Promoting Swift and Stringent Enforcement

Remarks by FCC Commissioner Kathleen Abernathy
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Shortly after I began my tenure as a Commissioner, I developed several core principles to guide me through my term. One of those principles is that swift and stringent enforcement of the Commission's rules is critical to our effectiveness as a regulatory agency. I would like to discuss with you the importance of strong enforcement and then provide my thoughts on some of the Commission's recent enforcement activities.

The Importance of Swift and Stringent Enforcement

Most people think of the FCC as a rulemaking body. And that makes sense: Even though Congress established a *de*-regulatory and procompetitive framework in the 1996 Act, we still spend a lot of our time developing rules. But more and more, as the Commission implements Congress's plan to rely on market forces rather than prescriptive regulation, enforcement becomes our primary role.

We cannot rely on competition to allocate resources and maximize consumer welfare if companies can game the system by violating our rules with impunity. Penalties for such violations must be swiftly and fairly administered and must be sufficiently severe to deter anticompetitive conduct. Most would agree that failure to engage in stringent enforcement breeds disrespect for the FCC's authority and undermines the agency's credibility. For example, although the Commission has recently gotten tough with companies that violate the ban on unsolicited faxes, for years this prohibition was not enforced. As a result, a number of unscrupulous companies built businesses around violating our rules. Now, thanks to the threat of stiff penalties — such as a proposed fine of more than $5 million against one fax broadcaster — our rules have teeth, and I hope companies will think twice before violating them.

As this example illustrates, our enforcement responsibility is an area that often provides the Commission with a direct opportunity to protect consumers. While much of the inside-the-beltway attention is placed on high-profile disputes between carriers, it is equally important for the Commission to devote resources to the consumer protection provisions of the Act, including the provisions relating to slamming, cramming, and unwanted telemarketing calls. As I have discussed in recent months, the development of competition not only creates opportunities for consumers but also poses challenges. In a world without choice, there wasn't much confusion. You simply bought telephone service from AT&T, used your black rotary phone, and left it at that. Now, consumers have many plans to choose from, including wireline and wireless, stand-along services and bundles, and prepaid versus customary billing arrangements. This is great news, because services and prices are better than ever before. But it also means that consumers have to spend more time gathering facts, and have more reason to be wary of

unscrupulous providers. So the Commission plays a critical role in serving as an information clearinghouse for consumers, and the Enforcement Bureau in particular must ensure that carriers do not engage in unreasonable practices. As I pointed out last week in addressing the new Consumer Advisory Committee, we need to be particularly vigilant in ensuring that vulnerable groups such as senior citizens have the information they need to be educated consumers and to avoid becoming the victims of scams.

Another reason I favor a strong enforcement policy is that enforcement mechanisms are more narrowly tailored than prescriptive rules. Relying on prescriptive rules to foster competition has the disadvantage of prohibiting conduct that may benefit consumers. In other words, fixed rules are by their nature overbroad. By relying more on enforcement mechanisms, the FCC can tailor its intervention to particular circumstances, thereby allowing markets to operate with minimal regulatory distortion.

Commentary on Enforcement Activities

Now that I have provided a general overview on the importance of enforcement, I thought I would discuss some of the Commission's recent enforcement activities in the areas of wireline, wireless, and satellite services, and I will conclude by discussing what our priorities should be going forward.

1. Wireline: Jurisdiction Under Section 208

In the past two weeks, with little fanfare, the Commission has adopted orders finding SBC and Verizon liable in interconnection disputes with CLECs. This is a very significant development, not so much because of the merits of these proceedings, but because of the Commission's assertion of jurisdiction under section 208 of the Act.

When the Commission adopted the *Local Competition Order* in 1996, it found that it had jurisdiction over a wide range of interconnection disputes under section 208. Incumbent LECs challenged this assertion of jurisdiction in the Eighth Circuit, arguing that Congress's decision to establish a system of negotiations backed by *state commission* arbitrations superseded the Commission's general authority under section 208. The Eighth Circuit agreed and vacated the portion of the *Local Competition Order* that asserted jurisdiction. Ultimately, in the first *Iowa Utilities Board* decision, the Supreme Court reversed the Eighth Circuit's judgment on ripeness grounds. The net result was legal limbo: The *Local Competition Order* stood, but there remained a cloud of uncertainty as a result of the Eighth Circuit's analysis. This uncertainty would have to be resolved in a complaint proceeding.

