The View from Washington

Remarks of FCC Commissioner Kathleen Q. Abernathy
At
Real Women: Digital World
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Introduction

Thank you very much for inviting me here today. It is always a privilege to have the opportunity to spend some time with so many impressive women. 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 private and public sector to gain their insights into key policy issues and learn from their experiences. As Harriet Beecher Stowe wrote, "women are the architects of our society." As such, we have a particular ability to influence the further development of our digital world and economy.

I thought that today I would focus my remarks on how government regulation in the communications industry intersects with market realities and on why I, as a policy maker, have tried to adhere throughout my term to the principle of relying on competitive market forces, as opposed to prescriptive regulation, whenever possible.

Trust the Market

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 ever can or will. Past examples bear this out. For example, in the very robust cell phone industry consumers benefit from choice, innovation and price competition.

At the same time, I recognize that there is a role for regulation. While I have faith in the ability of competitive markets to deliver innovation, expand service and drive down costs, regulation is often necessary to limit externalities, facilitate informed consumer decision-making or oversee policies that are not market-driven. Congress has recognized this limitation by crafting a number of statutory obligations that the Commission has a responsibility to enforce vigorously. For example, in areas like indecency or with regard to universal service funding, we have a specific statutory obligation to adopt and enforce our rules. Thus, while I favor vigorous FCC action to enforce our statutory mandates, we must tread lightly when it comes to manipulating players in the competitive arena.

When I first became a Commissioner, I believed that adhering to the core principle of trusting the market would be relatively easy. In reality, it is often quite

difficult. Regulators are often hesitant to trust markets to operate rationally, even if they do believe it is the right thing to do and even if past Commission decisions 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.

But as a Commission we have persevered and today I would like to share with you some of the more recent decisions that the FCC has made whereby we have placed our faith in the marketplace as opposed to imposing market-stifling regulations and these decisions resulting in increased benefits to consumers.

The FCC has recently focused on increasing the amount of unlicensed spectrum that is available for companies that want to offer new, innovative 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 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, blue tooth which provides wireless connections between your mobile phone, computer, 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. However, we do not impose stringent licensing and service rules – instead each entrant has the flexibility to develop and offer service in response to market demands. The success of the unlicensed approach to spectrum regulation has been due 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. Basically, unlicensed bands, unlike licensed bands, do not create property like rights, but rather focus on communal use. So, just like drivers on the highway, all users must comprehend and obey the rules of the road and the FCC, as the regulator, must ensure the rules are clear.

The FCC is also continuing to examine its current spectrum allocations to see if additional spectrum can be made available for unlicensed use. For example, the FCC is seeking comment on the technical rules are required to allow the offering of broadband powerline services. 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 key area we have been working towards is our transition to digital television and digital radio. We are at the precipice of bringing exciting new opportunities and services to consumers – high definition video and audio, multicasting, data services and interactive services. Broadcasters are commencing operation of these

services and the Commission is working on both operational and technical rules, as well as public interest and service rules.

These technological advancements give broadcasters many opportunities to have greater flexibility in achieving their public interest obligations, while delivering to the public innovative new services. For example, the Commission has historically imposed a three hour per week processing guideline with respect to children's programming obligations. Thus, if a broadcaster airs three hours a week of educational and informational material, they meet their renewal requirements in this area. But I know as a parent it is very difficult to find this programming. In contrast, in the digital world, broadcasters will be able to provide multiple channels of programming so the public can not only expect to have more educational programming available to them, but a broadcaster may be able to dedicate an entire channel to children's programming. Thus, parents can rest assured as they do with many cable channels, that whatever programming is on that channel will be suitable for their child.

Also, in the past, the Commission has been concerned that preemption of children's programming may thwart the goals of the Children's Television Act of 1990. We, however, allowed limited preemptions. But now we must ask whether the ability to multicast resolves this problem, so that rather than preempting a children's show for perhaps a college football game, they can put the sports program on an alternate channel and air both simultaneously.

