SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling Proceeding; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, GN Docket 00-185.

The declaratory ruling we adopt today provides the long-awaited answer to a pivotal question: What is the appropriate regulatory classification of cable modem service? I am pleased that this item will end the regulatory uncertainty that has led to divergent interpretations of the Act by the courts of appeals and that may well have hampered the deployment of cable modem facilities and the introduction of these services to consumers. I commend the Cable Services Bureau and my fellow commissioners for developing an analytical framework that not only represents the best reading of the Act but also serves important public policy objectives. Classifying cable modem service as an information service will promote our goal of fostering a "minimal regulatory environment that promotes investment and innovation in a competitive market."[1] It also provides the opportunity to create a more consistent regulatory framework across technological platforms.

As we have done in the *Wireline Broadband NPRM*, I believe it is important to seek comment on the appropriateness of wholesale access obligations. It may turn out that marketplace developments concerning multiple ISP access will make regulatory intervention unnecessary. Most of the factors that cable operators had formerly cited as impediments to offering consumers a choice of ISPs — exclusive contracts with affiliated ISPs and technical feasibility concerns, for example — appear to have been resolved. Accordingly, in addition to AOL Time Warner, which offers a choice of ISPs pursuant to merger conditions imposed by the Federal Trade Commission, Comcast and AT&T Broadband have announced agreements under which they will provide consumers with a choice of ISPs, and Cox is conducting technical trials. I also hope that the declaratory ruling we adopt today will provide a blueprint for cable operators that seek to negotiate additional access arrangements with independent ISPs. By establishing that cable operators may enter into access arrangements with independent ISPs on a private carriage basis, our ruling makes clear that cable operators can provide choice without necessarily subjecting themselves to common carrier regulation.

Overall, however, while these marketplace developments and our clarification of the legal regime provide a basis for optimism, I remain concerned that some cable operators may continue to offer consumers only a single brand of ISP service or that cable operators generally may offer only two or three options. As the owners of the nation's most extensive broadband architecture and as the leading providers of broadband service, cable operators have the potential to suppress competition. I believe that the

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[1] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking ¶¶ 5-6 (rel. Feb. 15, 2002) ("*Wireline Broadband NPRM*").

Commission should not yet dismiss proposals to impose some kind of access requirement without better evidence that robust competition among broadband ISPs will develop on its own.

The interrelation of this proceeding and the *Wireline Broadband NPRM* is a critical part of my decision to seek further comment on whether to impose an access obligation on providers of cable modem service. Cable modem and DSL providers appear to be competing in a converged broadband marketplace, yet DSL providers alone are subject to a series of unbundling and nondiscrimination requirements under *Computer II/III*. I therefore believe that it would be inappropriate for the Commission not even to *consider* imposing access obligations on cable operators. I recognize that there are substantial differences in the historical treatment of wireline common carriers and cable operators, and that it may not be appropriate or even within our statutory authority to seek complete parity in our regulatory treatment of broadband services provided over the wireline and cable platforms.[2] Nevertheless, we are faced with a single overarching question with respect to each service: What is the appropriate role for the Commission in ensuring that consumers receive the benefits of competition and choice? If the Commission decides to maintain some form of access obligation at the conclusion of the *Wireline Broadband* proceeding, we would need to develop a compelling rationale if we were to refrain from imposing an analogous requirement on cable operators.

Finally, I am pleased that the Commission has decided to tackle the challenging questions relating to state and local jurisdiction over cable modem services. We must balance the legitimate role of local franchising authorities in managing rights-of-way against the risk that excessive regulation will hamper efforts by cable operators to upgrade plant and roll out new broadband services. I believe that our state and local colleagues have no desire to erect regulatory barriers that would thwart our efforts to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[3] I look forward to working closely with local franchising authorities and their representative associations so that we can cooperatively establish appropriate guidelines for right-of-way management.

[2] I encourage commenters to provide detailed arguments on our statutory authority to impose a cable access requirement, including in particular the provisions of the Act that might support our exercise of ancillary authority under section 4(i). I note that, while the Commission relied on that provision in adopting the *Computer Inquiry* requirements, there may be a greater nexus between those requirements and the provisions of Title II than exists between a cable access requirement and other affirmative grants of authority.

[3] Telecommunications Act of 1996, § 706, 47 U.S.C. § 157 note.