Guiding Principles for the Age of Convergence
FCBA Annual Meeting
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Remarks of Commissioner Kathleen Q. Abernathy

(As prepared for delivery)

Thank you very much. I have been deeply involved with the FCBA for many years now, and over that time this organization has provided me with great training, professional opportunities, mentors, and many close friends — and more recently, speaking opportunities. So I am extremely grateful for everything the FCBA has done for me, and it is a great honor for me to appear before you at this annual meeting, where the gavel is passed.

Shortly after I was appointed to the FCC a fleeting three years ago, I wrote an article discussing the key tenets of my regulatory philosophy, and I described these guiding principles at an FCBA luncheon. My overall focus was on harnessing the benefits of market-based solutions rather than relying on prescriptive regulation. Now that it's three years later, I thought it would be interesting to discuss how those principles have played out in the real world. And since Congress is beginning to consider legislative reform and the Commission is also facing fundamental questions of how to respond to an increasingly converged marketplace, I think it is important to reflect on where we've been and how policy-makers should proceed in the digital age.

Successes and Failures

First, I'll review some of the policy cuts we've made that have succeeded in encouraging infrastructure investment and creating choice for consumers. Foremost

among the positives has been the Commission's approach to broadband networks and services.

With respect to the deployment of broadband *facilities*, I am particularly pleased that the Commission removed regulatory obstacles to infrastructure investment by wireline telephone companies in the Triennial Review Order. More specifically, the Commission made clear that next-generation fiber networks would not be subject to unbundling obligations at TELRIC rates, and thereby removed a significant *impediment* to investment by both incumbent LECs and competitors. I am also hopeful that the Commission will soon resolve some remaining uncertainties on reconsideration, regarding both the treatment of multiple dwelling units and fiber-to-the-curb deployments.

Based on discussions with carriers and equipment manufacturers, it appears that the Commission's deregulatory action is already bearing fruit. Many large and small carriers are stepping up plans to deploy fiber deeper into the network, including fiber all the way to the home in several areas. This increased investment has brought new life to the equipment vendors and should spark a revitalization of research and development activity. Earlier this week, for example, a senior vice president at Tel Labs told me that, because of the Commission's broadband decision, has company spent $1.1 billion to acquire AFC, a manufacturer of fiber optics and advanced electronics. And they will invest millions more to help bring broadband services to consumers. Unfortunately, the loss of jobs and R&D cutbacks cannot be reversed overnight — we still have a ways to go to recover from the economic downturn of the last several years. But I am confident that eliminating the specter of burdensome unbundling obligations will have a very

positive impact on broadband deployment, which in turn will speed the adoption of faster and more exciting consumer applications.

So the broadband portion of the Triennial Review represents a major success, and so too does the Commission's steadfast campaign to promote the development of new *wireless* broadband services. I have often spoken about the success of the Commission's lightly regulated model for wireless services — there is no doubt in my mind that we would not have seen the robust price competition and high degree of innovation we enjoy today if not for the Commission's decision in the early 1990s to refrain from imposing heavy-handed common carrier regulations on PCS services. Recently, the Commission has built on this success by allocating additional spectrum, increasing flexibility, and continuing to avoid excessive regulation. At our June meeting, we provided increased flexibility in the MMDS and ITFS bands to create the possibility of innovative new uses, including commercial broadband services. Previously, in cooperation with NTIA, the Commission allocated 90 MHz of spectrum for 3G services, and we also issued licensing and service rules. I am also optimistic that the FCC's efforts to develop more effective secondary markets for spectrum will enable more consumers to reap the benefits of broadband technology. And there is no doubt that the Commission's allocation of *unlicensed* spectrum also has helped promote broadband services. Many of us have become quite familiar with the 2.4 GHz unlicensed band, as this spectrum has enabled an explosion of Wi-Fi "hot spots" in homes, offices, coffee shops, hotels, and many other settings. The FCC recently allocated an additional 250 MHz of unlicensed spectrum at 5.8 Gigahertz for Wi-Fi. Thus far, Wi-Fi systems complement, rather than compete with, last-mile technologies. But the development of several new standards, including Wi-

Max, as well as the Commission's recent NPRM concerning the potential for unlicensed devices to operate on a non-interfering basis in the broadcast television spectrum, could dramatically extend the range and robustness of wireless broadband services and provide another last mile to the home.

