Trust the Market

Remarks by FCC Commissioner Kathleen Q. Abernathy
to the Women's High-Tech Coalition
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Thank you for your introduction. I want to thank you for inviting me to join your group today for lunch. I believe that the mission of the Women's High-Tech Coalition to leverage the significant power of women senior executives from both the public and private sector to impact public policy is extremely important. We cannot underestimate the influence and power we have as a group. I know that in my role as FCC Commissioner, I have endeavored to engage in frequent dialogues with other women in both the public and private sector to gain their insights into key policy issues, and learn from their experiences. I believe that the very traits that sometimes hold women back, a lack of faith in our own ability, that drives us to be better and work harder, can, in time, become our strength and our best asset. As Harriet Beecher Stowe wrote, "women are the architects of our society."

Today, I thought I would talk about how government regulation intersects with market realities. More specifically, why, as a policy maker, one of the principles I have tried to adhere to throughout my term is reliance on market competitive forces, as opposed to increased regulation when I am granted the discretion in making decisions. I firmly believe that as a regulator I have the obligation to trust the market and forbear from imposing unnecessary regulation because fully functioning competitive markets make better decisions than the government can or will. As past examples demonstrate, this type of decision-making ultimately results in the most innovative and reasonably priced services being provided to consumers by the communications industry.

One such example is the United States wireless industry. When the rules for the wireless industry were being developed by the FCC, the Commission considered imposing Section II common carrier type regulation. That is, it could have imposed price regulation, service quality controls, mandated certain technologies or demanded tariffing. But the FCC instead let go of the reins and relied on market forces to govern pricing and service terms for PCS and other mobile services.

This is not to say, however, that there was no regulatory intervention. The FCC continued to place additional spectrum into the marketplace - thus allowing multiple players to pave their own wireless last mile and to compete with existing providers. Included in this policy was a spectrum cap that guaranteed, at least initially, that there would be at least four distinct wireless providers in each market. The Commission also developed and enforced strict interference rules that prevented competitors from interfering with each other.

So while the approach to wireless was largely deregulatory, the Commission also engaged in limited interventions to ensure, for example, that there was a diversity of providers of the "last wireless mile" and to prevent competitors from externalizing costs

onto one another or consumers. In sum, the wireless experience illustrates how Commission policy ought to work: We establish policies that encourage entry into the marketplace; firms compete with one another based on price and service quality; and consumers make choices that maximize their welfare. In the end, some firms succeed while others fail, and it is the role of regulators to referee between carriers and consumers and among providers - not to pick winners and losers. Based on the success of the U.S. mobile telephony industry, I believe that.

When I began as a Commissioner, I believed that adhering to the core principle of trusting the marketplace would be relatively easy as a Commissioner. In reality, it is often quite difficult. Regulators are often hesitant to trust markets to operate rationally, even if they believe it is the right thing to do and even if past Commission decisions, such as the cellular decision, support such an approach. This is despite the fact that time and time again marketplace forces have delivered innovation, competition and their accompanying benefits to consumers. There is always a tendency to believe that direct intervention and manipulation will somehow yield a better result for consumers.

Today I would like to share with you some of the more recent decisions that the FCC has made whereby the Commission has placed its faith in the marketplace as opposed to imposing market-stifling regulations. In addition, I would also like to spend a few minutes discussing with you a decision where the Commission, by failing to trust the marketplace created an uncertain regulatory environment that has deterred investment and innovation. But, first the good news ---

The FCC has recently focused on moving towards increasing the amount of unlicensed spectrum that is available for new entrants to provide telecommunications services. Today American consumers increasingly rely on unlicensed devices in their day to day work and home environments. For example, your cordless telephone, garage door opener and computer all operate on an unlicensed basis under the FCC's rules. In addition, many more innovative devices operating in the unlicensed bands are becoming commercially available. These include Wi-Fi which allows you to have wireless access from your computer to your ISP, and blue tooth which provides wireless connections between your mobile phone, PDA, and other devices, such as keyboards and earphones.

