Reaching Broadband Nirvana

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Remarks of Commissioner Kathleen Q. Abernathy
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Thank you very much for inviting me to speak with you. I am very excited about broadband-over-powerline technology. I have seen it in action, and I believe it has a very bright future. It is a real honor to be your keynote speaker at this important juncture for BPL.

As a regulator, I am keenly interested in BPL technology for a number of reasons. One of my central objectives as an FCC commissioner is to facilitate the deployment of broadband services to all Americans. I also fundamentally believe that the FCC can best promote consumer welfare by relying on market forces, rather than heavy-handed regulation. The development of BPL networks will serve both of these key goals. It will not only bring broadband to previously unserved communities, but the introduction of a new broadband pipeline into the home will foster the kind of competitive marketplace that will eventually enable the Commission to let go of the regulatory reins. I want consumers to have a choice of multiple, facilities-based providers, including not only cable and DSL, but also powerline, wireless, and satellite services. Such a robustly competitive and diversified marketplace is something I would call broadband Nirvana. We will not get there overnight, but the continuing development of BPL technology is a major step forward.

While the long-term objective is a robustly competitive marketplace that is free of regulatory distortions, a more immediate question is: What should the FCC do to help foster such an environment? Sticking with my Nirvana metaphor, I guess the question would be, what is the path to enlightenment?

I believe the answer, in short, is regulatory restraint. It is tempting for regulators to take every new technology or service that comes along and apply the same rules that govern incumbent services. After all, regulatory parity and a level playing field are intuitively appealing concepts. But I believe that it would be a huge mistake to carry forward legacy regulations whenever new technology platforms are established. Many of our regulations are premised on the *absence* of competition, and when that rationale is eroded, we must not reflexively hold on to regulations that no longer serve their intended purpose. In fact, many of our old rules not only become unnecessary as markets evolve, but they can be fatal to new services that need room to breathe.

The Nascent Services Doctrine

This policy of restraint is something I have described as the Nascent Services Doctrine. By avoiding the imposition of anachronistic regulations, regulators can best allow new technologies and services to flourish. Once facilities-based competition has taken root, regulators can begin to dismantle legacy regulatory regimes, rather than extend those regimes to include the new platforms. This is not a matter of picking winners and losers; it is about creating an environment conducive to investment in new infrastructure, because new platform providers create competition and innovation that ultimately benefits consumers far more than prescriptive regulation. In essence, short-term regulatory disparities are tolerated to generate long-term facilities-based competition.

Incubating new technologies and platforms helps establish new facilities-based competitors, and the increased competition ultimately delivers to consumers the benefits of lower prices, better service quality, more innovation, and more choice. Regulatory restraint is a necessary part of fostering such competition, because there is little doubt that overregulation can do substantial damage to nascent technologies and platforms. As the recent turbulence in the capital markets has shown, companies take enormous risks when they invest heavily in communications networks — such as the broadband networks being built today. To avoid creating additional disincentives to invest — beyond those risks that are inherent in the marketplace — we must resist the reflexive tendency to apply legacy regulations to new platforms.

As I will discuss in a moment, regulatory parity is an important *long-term* goal, because applying different regulations to providers in a single market inevitably causes marketplace distortions and leads to inefficient investment. As a *short-term* policy, however, accepting some degree of disparity is not only tolerable, it is essential. For example, when the DBS platform was created, it was appropriately exempt from most of the legacy regulations imposed on cable operators. This regulatory restraint allowed those nascent platforms to develop into effective competitors. Today, as electric utilities, wireless carriers, and satellite operators strive to bring new broadband platforms to market, it will be equally important to avoid stifling those nascent platforms with the heavy-handed broadband regulations associated with the wireline telecom platform. Just as you would not build a tree house in a sapling — because you might kill the tree and hurt yourself in the fall — it does not make sense for regulators to immediately and reflexively burden new providers with a full regulatory load. If the ultimate goal is to develop sustainable facilities-based competition — and I think it is — it seems reasonable to me to allow the new service to develop free of most legacy regulatory burdens.