Another promising broadband technology is broadband over powerline, or BPL. Electric utilities have field-tested BPL systems and successfully delivered broadband Internet service to a small number of consumers. If interference concerns can be addressed, BPL will hold tremendous promise for consumers, because it could bring broadband to any home that has electricity. And I think they will be addressed. The Commission is also sending the right signals to the market. We resisted efforts to impose economic regulations on BPL services in the NPRM adopted last year, because we wanted to give this nascent service room to develop before embracing a specific regulatory framework. In fact, I doubt that there will *ever* be a need to impose common-carrier-type obligations on a nascent platform such as BPL.

In addition to promoting the deployment of broadband over wireline, wireless, and electric utility networks, the Commission has maintained its pro-investment framework for the market-leading cable modem services by resisting calls for heavy-handed regulations in that arena. Unfortunately, the *Brand X* decision by the Ninth Circuit complicates the Commission's effort to regulate cable modem services under Title I, as well as the Commission's proposals to develop comparable regulations for DSL services. While this case — as I'll discuss later — underscores the need to consider a regulatory regime that is less dependent on arcane service labels, the good news is that the Commission's investment-friendly treatment of broadband network owners has

helped ensure that the vast majority of Americans have access to high-speed Internet access services, whether delivered via cable, DSL, satellite, or wireless.

The reason I am focusing on broadband deployment — and why I talk about it so often — is that it truly has the power to transform our society. I just returned from a trip to Alaska, where I was able to visit with Native Alaskans living above the Arctic Circle who are making broadband services part of their everyday lives. A consortium of companies use DSL and wireless broadband technologies to furnish the village schools, health clinics, and a surprising number of private homes with broadband connections. This trip really drove home something that has become increasingly clear to me: broadband has the power to make geographic isolation irrelevant. It brings a world of information to rural communities via the Internet, so school children have access to the same resources in Selawick, Alaska as children do right here in Washington, D.C. It gives rural families access to medical specialists without having to travel long distances. And it fuels economic expansion by connecting small businesses to millions of potential customers all over the world and by allowing larger businesses to set up call centers and otherwise tap into a new employee base. Broadband networks also are inherently more efficient than narrowband networks, so they allow service providers to lower their costs. As a result of the consumer benefits and efficiencies, companies in all segments of the industry have strong incentives to build broadband networks, and our job at the FCC is avoid getting in the way.

In addition to our broadband policies, I also believe that the Commission's approach toward Internet-based services and other information services been a triumph for consumers. While the Commission always regulated the common carrier facilities

that underlie information services, it adopted a deliberate policy of non-regulation regarding the information services themselves. The Computer Inquiry proceeding unquestionably set us on the right path by fencing off information services from regulation. The result is a vibrant, innovative marketplace that is highly competitive. The Commission's recent order regarding Pulver.com's Free World Dialup service is faithful to this model: Because Pulver does not provide the underlying telecommunications functionality or even make use of the PSTN, the Commission correctly concluded that there was no reason for federal or state authorities to regulate its IP voice service. As I'll discuss more in a few minutes, I am also encouraged that the Commission's NPRM on IP-enabled services will preserve the environment of minimal regulation that has allowed information services to flourish.

The common thread in these success stories is that the Commission trusted the market to deliver benefits to consumers. Wherever calls for heavy-handed regulation have been beaten back — in the wireless sector, in the broadband arena, and in the information services marketplace — consumers have enjoyed a high degree of innovation, good service quality, generally declining prices, and a choice of providers. Of course, I recognize that it is not always possible or desirable to eliminate regulation altogether. For example, the Communications Act establishes core social policy goals that are not market driven and require direct regulatory intervention. And some bottlenecks may exist that prevent markets from developing in the first place. But my philosophy has always been that where Congress gives the FCC discretion to rely on markets in lieu of regulation, and there is no reason to conclude that competition will not develop organically, we should be steadfast in our search for ways to minimize the

regulatory overhang. Otherwise, we risk the perils of over-regulation, which can be quite profound despite our best intentions.

