also important to credit an enormous amount of CLECs in this country who have done it that way. The vast majority of competitive local exchange carriers who are not long distance companies, which is an important distinction are using their own

switches. ALTSP, the Association of Local Telecom Service Providers didn't argue for preservation of switching so much in the proceeding because most of their members do it already. Because they know owning the brains of the network is the key to product differentiation, lower prices and greater competitive heft. This is mostly a methodology to bundle with a declining long distance business. I think that is somewhat of a distinct problem. But the point you make, which is one I feel is a little bit lost, is that when there are switches around we should stop the kind of complicated economic predictive analysis and merely take cognisance of that fact. And I do not think that that is a particularly a granular challenge.

Mr. ENGEL. I agree with you.

Thank you, Mr. Chairman.

Mr. UPTON. Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman.

Let me begin by first asking the question about the telecommunication development fund. Based on some narrow interpretation that we are not able to get the benefit from the fund as we thought we would when the law was actually passed in the 1996 Telecommunications Act, because only a certain percent we can get interest in, you know, there is legislation being put forth in this Congress by Congresswoman Wilson and of course Congressman Upton, and myself.

I would like to get the views of the Commission on that in terms of would you be supportive of that, the fact that, you know, where access to capital is always a problem. You know, trying to get service into under served areas. This is an opportunity where the government does not put up anything. So I would like to get your views on that.

Mr. POWELL. I would love to comment.

First on that, I sit on the board of the Telecom Development Fund and I am an active participating member. And I think it is a great idea that is underfunded and does not have enough ability to get a return on its corpus to make as much difference as it could. I have watched it firsthand and it is frustrating. I think the good men and women who are on it are doing the best they can, but it is a relatively modest amount of money and it is a modest amount in which it can be return.

I have always felt that areas like this where we take in sometimes millions, sometimes billions in auction revenue across the country, that much of that money could be put to more tailored uses to pursue goals in the telecom sector. The telecom sector produced the revenue for the country, so a greater portion of it could be used to advance some of the goals.

You could imagine if we could take some percentage of auction proceeds and use them more effectively in the TDF fund. So I would love to work with you on any ideas in that area, and I also just plug again something I have cared about for 5 years, the tax certificate effort. Because I think that the structural rules—I do not disagree that structural rules have impact on diversity, but I think it is minimal compared to the problems of capital. And no matter what those rules are, if we can not help the money flow,

help new entrepreneurs enter markets that have very expensive characteristics, then it is all for naught anyway.

Mr. TOWNS. All right. Thank you.

Any other comments?

Mr. COPPS. Well, I certainly would agree with that. This is an area where we need some really creative thought. If you stop to think about the challenges of getting communications out to the inner city or the Upper Peninsula of Michigan where I spent some time growing up, it is really kind of overwhelming. So I hope that we will learn to make maximum use of this. And I would very much look forward to working with you and your colleagues on the committee as we try to device new ways to accomplish those purposes.

Ms. ABERNATHY. The only point I would add, Congressman, is to echo the Chairman's concern about you have to have capital. Having been in business prior to joining the government and having worked when I was with a large company trying to do some work with some smaller startups that involve women and minorities, the capital funding issue kills you at the front door.

Entering the telecom arena is not like starting a dry cleaners. It is not like starting a local grocery store. It is a brutal industry. It is at a time when the markets are not very friendly. And so to ensure that we continue to promote some of these social goals that we value, there is going to have to be some capital made available.

Mr. TOWNS. All right. Thank you.

Mr. ADELSTEIN. I would just like to add I am very pleased to hear the Chairman talk about potential uses for auction revenues. I think that there is a proposal called Digital Gifts to the Nation that proposes using some of these revenues for educational purposes. And I think that this would also be an outstanding kind of area to invest in to try to get the startup capital available. And I think your legislative idea is a good one. And looking at creative ways of finding resources for that including revenues from our auctions is an excellent one as well.

Mr. TOWNS. Right. Thank you very much. And look forward to working very closely with you. Because I really feel that if we make these changes, that there will be additional money. It will not be enough. But it will actually improve the situation. Because I think it is an idea, as you agree too, that makes a lot of sense.

It has been reported that one of the next major issues that the Commission planned to tackle is that of media ownership caps. First of all, is that so? And if so, what's the time table?

Mr. POWELL. It is accurate. Again, pursuant to Section 202H in which the Congress commands the Commission to review its ownership rules every 2 years, this is the second such biennial review since the passage of the Act, and that is what you are reading about.

I would like to emphasize that the biennial review is principally about broadcast ownership rule, not all media ownership rules which is sometimes reported. And the timeframe is we have stated pretty publicly that we hope to complete that proceeding something in the very late spring, probably my best estimate would be sometime in May.