The Commission has now grappled with this difficult jurisdictional question, and we unanimously found that section 208 does provide jurisdiction to adjudicate interconnection disputes. While section 252 gives carriers the right to seek arbitration, and parties may file enforcement actions before state commissions, state authority is concurrent with the Commission's section 208 authority. The Act and the Supreme Court have made clear that the amendments in the Telecommunications Act of 1996 cannot supersede preexisting federal authority by implication — the new law must *expressly* displace the old. Because the 1996 Act says nothing about displacing or limiting the

Commission's general adjudicatory authority under section 208, it follows that the Commission and the states have concurrent jurisdiction to hear interconnection disputes.

This is a very important decision, and one where the courts will have the final say — although they should agree with us. But I want to emphasize something I pointed out in a separate statement: As a practical matter, the circumstances in which parties will have valid causes of action under section 208 for violations of interconnection agreements or violations of section 251 will be quite narrow. There are two reasons for this.

First, as the Commission as a whole made clear in the case of *Core Communications v. SBC*, a party's failure to adhere to the requirements of an interconnection agreement will foreclose any remedy under section 208. For example, most interconnection agreements have change-of-law provisions that govern how FCC decisions will be implemented. A CLEC cannot make an end run around those provisions by filing a complaint before going through the contractually prescribed steps. Rather, the CLEC must abide by the terms of its interconnection agreement. Thus, in the *SBC* case, the failure of Core Communications and Z-Tel to follow the change-of-law provision in their interconnection agreement in California denied them a cause of action against SBC for failing to provide shared transport for intraLATA toll traffic in that state. In essence, Core and Z-Tel waived any right of action before the FCC by failing to seek relief under their agreement.

Second, I also believe that if a carrier invokes the state-commission arbitration process prescribed in section 252, and that carrier *loses*, its sole remedy is to file an appeal in federal district court under section 252(e)(6). The losing carrier may *not* collaterally attack the state action before the FCC in a section 208 complaint. Permitting a second bite at the apple before the Commission would appear to violate not only the text and structure of section 252, but also black letter law on collateral estoppel.

2. Wireless: E911 Compliance

Let me shift gears now and say a few words about enforcement in the wireless arena. On Capitol Hill and in industry circles, the question of enforcement of the Commission's E911 milestones has become a very hot topic. In short, this is an area where my colleagues and I are determined to take a hard line against noncompliance with the mandate to implement E911. Indeed, during the past year we have not hesitated to use our enforcement power when wireless carriers are not justified in failing to meet the FCC's requirements. In cases where the public interest warrants, we have provided additional flexibility in situations where delayed compliance is beyond the wireless carrier's control, but going forward I expect the case for further waivers will be very tough to make.

Last Spring, the Commission entered into consent decrees with AT&T Wireless and Cingular Wireless regarding the deployment of E911 over their TDMA Networks. Both carriers plan to phase out much of their TDMA networks as they transition to the GSM standard, but the Commission determined that compliance was nevertheless required. These consent decrees required each carrier to make a $100,000 voluntary contribution to the U.S. Treasury, to deploy E911 Phase II technology at their TDMA cell sites, and to provide Phase II service in response to PSAP requests by specified

benchmark dates. The consent decrees also require the carriers to make automatic penalty payments for failure to comply with deployment benchmarks and to submit periodic reports on the status of their compliance efforts.

In another instance, after issuing a Notice of Apparent Liability against AT&T Wireless for apparent E911 violations concerning its GSM network, the Commission and AT&T Wireless entered into a separate consent decree in October 2002 to address these apparent violations. This decree requires AT&T Wireless to make a $2 million voluntary contribution to the U.S. Treasury, to deploy E911 Phase II technology at its GSM cell sites, and to provide Phase II service in response to PSAP requests by specified benchmark dates. The consent decree also requires AT&T to make automatic penalty payments for failure to comply with deployment benchmarks and to submit periodic reports on the status of its compliance efforts.

Most recently, the Enforcement Bureau initiated an investigation into Cingular Wireless's and T-Mobile's deployment of E911 with respect to their GSM networks and will make a recommendation to the FCC shortly on how to proceed.

It should come as no surprise that the Commission continues to monitor each carrier's progress in deploying Phase I and Phase II E911 and to investigate alleged failures to meet FCC-mandated benchmarks. Where warranted, the FCC will continue to take quick action to ensure that wireless carriers comply with the FCC's E911 rules and regulations.