Obviously, not everyone agrees that economic regulations should be avoided where robust competition exists. There is a little voice in the back of our heads that says, despite how competitive a market is, I'm sure I can make it better. So we have the example of the California Public Utilities Commission — it recently adopted a set of regulations to govern wireless services, and several others states are considering similar action. While such actions are well-intentioned, I cannot quite figure out what it is that they are trying to fix. In a market that has six nationwide wireless providers and many local and regional providers, the carriers have powerful economic incentives to provide the best possible service to their customers. They compete not only on price, but also on service quality. Especially following the FCC's introduction of wireless local number portability, customers have the ultimate response to inadequate service: they can switch to another provider.

And while I'm the first to admit that no service is perfect, even where competition is cut-throat, additional regulation can't change the laws of physics or eliminate zoning restrictions. It is simply a fact of life that signal strength will vary from place to place, and some calls will occasionally be dropped. Tempted as we may be to try and make things even better, it is unlikely that additional regulations will improve wireless service quality or the manner in which the carriers treat their customers. But it is likely to add costs and result in unintended consequences, and consumers will ultimately pick up the tab. Regulations concerning contractual terms, billing practices, service quality, and the like force carriers to develop new systems and safeguards and inevitably engender

litigation. Such costs divert capital away from investment in new cell towers and other more productive uses. In short, if ever we were to trust in markets and let go of the regulatory reins, the wireless arena is the place to do so. I sincerely hope that other states will think twice before following a similar path.

A related concern involves the efforts of several states to regulate voice over IP services. As with wireless services, there is no dominant provider of IP voice services, and the absence of a monopoly together with the very low entry barriers makes it hard to understand the justification for seeking to regulate these services. There is of course a legitimate governmental interest in ensuring that consumers have access to 911 services and that other core social policy goals are achieved, but some states seem interested in moving far beyond these issues. Especially given that the FCC has a rulemaking proceeding pending, a wiser course of action is to show restraint with respect to these nascent services. If providers are forced to deal with a patchwork of disparate state rules, many providers may be unable to survive, and costs to consumers will rise. That would be a terrible result, because IP services hold such great promise for consumers. I believe that the inherently interstate nature of IP services warrants a federal regulatory regime, and that regime should rely to the greatest extent possible on market forces rather than on prescriptive mandates.

There are similar examples of FCC decisions that were well-intentioned but nevertheless headed down the path of overregulation. A notable example that has been in the press quite a bit is the Commission's saga involving UNE-P. I think everyone would agree that crafting the appropriate regulatory regime in the wireline arena is more complex than with wireless or IP services, because Congress enacted an extensive

sharing regime to address incumbent LECs' historical monopoly status. But the fact that Congress mandated *some degree* of regulation should not have been considered a license to order what the Supreme Court called "blanket access" — that is, access to virtually *every* network element in *every* market across the country. When combined with a TELRIC pricing scheme that makes unrealistic efficiency assumptions, this approach resulted in a regulatory scheme that rewards unsustainable business plans. It was inevitable that the FCC's myopic attempts to promote a resale model of competition failed to encourage long-term, facilities-based competition. Indeed, the Commission has effectively *dis*couraged such competition by channeling capital toward UNE-P providers.

As most of you know, the Commission has adopted three orders mandating UNE-P since 1996, and each has been vacated. This remarkably poor record has produced debilitating uncertainty, and that uncertainty has been compounded as a result of the Commission's decision last year to delegate the FCC's authority to every state commission to conduct impairment proceedings. Apart from the sound principle that the FCC may not abdicate its statutory responsibilities, the central lesson of the repeated failures in the courts is that the Act does not permit the Commission to order blanket access to incumbents' networks when some lesser degree of sharing would enable competition to develop. Even if the FCC had a rationale for unbundling circuit switches — and thereby creating UNE-P — in 1996, by the time of the Triennial Review proceeding in 2003, it should have been obvious that competition can succeed without such a broad sharing mandate.