Mr. TOWNS. On that note, I yield back. I understand I do not have anything to yield back?

Mr. UPTON. You are correct, Mr. Towns. Thank you.

I would just note for the record that all members will be able to, as we start this second round, we are expecting some votes soon, that all members will be able to submit questions in writing if they do not get an opportunity. And we will close that record at close of business on Friday and then submit the questions the first thing next week.

I just have a quick question that I want to follow up on with Mr. Towns, and obviously we are all pleased to hear that the biennial review on this cross ownership ban is going to be considered. And these curtains are closed for a reason, Mr. Copps. I am not sure I am going to get to Richmond tomorrow with the snow that is coming down. I know there 13,000 some comments. I do not think it is any surprise for folks to know where I stand on this particular issue. And, for me, I live in a community of about 50,000 people, southwest Michigan. The newspaper stand outside of the post office on main street has a stand for the Detroit News, the Detroit Free Press, the Wall Street Journal, the Chicago Tribune, the Herald Palladium and the USA Today. Our cable companies in the area provide local channels from Grand Rapids, Kalamazoo, Battle Creek, Elkhart, Indiana, South Bend and Chicago. And particularly the news that is broadcast, as we look at the Tribune Company, WGN, channel 9, uses quite a bit of their nightly news commentary from the Chicago Tribune. And I think virtually everybody that watches it thinks that their news is enhanced because of the ownership that is there.

And I just want to know, I have yet to hear any complaints from any of the views with that regard. And I just want to know is you have had extensive hearings throughout the country and, you know, the many thousands that have come in, have you actually heard some complaints with regard to the news gathering organizations of some of those media giants?

Mr. COPPS. Yes, I have heard complaints, and no I have not had extensive hearings throughout the country. I would like to have extensive hearings throughout the country, but I am going to be going off on my own and doing a couple shoestring hearings and also trying to attend some of the other forums that have been put together by public institutions and all. But I do not think we have met our obligation to have as many hearings around the country as we should have.

Let us look at that 13,000 and that 15,000, all of those comments coming in. You know, my conclusion on that is if we have got 13,000 comments from the relatively few number of Americans who know about this issue, then when we get to that point where enough Americans know about this issue or are concerned about, we are going to be looking at 15 million comments. This is an inside the beltway issue right now. It is not an issue for the vast majority of the American people, although it should be an issue for the vast majority of the American people.

We teed this up back in September or October. One network, one time mentioned the fact that this proceeding was going forward, and that was reportedly at 4:45 in the morning. So, you know, not

everybody knows that this is teed up. Not everybody knows that the FCC is going to have the possibility to change these views. Not everybody reads the Federal Register and knows exactly how to comment.

So, yes, I want to go out and have those hearings. And some will say well, you are just going to get anecdotal information when you go out there. I do not buy that. I think if I go to Detroit, Michigan or any state, Kansas, Nebraska, I think I am going to find factual data, granular data and expertise that some of our normal commentors just do not have. And I appreciate all the comments that have come in, but I do not think the comments have the kind of diversity that I am looking for. In our universities, in our broadcasting community, in our journalistic community out there there is a lot of people that have a lot to add to this debate. And I think we do them a tremendous disservice by not doing the outreach to tell them that this is going on.

Mr. UPTON. Well, we look forward to hopefully to having this stick on a time table and some decision is made this spring.

Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman.

You know, what really worries a lot of public interest? If we could have the network chieftains sit here just for one whole day. The networks would cover it, that is for sure. And the public would then all start to have views as to whether or not, instead of having 6, only 3 of them would be sitting there a year later. And I would be you could probably have very strong views on the subject. And that is the issue that Mr. Copps is raising.

By the way, I was just wondering Mr. Tauzin asked Mr. Martin about the NERUCs, whether or not they thanked him.

Mr. Chairman, did the Bells, has any Bell employee or lobbyist thanked you since Thursday for anything? Have they talked to you at all?

Mr. POWELL. I have not gotten a lot of thanks in the last few weeks, no.

Mr. MARKEY. No Bell has talked to you and thanked you?

Mr. POWELL. And, Congressman Markey, of course out in the public someone said "Thanks, for your efforts." I have had nobody talk to me about the substance or——

Mr. MARKEY. So about like Mr. Martin then? You have each——

Mr. POWELL. I have no idea what that letter said.

Mr. MARKEY. I understand what you are saying. Okay. I just wanted to make sure that we are living in the same world; that is all.

