From VOIP to EOIP: Implications for Policymakers

Remarks of Commissioner Kathleen Q. Abernathy
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Thank you very much for inviting me to participate today. I have been able to attend all three National Summits on Broadband Deployment, and I want to commend NARUC and NECA — and in particular Bob Rowe, my colleague on the Joint Board on Universal Service — for putting together these great events.

Since the first summit in 2002, we have witnessed dramatic growth in the broadband communications sector, both in terms of network deployment and the development of IP-enabled services. I have spoken often about the Commission's multifaceted efforts to spur broadband infrastructure investment — including our allocation of licensed and unlicensed spectrum for broadband wireless services, our recent proceeding on broadband over powerline, and our series of deregulatory steps to promote next-generation fiber networks, among other things. These are a critical part of any discussion of IP-enabled services, because we need robust broadband networks to support innovative new applications. But today I want to focus on the IP-enabled services that *ride over* broadband networks.

The most talked-about IP-based service is undoubtedly Voice over IP. But it's important to recognize that VOIP is just one of many applications that consumers will enjoy over broadband networks. As we all know, packet-switched networks transmit data and video content, as well — a fact that gives rise to the latest hot acronym: EOIP, which stands for *Everything* over IP.

Fortunately, the FCC was mindful of this reality when we launched the rulemaking on IP-Enabled Services earlier this year. Notably, we did not call this proceeding the VOIP rulemaking. Instead, we focused on IP-enabled services generally, recognizing that many of the same arguments favoring regulation or an absence of regulation will apply irrespective of whether a packet transmits voice, data, or video.

To be sure, we have paid special attention to voice applications, because the legacy of extensive regulation of POTS, or plain old telephone service, raises a number of complex questions about how to approach IP telephony. On the one hand, many rural LECs, some state regulators, and others have expressed the view that any substitute for POTS should be subject to some or all of the legacy common carrier regulations, such the access charge regime. In their view, since VOIP walks and quacks like a duck, it must be a duck. On the other hand, from the standpoint of many in the IP community, there is no principled reason to treat voice packets differently from other kinds of packets, and carrying forward legacy rules would be needlessly burdensome, economically inefficient, and a barrier to investment and innovation. In a few moments, I'll share some of my thoughts on these issues, but for now I want to emphasize that, as important as these questions are, we should avoid falling into the trap of thinking that the IP debate is simply about extending or not extending common carrier telephone regulations to VOIP. Rather, we need to recognize that the IP revolution will have consequences for ***all*** legacy regulatory structures, not just the utility regulations that apply to telephone services.

Take IP television, for example. This is an exciting new application that has the potential to reshape the market for multichannel video programming services. As local exchange carriers, software companies, and others begin to introduce IPTV services,

regulators at the local and federal levels will be forced to grapple with many of the same kinds of questions that arise in the VOIP debates. For example: Will IPTV be regulated as an information service, a cable service, or both? Should IPTV services be subject to any or all of the regulations that govern cable operators, including build-out requirements, franchise fee obligations, public access channels, must carry, and so forth? Would exempting new entrants from such legacy requirements be a good way to promote innovation and competition? Or would it create an uneven playing field that is unfair to incumbent video distributors? Will existing program access requirements ensure that IPTV providers have nondiscriminatory access to programming controlled by vertically integrated MVPDs? These are just a few of the questions that are likely to arise in coming years.

So one of the primary benefits of focusing on **E**OIP, rather than **V**OIP, is that it forces us to look more broadly at the IP migration that is underway, and think comprehensively about how policymakers should approach the transformation. There will be calls from entrenched interests in various industry segments to carry forward most, if not all, legacy rules to ensure a level playing field. And new entrants generally will argue that they should be exempt from such regulations, to avoid choking off investment and innovation.

My own view is more sympathetic to the latter position — that we should give new platforms room to breathe instead of saddling them with legacy regulatory requirements. This is something I have called the Nascent Services Doctrine. My thesis is that reflexively extending legacy rules can do great harm, and is usually unnecessary, because the conditions that justified adoption of such rules seldom apply to new entrants.