But now it is time to move on and spend less time and money on litigation. I'm very pleased that the Solicitor General decided not to seek Supreme Court review of the

D.C. Circuit's decision, and that the Commission in turn abandoned its appeal plans. Our job at this stage is to follow a more market-oriented path towards sustainable facilities-based competition.

A Blueprint for the Future

As we look back at these successes and failures, what lessons should we draw? It seems clear that when the Commission applied a light regulatory touch and found the courage to resist calls for increased management of the marketplace, competition has thrived, innovation has flourished, and consumers have been the beneficiaries. By contrast, overregulation in the wireline arena has drawn all providers — incumbents and competitors alike — into a downward economic spiral and litigation that has benefited only lawyers. And state forays into regulating wireless services and IP services threaten to diminish consumer welfare in those arenas.

Hopefully, we will move beyond the contentious UNE wars that have plagued the industry over the last several years, and we will develop a greater consensus on the appropriate regulatory approach for the digital age. Many people have called for a new regulatory model that does away with the old regulatory silos for wireline, wireless, cable, and satellite services. I couldn't agree more. The emergence of IP-based services promises to reduce the significance of historical monopolies and erode the boundaries separating these legacy service categories. I believe we are finally witnessing the convergence that many have anticipated for years. Cable operators are ramping up VOIP offerings over their broadband facilities, wireline carriers are deploying fiber optic networks capable of supporting high-speed data and video services, wireless and satellite

broadband options are multiplying, and other providers using other platforms are joining the mix.

In this environment, I believe it is essential for policymakers to let go of dated notions of dominant providers and public-utility regulations — since *everyone* is a new entrant in the converged broadband marketplace, the justifications for most forms of economic regulation are rapidly becoming obsolete.

I have spoken previously about what I call the Nascent Services Doctrine, which posits that we should apply a heavy presumption against extending legacy rules to new services and technologies such as Voice over IP. Rather, we should foster the development of such services in a minimally regulated environment to promote facilities-based competition and other important goals. Eventually, leveling the playing field is necessary, but we should strive to do so by relaxing the legacy rules applied to incumbent providers — in other words, the existence of multiple facilities-based providers should enable us to "regulate down" rather than "regulating up." Less is more.

When I developed the Nascent Services Doctrine, I also made clear that I was not advocating complete freedom from regulation. Indeed, there are certain core social policy goals that are not market-driven and probably cannot be achieved without governmental urging, and perhaps mandates. I have been very pleased to see in the developing record of the Commission's rulemaking on IP-enabled services that almost all parties support policies that would ensure access to 911 services, access for persons with disabilities, compliance with law enforcement surveillance requests, and the preservation of universal service.

And I think that NCTA has made a very helpful contribution to our rulemaking proceeding by suggesting that network owners and other providers of IP telephony services that are a substitute for POTS should bear these *responsibilities*, and should also should be granted certain basic *rights*. Such rights would include the ability to interconnect with other network owners on a peering basis and the right to obtain telephone numbers. This notion of adopting basic rights and responsibilities — but avoiding traditional economic regulations — is consistent with my call for the regulatory equivalent of strict scrutiny in this arena. What I mean by strict scrutiny is that we should adopt rules only where necessary to promote *compelling* governmental interests, and we should ensure that any rules we do adopt are *narrowly tailored* to the interests at stake. We have to ask ourselves repeatedly, what's broken that we are trying to fix?

I also find myself in agreement with those who have advocated a layered regulatory model. At the network layer, we should ensure that service providers comply with these basic social responsibilities and possess whatever basic rights are necessary for the market to operate efficiently. And at the application layer, we should generally avoid regulation altogether.