In the unlicensed environment, the FCC does intervene to establish certain rules of the road to avoid harmful interference and allow multiple devices to operate in the same frequency band. The success of the unlicensed approach to spectrum regulation has been do in large part to the Commission's willingness and ability to clearly define the rules that govern the common use of this resource, while resisting the urge to impose heavy-handed regulation. This approach has encouraged capital investment, and in turn, new services, have been introduced to the American people. Unlicensed bands, unlike the licensed bands, do not create property like rights, but rather focus on communal use. Accordingly, like drivers on the highway, all users must comprehend and obey the rules of the road and the FCC, as the regulator, must ensure its rules are clear.

The FCC is continuing to examine its current spectrum allocations to see if additional spectrum can be made available for unlicensed use. Most recently, the FCC

affirmed its decision to allow ultra-wide band devices on an unlicensed basis to be deployed in a large portion of the lower frequency bands. Ultra-wide band technology holds great promise for many applications including public safety. For instance, one company has developed a device that allows police officers to see through the walls of buildings to locate hostages.

The Commission is also looking at additional frequency bands at 70, 80 and 90 MHz for other unlicensed devices. And just last month the FCC issued a notice of inquiry seeking information on what technical rules are required to allow power line broadband carrier services to be utilized. We are hopeful that power lines might offer a new broadband pipe to the home and office over the existing power infrastructure by operating in unlicensed frequency bands.

Another area where the Commission is adopting market-based solutions is in crafting service rules for wireless providers. A good example of this was our recent decision to craft a flexible regulatory regime that offers mobile satellite service operators the ability to include an ancillary terrestrial component to their satellite systems, as long as the satellite operator meets certain gating criteria. This decision enables mobile satellite operators to maximize the value of their spectrum by offering an integrated service package of both satellite and terrestrial mobile services in rural and urban areas of the United States.

Similarly, the FCC last month adopted an order providing flexibility to public safety licensees who use the 4.9 GHz band so they can offer both mobile and fixed broadband applications. Such flexibility will allow each public safety licensee to deploy systems in a manner that best serves the service and technological needs of their community.

Unfortunately, in some instances, the Commission has taken a step back from relying on competitive market forces to deliver value to consumers. Such slippage will ultimately harm consumers by stifling innovation and choice in the marketplace which may ultimately lead to fewer choices and higher rates for consumers. It can also lead to unintended consequences, such as uncertainty and a lack of capital investment. This is what happened in part of the recently adopted triennial review order. While we remain in our sunshine period, I am limited to discussing my own take on the issues, so let me offer a brief summary of my views on two of the key issues decided in that proceeding. One of which I supported and one I did not.

One of these issues concerns the imposition of unbundling obligations on fiber loop facilities used to provide broadband services, and the other concerns UNE-P, which stands for the unbundled network element platform. First, the good news. As most of you probably know, the Commission decided not to impose unbundling obligations on new investment in fiber loop facilities. Specifically, the Commission will not require incumbent LECs to unbundle fiber-to-the-home loops. Nor will incumbent LECs be required to unbundled a packetized broadband channel over hybrid fiber/copper loops. What this means is that CLECs will continue to get exactly what they get today — access

to copper loops, and access to high-capacity loops over fiber, using a non-packetized technology called TDM. In addition, I want to make clear that when I say incumbents are not required to unbundle these fiber facilities, I mean that they need not provide them at TELRIC prices. But the Bell operating companies still must make the facilities available to competitors on a wholesale basis, because section 271 requires them to provide competitive access to their loops.

I believe this decision strikes the appropriate balance between the goals of providing incentives to invest in new infrastructure and of giving competitors access to bottleneck facilities. As I mentioned, CLECs will not lose access to any existing UNEs. But we are refusing to *extend* new unbundling obligations to the advanced networks of tomorrow that do not yet exist. Why? First, because I generally do not support adopting regulations based on what *might* happen, because it is difficult to make accurate predictions about impairment. Second, I believe that those next-generation networks may never get built if incumbents are required to turn over the fruits of their investment at TELRIC prices.