There are two distinct applications of this doctrine. First, it applies to *nascent technologies*, which appear in the market without any clear sense of the services they will ultimately support or the markets in which they will ultimately compete. And second, it applies to *nascent platforms*, which I think of as new competitors to incumbents in already-defined markets. Ultra-wideband is an example of a nascent technology. We do not know precisely how this technology will be used, but we do know that it has tremendous potential and we should approach it in a restrained manner. Broadband over

powerline is the quintessential example of a nascent platform. There is little question that BPL services will compete with more-established cable modem and DSL services — and in some markets, satellite and fixed wireless services.

The FCC has a pretty good track record of adhering to these principles. When wireless voice services were first developed, the Commission refrained from imposing common carrier price and service-quality regulations, despite many calls to do so in order to establish parity with wireline regulation. Similarly, the Commission generally took a hands-off approach to DBS services as they emerged as competitors to cable in the MVPD market.

I am especially pleased that, when the FCC adopted its Notice of Inquiry on BPL systems in April, we rejected proposals to seek comment on the application of legacy regulatory requirements to this platform. For example, some argued that the Commission should consider issues such as nondiscriminatory access for unaffiliated ISPs, and other regulatory requirements imposed on common carriers. I opposed such efforts because it is premature even to *consider* such regulatory intervention. We do not know at this point how BPL systems will evolve or, candidly, the extent to which BPL services will succeed in the marketplace. The flow of capital at this formative stage is critical. If the Commission signaled that it was heading down a path toward extension of our legacy rules, that would have a chilling effect on investment. Therefore, raising the specter of heavy-handed regulation — that is, ignoring the central premise of the Nascent Services Doctrine — would threaten to undermine our core goals of fostering facilities-based competition and broadband deployment.

Of course, the interest in nurturing nascent platforms cannot justify preserving regulatory disparities forever. While my Nascent Services Doctrine calls for tolerating short-term disparities, it also recognizes that the *benefit* of such disparities is that they provide the impetus to reconsider the appropriateness of our regulation of incumbent providers. If we succeed in spurring investment in new platforms — and robust facilities-based competition takes hold — we can then begin to dismantle regulations imposed on incumbent providers and replace them with more appropriate rules. In this way the Nascent Services Doctrine provides a laboratory to assess the necessity of our regulatory intervention on the incumbent provider when compared with its nascent competitor. In contrast, if we were to extend legacy regulations immediately in a reflexive drive toward symmetry, that would assume the ongoing need for the underlying regulation and never allow us to assess deregulation in the real world. Indeed, reflexive symmetry actually institutionalizes the legacy regulation by imposing it on more providers across all platforms, ultimately making it all the more difficult to remove regulations from the books — even after they have outlived their usefulness. The Nascent Services Doctrine places the burden on the regulator to re-institutionalize the regulations after a new competitor has established itself in the marketplace.

We are seeing this process unfold right now as we review the rules applied to wireline broadband services offered by incumbent LECs. The emergence of cable operators as the leading providers of mass market broadband services makes clear that

applying more stringent regulations to wireline providers at a minimum must be reconsidered. As other platforms, including BPL and wireless, become more widely available, that will further undermine the justification for regulating incumbent LECs' broadband services as if they were the only available offerings. When the Commission completes this rulemaking, I expect that we will eliminate many existing rules and substantially modify others; the central question is the degree of regulation that will remain during the transition to a more robustly competitive market.

Finally, it is important to recognize that although the emergence of new platforms like BPL will eliminate the need for many *competition-related* regulations, *other* types of regulation may well remain necessary. For example, the FCC must implement public policy goals unrelated to competition, or even at odds with competition. Universal service and access for persons with disabilities are examples of this kind of regulation. These public policy goals generally should be applied to *all* service providers, to the extent permitted by the Communications Act. The FCC also must intervene to prevent competitors from imposing externalities on one another and to protect consumers where market failures are identified. Although, as I have noted, the Commission was right to refrain from imposing heavy-handed price and service-quality regulations on PCS services when the were introduced, it was also right to adopt strict interference rules to prevent competitors from externalizing their costs. The same principle will apply to BPL. They key point is that, while some degree of regulation is both inevitable and desirable, we should ensure that it is narrowly tailored to the particular governmental interests at stake.

I appreciate the opportunity to share these thoughts with you, and I would be happy to answer a few questions if we have time.