I am encouraged that the Commission's approach to IP services thus far has adhered to these concepts. Our NPRM, as I mentioned, recognizes the need for a minimally regulated environment, and it outlines the basic rights and responsibilities we are likely to recognize. And our declaratory ruling regarding the peer-to-peer service offered by Pulver.com appropriately concluded that such application providers — which neither provide telecommunications nor make use of the PSTN — should not be subject to regulation at the federal or state level.

While the Commission appears to be heading down the right path, there may well be limits to what we can achieve without legislative change. The NPRM on IP-enabled services correctly states that our regulatory framework should be guided by the functional nature of particular services, rather than the regulatory classification as a "telecommunications service" or "information service." But those labels carry a great deal of weight and also present significant limitations. For example, if the Commission classifies a service as an information service, there is substantial uncertainty regarding the extent to which we can use our Title I ancillary authority to establish the sorts of social policy obligations we all deem to be critical. Conversely, if the Commission classifies a service as a telecommunications service, that label carries a lot of baggage. The Act authorizes the Commission to forbear from unnecessary regulations, but it likely would be difficult and burdensome for the Commission to develop the appropriate record to make the requisite findings to support forbearance from vast swaths of Title II. Moreover, the most significant risk of all is that the courts of appeals may reject the Commission's attempts to apply the statutory service classifications, notwithstanding the deference we are supposed to receive. This is what happened in the *Brand X* case, because the court considered itself bound by a prior panel decision, and it is what we are hoping to avoid in the ongoing Vonage litigation in the Eighth Circuit. These court cases and the prospect of others introduce uncertainty that inevitably chills investment to some degree.

So I am encouraged that Congress has begun to hold hearings on possible amendments to the Communications Act. I don't know how Congress will proceed, but I believe that the layered approach and the nascent services concept I described provide an

excellent foundation for a revised statute and warrant further consideration. Specifically, if Congress were to define the core rights and responsibilities of network owners and others that provide the functional equivalent of POTS, it would likely be possible to do away with many legacy provisions. A more streamlined Act would, in my opinion, usher in an era of increased investment and innovation.

In addition, industry participants and regulators both would benefit if Congress were to address the role of the states in the converged broadband marketplace. I don't think there is any question that states should continue to apply generally applicable consumer protection requirements, such as laws prohibiting deceptive trade practices and certain telemarketing practices. But it has become a significant matter of debate whether states should be permitted to impose economic regulations on IP-enabled services — or indeed *any* rules that differ from the federal regime established by the FCC. As I discussed earlier, companies seeking to offer broadband services such as VOIP will be hard-pressed to pursue nationwide or regional deployment strategies if they are confronted with a patchwork of burdensome and inconsistent state laws. I believe that IP-enabled services are inherently interstate — indeed, some are global in their reach. It follows that the regulatory framework should be determined at the federal level.

And finally, while policymakers need to rethink the *substantive* responsibilities undertaken by the regulator, the FCC in the future also will need to rethink its *functions* by reorienting itself from a rulemaking body to one focused on enforcement and consumer education. The movement away from economic regulation undoubtedly will translate into a substantial reduction in rulemaking activity. But with fewer prescriptive rules, there is a heightened need for stringent enforcement of the core mandates. This

will produce a better, leaner model as the FCC focuses on the policies that are the most important and ensures strict compliance with them. In addition, I have spoken previously about the need for the FCC to continue to improve its consumer outreach and education efforts. Competition delivers tremendous benefits, but it also can confuse consumers as they are faced with unprecedented choices. The FCC plays a vital role in informing consumers of their rights and opportunities so that they can better navigate the competitive marketplace. To borrow from a discount clothing chain, an educated consumer is our best customer.

In closing, I am truly excited by the limitless promise of broadband communications networks and the IP services they support. When we look back at what has succeeded in promoting investment and innovation, it is clear that regulatory restraint is an essential ingredient. It is no accident that our most problematic and sluggish sector is also our most heavily regulated. I hope that the FCC, our colleagues in the states, and Congress all heed these lessons and work together to create an appropriate model for the future of communications. Thank you for allowing me to share my thoughts with you today.