I did disagree with one aspect of the broadband analysis, which was the decision by the majority to eliminate line sharing over copper loops. Unlike new fiber investment, copper loops are already in place. So giving competitors like Covad the ability to share those loops does not deter investment at all. In fact, allowing competitors to offer DSL through line sharing promotes competition *and* investment. If the incumbent wants to find a way to differentiate its service offerings, it can build new fiber loop facilities without being subject to the TELRIC unbundling regime. I recognize that, in time, intermodal competition from sources like cable, wireless, and satellite will be very beneficial for consumers, but in the short term, as some of these new broadband platforms are still getting off the ground, I think line sharing would have provided a much-needed competitive alternative, but I was in the minority on that point.

Finally, let me say a few words about UNE-P and why it represents a failure to put some faith in the market. Fundamentally, I believe the majority's decision to allow each state commission to decide the fate of unbundled switching, based on a largely subjective analysis, was bad for the telecom market and, in the long term, will be bad for consumers. The majority concluded that, even though CLECs have deployed more than 1,300 switches nationwide — in some 86% of all wire centers — they were unable to reach any conclusions about whether competitors are impaired in the absence of unbundled switching.

I believe that the Commission had a legal obligation to take on the challenge of deciding the circumstances in which impairment exists. For example, all the Commissioners believe that certain operational issues surrounding the hot cut process needed to be addressed through performance metrics and other rules. The Commission also could have determined that *economic* impairment exists in markets where fewer than a particular number of switches have been deployed, or in markets with fewer than a set number of lines, or based on a variety of other tests in the record. But I believe we were not permitted to throw up our hands and turn over the entirety of the job to the states.

The FCC and state commissions have an important partnership in promoting local competition, but each has a statutorily defined role to play in that partnership. Section 251(d)(2) of the Act makes clear that the FCC — not the states — must decide which network elements must be unbundled.

While I believe the decision is legally indefensible, I am equally concerned about its impact on the marketplace. What this market needs to promote investment is certainty. A better approach, which I would still have dissented from, would have been to make an actual *finding* that impairment exists. But instead the majority established a *presumption* that will give CLECs and ILECs no indication of whether UNE-P will be available in a given state. Rather than adjusting business plans to a new federal regime and investing in facilities-based competition, carriers will now spend the next several years litigating before each state commission, and then litigating in federal district court, and ultimately litigating in the courts of appeals. To be sure, any decision by the FCC would have been appealed as well, but there is an enormous difference between the timing and uncertainty involved in a single federal appeal and 50 separate litigation tracks.

I am disappointed by this outcome, because the FCC had an opportunity to put us on a path towards more sustainable facilities-based competition and, ultimately, a greater reliance on market forces. Instead, the majority opted for an extraordinary degree of regulatory oversight and uncertainty. And while I have no doubt that the state commissions will attempt in good faith to make economically sound decisions, I also know that different states will reach diametrically opposed conclusions based on the same underlying facts. That can't be a good outcome for consumers. In the meantime, legal and regulatory costs escalate for all the carriers, whether incumbent wireline provider or new competitor. And this fact combined with the overall uncertainty of the process drives down the market valuation of all the players. At the end of the day, both competition and innovation would have been better served by an approach that recognized the value of allowing the market to work with lighter touch regulatory oversight.

The good news, however, is despite regulatory failures, which are inevitable since we lack perfect knowledge, technology never stands still. New, innovative life changing services find their way to the market despite the hurdles we may erect. And my hope is that we learn from our past mistakes and continue to trust in competitive market forces to deliver innovation and value to consumers. We can then focus our regulatory efforts on enforcement and consumer protection, which is a speech for another day.

Thank you for the opportunity to discuss these important issues. I would be happy to take some questions.