Another important public policy issue that affects all consumers is the FCC's adoption of the do-not-call rules. Unwanted telemarketing calls had become a national problem. Congress and the FCC heard the American consumer and responded. Just last summer, the Commission expanded its original rules to give consumers a choice of whether or not to receive telemarketing calls in their home.

Of course, in addressing this issue the Commission had to carefully balance the right of consumers to be free from unwanted telemarketing calls, with the first amendment right of telemarketers, which requires that any restrictions on commercial speech advance a substantial governmental interest and be no more extensive than necessary. Accordingly, the FCC, in conjunction with the FTC, established a nationwide do-not-call registry, which balances these two interests. For example, we have preserved some exemptions for calls to consumers, by tax-exempt nonprofit organizations and by marketers who have an established business relationship, while providing a mechanism to consumers to limit the more invasive telemarketing calls.

The FCC and the FTC are now moving down a similar path with regard to SPAM. On January 1, 2004, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, or what we call CAN-SPAM Act, took effect. This new law set out three requirements that commercial e-mail senders must follow. The first requirement involves labeling and it stipulates that every unsolicited e-mail must be clearly identified as a solicitation or advertisement. The second, offering an opt-out option, provides that commercial e-mail senders must allow an easy and legitimate way

for recipients to opt-out of the sender's future e-mails. Last, the return address provision requires that unsolicited e-mails contain a legitimate return e-mail address, as well as the sender's postal address.

The FTC recently sought public comment on regulations regarding unsolicited commercial spam, including the establishment of a do-not-e-mail registry, which would function like to the do-not-call list. And the FCC is also considering regulations to cut back on unwanted e-mails. Specifically, we're in the process of establishing rules that will protect consumers from the costs and inconveniences that result from unwanted commercial messages sent to wireless devices. Once again, in implementing rules in this area, the FCC will have to be careful to balance the interests of the consumers to be free from unwanted commercial e-mails, with the rights of the marketers.

Enforcement

I'd like to turn now to the issue of enforcement. In discussing arms control with the Soviet Union, President Reagan used to say "Trust but verify". I have the same trust in markets – I do trust in them when they are allowed to work – but I believe my responsibility as a regulator is to verify that market actors are not interfering with market functioning by improperly leveraging their market strength or by imposing externalities that skew the market. Thus, my enthusiasm for markets is constrained by a vigorous commitment to enforcement.

And that's why the FCC has stepped up its enforcement. For example, one area where we have been active is in the area of indecency. To be honest, on the media side, the indecency issue seems to have pushed everything else to the sidelines for now. The law currently prohibits the broadcasting of indecent material between the hours of 6 am and 10 pm. There are several interrelated legal bases for this restriction.

First, there is the distinctive nature of broadcasting itself. It makes licensed use of a publicly-owned resource to provide programming intended to be available free to the general public. Therefore, the courts have found that broadcasting is imbued with a very specific obligation to serve the needs and interests of the local audience.

Second, there is the unavoidable fact that children are a part of the local audience for a substantial portion of the broadcast day. The courts have consistently stated that there is a compelling governmental interest generally in the well-being of children, and particularly in supporting parental supervision of children. Thus, while indecent material is protected under the First Amendment and cannot be completely banned, it is limited to the hours of 10 pm and 6 am, when children are less likely to be in the broadcast audience.

This raises the next question – exactly what is indecent for broadcast purposes? The Commission's definition is as follows: indecent speech is "language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium."

These "contemporary community standards" are determined on a national, not a local basis. This means that the standard is that of an average broadcast viewer or listener rather than either a hypersensitive of hyper-jaded individual. And, to determine how "patently offensive," "in context" to an average broadcast viewer, the Commission considers three factors: how graphic or explicit the material is, how fleeting or repetitive its focus is, and whether it is presented in a pandering or titillating manner or for its shock value. These factors are weighted and balanced in light of the circumstances that are present in each alleged indecent broadcast. Not all three of these criteria are necessary – in some cases one or two may outweigh the other factors. And context is critically important.