Most importantly, where the justification for legacy rules was an incumbent provider's market power, it is counterproductive to apply such rules to entities that *lack* market power. Regulatory parity is an important long-term goal, but it should be achieved by lifting legacy restrictions on incumbents once new platforms have emerged, rather than extending those rules to the new platform. This approach is most faithful to Congress's call for a pro-competitive, deregulatory framework, and it also accords with my experience that fully functioning markets invariably do a better job of maximizing consumer welfare than regulators can hope to achieve.

My belief in the Nascent Services Doctrine is one of the reasons why I have been a strong proponent of regulating IP-enabled services primarily at the federal level. Some state regulators have argued that we should use the states as laboratories to test a variety of different regulatory approaches. The argument seems to be that states can experiment with either heavy handed regulations or a light touch, and the nation will eventually decide what works best. While state experimentation is a time-honored conservative principle that makes sense in many contexts, I believe it would be disastrous if applied to IP-enabled services.

IP-enabled services are inherently interstate because of the architectural configuration of the Internet. The routing of packets over the Internet without regard for state or even national boundaries, together with the ability of subscribers to log onto the Internet on a nomadic basis from locations throughout the country or even abroad, makes it impossible to separate most IP communications into interstate and intrastate components. Accordingly, efforts by a single state to craft an individualized regulatory regime would not only apply in that state, but would necessarily apply to *all* IP

communications. State regulatory authority must yield in such circumstances. It is troubling enough to give one state the ability the set default rules for all interstate IP communications, but the prospect of multiple sets of inconsistent rules further compounds the problem. How can new entrants introduce services nationally when they have to navigate a maze of different and potentially inconsistent state regulatory requirements, ranging from entry regulations, tariffing requirements, network reliability rules, and so forth?

These considerations and others persuade me that the regulatory framework for IP-enabled services must be established at the federal level. As many have pointed out — including a growing number of state regulators — subjecting service providers to a patchwork of inconsistent and burdensome state requirements is a recipe not for enlightened experimentation, but instead for curtailing investment, chilling innovation, retarding economic development, and undermining consumer benefits. IP applications hold enormous promise: They can improve our economic productivity, our delivery of health care, our educational system, and our modes of entertainment. We need to ensure that our federal policy *promotes* such benefits by avoiding unnecessary regulatory barriers.

I have spoken at length — as have many others — about the specific issues that should be addressed by the federal regulatory regime for IP-enabled services. I won't repeat those comments here, except to say that the FCC should focus on ensuring the fulfillment of certain core social policy goals, including access to E911 services, compliance with lawful surveillance requests, access for persons with disabilities, and the preservation of universal service. To the extent that regulation, rather than voluntary

practices, proves necessary to achieve these goals, Congress or the FCC should establish the requirements and should ensure that they are narrowly tailored to the governmental interests at stake.

I have also made clear that preempting certain state regulations — such as public utility regulations — does not mean that *all* state regulation is inappropriate. Quite the contrary, states have a critical role to play in protecting consumers from fraud and deceptive practices, and I expect states to work cooperatively with the FCC in developing and implementing rules to ensure the fulfillment of the social policy goals I have described above. For example, as Chair of the Federal-State Joint Board on Universal Service, I have enjoyed an extremely productive relationship with my state colleagues, and their views have been invaluable even where it is the FCC, rather than state public utility commissions, that ultimately must establish the regulatory framework. So establishing federal jurisdiction and preempting certain state regulations is not inconsistent with the notion of a federal-state partnership. It simply recognizes that, for the benefit of consumers and service providers, a uniform set of rules is essential in light of the inherently interstate nature of most IP communications.

So thank you for allowing me to share my views on this important subject. I look forward to hearing from our distinguished panelists, and I look forward to working with all of you as the FCC continues to grapple with the implications of the migration to EOIP.