You know, and Commissioner Abernathy, you are right. Corporations have no responsibility to the public interest. As a matter of fact, it is antithetical in many instances to their legal obligation to maximize profit for their shareholders. And a lot of these corporations if you kicked them in the heart, you are going to break their toe. I mean, we know that. Okay. So the public interest is sitting right here. And the public interest for a regulatory purposes is the intelligence and the conscience of the 5 of you in telecommunications policy. And the same way that it is our intelligence and our conscience when we legislate in the same areas. It is us. There is no magical, you know, formula up there. It is you.

So that is what you have to accept, is your moral responsibility in addition to your legal responsibility. I mean, it is you. It is your conscience. Because no one else is going to tell you what it is. It is your own life experiences.

Now, I have heard many people, and I want to think Mr. Dingell for starting to down this line. There are many people who are right now advocating a level of consolidation that would make Citizen Kane look like an under achiever in the media field, you know. And I actually hear some people talk about—and by the way, let me stipulate that not only did Congress screw up the radio deregulation, but it needed a little bit of help from the FCC as well. But I think, you know, can we all accept that that was a big mistake, a big mess. Too much consolidation in many communities across the country. And that is my concern.

It is not so much the national reach as it is in each individual community. So, for example, in most communities in America if one company owned 2 TV stations, 8 radio stations and a newspaper since the best of them only have 2 newspapers, and then another company owned the other 2 biggest TV stations, 8 radio stations and the other newspaper that would pretty much, you know, dictate then the coverage of almost the local news and public affairs in that community forever; a couple of voices.

And I think that that would just go too far. So, that is the bottom line on kind of your common sense reaction to it. If the public ever got to hear that, you know, they would say well that does not make any sense. You know, when I was growing up in the 1960's, you know, we had 5 newspapers in Boston, 3 TV stations, had all these radio stations, you know. So that's the oral paradigm before we had the introduction of new technology. So clearly the new technology should make even more choices, even more voices possible. Not fewer than the 1960's, huh? So I start there.

So within that common sense guideline I think it makes sense that adjustments can be made, decisions can be made, but you know not trying to reach some kind of free market paradigm, because that is not what communications is. We are talking about democracy now. We are talking about the information that goes into the minds of each American determining their relationship with their local community and with their state. And cable does not really deal with that. And satellite does not really deal with that. And the Internet does not really deal with that to the exception to which on the Internet you can pick up the local newspapers on line that gives you the same information.

So, Mr. Copps, give me your view. Give me how important you think this issue is for the American people fundamentally as you are now entering into this new deliberation?

Mr. COPPS. Well, important as the decision we spent so much time talking about today is to the future of telecommunications, I think it almost pails in significance compared to the media ownership and the broadcast caps that are coming up. I think this does go to the very nature of the entertainment that the American consumer hears and listens to. Is there localism? Is it bubbling up from the creative genius of the American people or is it more and more coming out of the advertising agency on Madison Avenue? So I think it has that dimension.

And then as you so eloquently said, it goes to the very marketplace of idea and the democratic discourse we have, and who is going to have access, and what issues are going to be covered. And I think arguably we are not doing a very good job of that in the country today even though we have more variety of formats, they say, and all of that. I do not know what that translates into when you start talking about diversity in a historical basis.

So, I am not trying to sabotage a vote or to sink a vote. I just want to make sure that when we vote we have an adequate corpus of information to cast an intelligent vote on. Does that we mean we answer every question in the world? No, it does not. Does it mean we answer some elemental questions like what are the impacts of this going to be on diversity of programming or on diversity of job opportunities in the industry?

You talked about new technologies. How does something like digital television play into this? You said new technologies are supposed to expand diversity. I do not know. Here, if you have a channel that can suddenly do 5 or 6 multicasts how much new diversity that is, variety of format maybe. What is the impact on children? And this is a question that kind of intrigues me, too. Is there a relationship between the rising tide of consolidation that we have seen in this country and the rising tide of indecent programming that we have on the airwaves? And I think there are some people who think there is.

I do not know the answer to that. But I think we had better ask the question and at least get some input before we proceed.

What is the impact going to be on advertisers, small advertisers, mom and pop stores in a consolidated media environment? And what is the impact going to be on diverse ethnic communities based on not just the programming they get, but the products and services that are previewed to them? So, you know, it just goes to the very crux of what we are talking about.

Mr. UPTON. Thank you.

Those buzzers mean that this hearing is now officially over as we have a series of votes on the House floor.

I want to thank all of you for the many hours you spent with us today. And, Chairman Powell, particularly with your leadership trying to put the things together. And we look forward to seeing the actual order as it is written.

Thank you. God bless.

[Whereupon, at 3 p.m., the subcommittee was adjourned.]