It is also worth noting that the three wireless carriers deploying GSM networks have experienced difficulties in meeting their benchmarks due to technology problems. The Commission has repeatedly met with these carriers to emphasize the seriousness of the existing benchmarks, and all three carriers were referred to the FCC's Enforcement Bureau. Within the past six months, two of those carriers have announced their decision to switch location technologies to ensure improved performance of their E911 systems.

Finally, on a separate enforcement front, in December 2002, in response to allegations made in lawsuits filed by the Wireless Consumers Alliance, the Enforcement Bureau initiated an investigation against ten equipment manufacturers regarding possible violations of the 911 call processing rule with respect to certain handset models. The goal is to ensure that 911 calls go through regardless of the preassigned carrier or the technology.

3. Satellite

Another area where the FCC has focused its efforts on enforcement is with regard to satellite construction milestones. These milestones are intended to ensure that licensees provide service to the public in a timely manner, and to prevent warehousing of scarce orbit and spectrum resources. Such warehousing could hinder the availability of services to the public at the earliest possible date by blocking entry by other entities willing and able to proceed immediately with the construction and launch of their satellite.

The FCC has generally required licensees to execute a construction contract within one year of the license grant and to launch and begin operation of all their satellite within five to six years. Recently, the FCC has revoked several satellite operators' licenses for failure to meet these milestone requirements. Last week, in our effort to

streamline the satellite licensing regime, we strengthened the existing milestone requirement to include the posting of an initial bond. We also required that licensees meet specified dates for critical design review and construction commencement. I believe that such action will guard against speculation and warehousing of spectrum, as well provide incentives for the most efficient use of the spectrum resource.

4. Media

The Commission of course has active enforcement underway in other contexts, including mass media, but I could take up your whole day if I got into the subject of indecency. I have made clear my general approach, however: We must uphold the statutory limitations on the broadcasting of indecent content, and at the same time we must be mindful of the First Amendment's limits on our ability to regulate in this arena. Rather than delving into this complex area today, I will instead conclude my remarks by discussing what I believe our focus should be in coming months.

5. Focus for the Months Ahead

David Solomon and his team in the Enforcement Bureau have done an exemplary job of boosting our enforcement capabilities. Now, as we move forward, I believe we should continue to emphasize the need for faster resolution of disputes. The Bureau has eliminated most of the previous backlog and is well positioned to continue improving its timeliness. But more fundamental changes may be necessary. We have a Rocket Docket, but it is seldom used. I am told that this is because most disputes are too complex, and the governing rules are too amorphous, to permit rapid resolution. At the same time, however, the marketplace demands greater responsiveness, and we should tailor our rules to this end.

Therefore, if we are going to place heavy reliance on enforcement mechanisms, we need to make sure that our rules are clear and that they are crafted with enforcement in mind. Too often, the Commission's rules prohibit conduct in extremely broad terms — for example, we bar "unreasonable discrimination." Well, as every lawyer in this room knows, it's very difficult to say what conduct runs afoul of such a ban. At times, the Enforcement Bureau can determine, based on the totality of facts and circumstances, that a carrier's conduct was unreasonable. For example, last week we issued an order finding Verizon liable for unreasonably delaying its provisioning of interconnection trunks to a competitor, because it had reason to know the facilities would not be available until well after the estimated due dates it provided. But even in such isolated cases, the Commission has a difficult time parsing through fact-intensive records and making judgments about reasonableness.

I therefore support moving forward with our proceedings concerning performance metrics for UNEs and special access services. These are the contexts in which we clearly need a nimble enforcement policy, but the broad nature of the statutory prohibitions makes that a difficult challenge. Even with the creation of the Rocket Docket, the complaint process remains relatively slow and arduous. Our goal of boosting reliance on enforcement would be well served by the creation of simple and easy-to-administer benchmarks. For example, if circuits must be provisioned within X number of days, or

with Y degree of reliability, that will make interconnection disputes far easier to adjudicate. Of course, the state commissions have done a great deal of work in this area, through the section 271 process and otherwise. But states are unable to regulate *interstate* services, and it also might make sense to introduce more uniformity to the standard-setting process, at least to create a baseline approach. I applaud competitive carriers for coming together to develop a consensus approach to national standards, and I look forward to considering recommendations from the Wireline Competition Bureau in the coming months.

Thank you very much. I look forward to your questions.