

January 28, 1999

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

Re: In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion (CC Docket No. 98-146).

In this statement, I write separately to explain the bases upon which I support this *Report*.

The deployment of advanced services, particularly broadband services, will radically transform American life, our society and our economy. The greatest danger for regulators, however, is our inability to keep pace with the speed of developments and innovations that the new networks will unleash. We must recognize that these new technologies, combined with the pro-competitive provisions of the 1996 Act,¹ are shattering the traditional telecommunications paradigm. As aspects of this *Report* suggest, competition and the free market, as opposed to burdensome regulation, will ultimately prove to be the best means for achieving the widespread deployment that Congress envisioned.

Section 706 of the Act commands that the Commission “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”² It is beyond doubt that such capability is not currently available to even a majority of Americans. Indeed, the market for broadband services is still in its infancy, notwithstanding evidence that its future growth will be strong. Thus, what we do today should assuredly *not* be interpreted as some finding that the lofty goal of Section 706 has been forever met and that our work is done. The remaining, I believe separate, question is whether deployment of advanced services, which is now underway, is proceeding in a reasonable and timely way toward this lofty goal. Based on what we know at this early stage, I think it is, and thus I am pleased to support this *Report*.

Although I fully recognize that all Americans do not yet have access to advanced services, I agree with the *Report*'s assessment that advanced services are being deployed in a “reasonable and timely” manner. Reasonable and timely achievement of the goal of deployment to “all Americans” must contemplate that such widespread deployment will take some time. But there is not yet a solid consensus as to all aspects of what constitutes reasonable and timely deployment. I believe this *Report* takes important steps toward developing such a consensus. In order to further that process in future proceedings, I offer some principles here that should guide our efforts to assess and encourage advanced services deployment. In sum, I believe these efforts must take into consideration such factors as the tools that Section 706 prescribes for encouraging deployment of advanced services, consumer demand and willingness to pay, economic cost, and technological limitations. I begin to touch briefly on some of these factors in this statement.

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

² Pub. L. 104-104, Title VII, § 706(a), Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157

I also support the *Report* for what it does *not* do. In particular, I applaud the *Report* for declining, as a general matter, to propose solutions in search of problems. The *Report* correctly notes it is likely that multiple methods of broadband access to customers will develop over the next few years. To support this statement, the *Report* points to the massive levels of capital investment by the industry that in turn will cause extensive broadband deployment to all areas of America. The current market participants have a vested interest in providing advanced services as rapidly as possible to all Americans who are willing to pay the economic cost of these services. Regulators must resist the temptation to play parent to these infant services and prospective customers, dictating what products and services consumers will see, regardless of what they value and are willing to pay. Rather, regulators must strive to ensure the freedom of both consumers *and* suppliers to determine the economically optimal set of services, prices and availability in the open market.

Notwithstanding the positive aspects of this *Report*, my participation in its development persuades me that the Commission should keep several critical considerations in mind as it undertakes future proceedings of this type:

First, I believe that our assessment of what constitutes “reasonable and timely” deployment and that any actions resulting from that assessment should take into consideration the specific methods that Congress has prescribed for encouraging more rapid deployment. Through Section 706, Congress has evidenced its intent that the Commission refrain from enacting restrictive regulation in encouraging deployment. Congress has prescribed methods by which the market itself can facilitate growth. Congress commands that the Commission, in the event of unsatisfactory deployment of advanced services, “shall take immediate action to accelerate deployment of such capability by *removing barriers* to infrastructure investment and by promoting competition in the telecommunications market.”³ Notably, Congress has not, under Section 706, created a program to mandate and fund deployment, but has instead instructed the Commission to let the influx of market participants and investment capital accelerate deployment and thus benefit all consumers. Thus, Congress mandates that we encourage deployment by *removing barriers* to investment and through other *deregulatory* market-based methods. We should, therefore, refrain from enacting cumbersome standards and from requiring “rollout” deadlines that may cause hesitation from the capital markets, thereby delaying, rather than accelerating achievement of the goals of Section 706.

Second, and relatedly, I believe we should acknowledge that competition and innovation are the results of self-interested market participants struggling to present the marketplace with newer and more useful products at competitive prices. We must keep in mind that regulators do not drive competition, market participants do. Our policies must reflect this understanding if we are to achieve our ultimate goal of making advanced services available to all Americans according to the methods Congress has presented.

Third, we should be mindful of the important distinctions between the advanced services provisions of Section 706 and Section 254. While there does appear to be a connection between

³ Pub. L. 104-104, Title VII, § 706(b), Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

the universal service provisions of Section 254 and Section 706's concerns about the availability of advanced services to school children, there are distinct differences between the provisions' methods for achieving their respective objectives. The placement of advanced services provisions in Section 254(b) appears to contemplate the use of discounts or subsidies to support services that the Joint Board and the Commission decide should be supported (presumably in an explicit and competitively neutral fashion). Section 706, on the other hand, instructs the Commission to encourage reasonable and timely deployment to all Americans "by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."⁴ Again, in my view, the tools suggested for encouraging advanced services deployment under Section 706 appear to be fundamentally more market-based and deregulatory in nature than those suggested under Section 254.

Fourth, we should strive to develop a more realistic and, as such, complex understanding of how we should measure the pace of advanced services deployment. Such measurement must, in my view, be sensitive to factors such as consumer demand, willingness to pay, and economic cost. It must decidedly not degenerate into some arbitrary, subjective or political measure, based on what "goodies" we wish to give to consumers, however well-deserved or well-intentioned. The *Report's* analysis demonstrates that no two services can be deployed in precisely the same manner, and as such, any comparisons must be flexibly drawn. As the 1996 Act ushers in new levels of competition for all telecommunications market participants, we must take care to recognize that past experiences with a non-competitive market will have limited usefulness. I appeal rigorously to commenters in future proceedings of this type to help us develop a richer understanding of how we should measure advanced services deployment consistent with the procompetitive, deregulatory framework Congress has erected.

Finally, as I said in my statement on the *Notice* initiating this proceeding, I believe we should be aware that requiring certain firms to provide access to their facilities or services to other firms or even to end users may have some unfavorable consequences. In particular, I think we should search for alternative solutions to encourage innovation and competition in the provision of "last mile" transmission to homes and businesses. While mandating access can bring about short-term improvements in retail competition, it also may undermine incentives for developing new methods to circumvent the influence of incumbents over distribution.

In conclusion, I would like to emphasize my appreciation of the commendable effort put forth by the Bureau, as well as that of my colleagues, on this critical and demanding issue. Additionally, I look forward to working with everyone at the Commission, in the States and in Congress to help make our effort to encourage the deployment of advanced communications a success.

⁴ Pub. L. 104-104, Title VII, § 706(a), Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.