This leads to a discussion of exactly what happens to a licensee when it violates the FCC's indecency rules. Fines and forfeitures and if repeated and egregious then potentially license revocation. I believe in strict enforcement of all of our rules, including our restrictions on indecent broadcasts.

As an agency, though, we must continue to be mindful of treading on free speech rights and carefully balance these interests with protecting our children from material that is inappropriate for them. But when broadcasters cross the line, we must be ready and willing to strictly enforce our rules.

The interesting dichotomy that exists though is that our indecency restrictions apply only to broadcasters and not to cable or DBS or satellite radio. This is in part because of the unique attributes and history of broadcasting, its use of spectrum and its intrusive nature into the home. Yet most people these days don't distinguish between a broadcast channel and a cable channel – to them, it's all just a click on the remote. So cable, DBS and satellite radio, have more freedom from indecency restrictions. This falls into the life's not fair category. Having said that, and although we cannot restrict what they air, I am pleased to see that these industries, along with the broadcast industry, have increased their efforts to inform parents about the choices they have available to them and how to make educated decisions about the programming they and their children watch. For example, the cable industry is letting parents know that upon request they can block a programming channel free of charge. The cable and broadcasting industries are also undertaking promotional campaigns around the v-chip and ratings system.

Consumer Education

And lastly let me talk briefly about consumer education. It is important to focus not just what on to air, but also to help direct parents to the multitude of educational and family friendly programming that is available. That is why as part of my consumer outreach and educational efforts, I have worked with our Consumer and Governmental Affairs Bureau to develop the Parent's Place website. The Parent's Place provides the tools for parents to make educational choices about their family viewing. Among other things, it allows someone to look up broadcasters' schedules for their children's educational and informational programming in each market. It also provides a link to

Cable in the Classroom that gives updated suggestions for educational children's programming that is being shown on cable television.

That brings me to the now infamous incident with Janet Jackson and Justin Timberlake. Regardless of whether we deem this to be indecent or not, it was objectionable not simply because it was inconsistent with the values of most people, but because it was a surprise. No parent viewing the Super Bowl had any reason to suspect what was planned, and therefore, parental choice was denied. The party or parties responsible for this presentation effectively imposed their own value system over that of the parent. They made it impossible for a parent to choose not to have a child watch, or even to put what was seen into any sort of context before the fact.

That to me is the real problem. So, as a Commissioner, I am committed to not only strictly enforcing our indecency rules, but perhaps more importantly reaching out to educate parents about choices and working with the industry to promote the v-chip, rating systems, and other tools that families have available to them to make informed decisions about family viewing.

I believe that this obligation to educate consumers is important in all areas of communications regulation. I take this role seriously and I often use my office to educate consumers about their rights and the obligations of the entities we regulate. For instance, just this past month, I issued a newsletter called Consumer Focus on Spam, and it educates consumers on how to stop unwanted Spam and what the government is doing in this area. I have brought copies of this issue of my Consumer Focus for anyone who would like one. I also meet regularly with consumer groups and others to ensure that they are well-informed about their rights under our rules and regulations and to hear their concerns.

I also believe that industry has an important role when it comes to consumer education and I encourage all the industry groups to reach out to consumers. A good example of this is the efforts of the cable television industry to inform parents that blocking technology is available for free.

Conclusion

In conclusion, I believe that as regulators, we must place our trust in the market. However, there are times when it is appropriate for the FCC to step in and regulate. In these situations, the Commission must have clearly written rule that we are willing to enforce. And finally, the Commission, in partnership with industry, has an obligation to educate consumers about their telecommunications choices. In the long run, I believe that this approach best benefits consumers by providing them with innovative services at competitive prices.

I would like to thank you for the opportunity to talk to you today. And, if there is time, I would be happy to answer a few questions.