Hot Issues from D.C.

FCBA Denver Chapter Luncheon
Remarks by FCC Commissioner Kathleen Q. Abernathy
Denver, Colorado
October 21, 2004

Thank you for inviting me to speak to you today. It is always a pleasure for me to have an opportunity to speak to the FCBA Chapter members around the country. As a former FCBA President and an active member of the FCBA, I realize how important our Chapters are in terms of bringing diversity of members and breadth of experience to the bar.

What I thought I would do today is talk a little about some of the hot issues we are looking at in D.C. and a few of those we have acted on recently. If you look back over 2004 we have been quite busy. Just to name a few of our accomplishments: we initiated a proceeding on VOIP, we issued a report and order solving the 800 MHz public safety interference issue, we allocated additional unlicensed spectrum for wi-fi type uses, we allocated additional licensed spectrum for advanced wireless services, we adopted some orders on indecency that raised some eyebrows, we created new technical rules for MMDS and ITFS licensees and reformulated the MMDS service into the Broadband Radio Service, and we adopted technical rules for broadband over powerline communications. And this is just the tip of the iceberg…

So I thought I would focus today on an area that is of particular interest to me and that is reforming our spectrum regime. Our goal has been to create more efficient use of this resource in order to stimulate the deployment of new services, such as broadband. More specifically, this past year we initiated two proceedings to allocate additional spectrum for unlicensed uses, such as wi-fi. The first of these proceedings addresses spectrum in the 3650-3700 MHz band and the other proceeding focuses on the allocation of spectrum in the white spaces of the broadcast bands. As you are probably aware, our past decisions to allocate the 2.4 GHz and the 5.8 GHz band for use by unlicensed devices has enabled an explosion of wi-fi hotspots in homes, offices, coffee shops and many other settings. By allocating additional spectrum through these two proceedings, we hope to continue to stimulate unlicensed broadband applications.

We are also examining how better to utilize the spectrum resource while protecting existing licensees from harmful interference. I am hopeful that we will be able to solve any interference issues into incumbent licensees in these bands and move forward quickly. With regard to our white space proposal it seems to me that this is an approach most appropriate for rural parts of the country where interference concerns are less of an issue and the need for low cost broadband alternatives is high.

In a further effort to increase broadband competition, just last week the Commission adopted technical rules to allow the deployment of a service known as broadband over powerline technology or what I call "BPL". Broadband over powerline

technology is an innovative and revolutionary technology that holds vast potential to advance the deployment of broadband service to all Americans, wherever they live. Our approach to this service is to craft a minimal regulatory framework for BPL, thus advancing Congress's goal of creating a pro-competitive, deregulatory framework, and the Commission's goal of deploying broadband to every American. Because BPL is a nacesent technology and the broadband market has no dominant incumbent service provider, only minimal regulations are appropriate at this time. However, this does not mean that the FCC is not cognizant of the need to protect existing licensed services from interference. To address this issue, we have worked closely with NTIA, to craft new requirements that will minimize the potential for harmful interference to existing governmental uses, amateur radio operators and other licensees and, to the extent harmful interference may occur, to quickly resolve any issues.

BPL holds great promise as a low cost broadband competitor. The pervasiveness of the utility grid means that almost every home in America can be accessed by this type of service. Moreover, the presence of third universal broadband connection will mean a robust choice for consumers and strong, healthy competition. Additionally, unlike some other technologies, there is no need for consumers to purchase supplemental broadband connectors in order to receive a broadband connection. The consumer simply plugs a device of choice into an electrical outlet to receive a broadband connection from the BPL service provider.

We have also made progress in allocating additional spectrum for advanced services using licensed spectrum. Just last month we issued an order that allocated an additional 20 MHz of spectrum to the 90 MHz we have already allocated for advanced wireless services. As part of that proceeding, we have released a notice of proposed rulemaking seeking comment on new licensing and service rules. In addition, the Commission has announced that it is planning its Auction 58, which will allow the Commission to auction off the spectrum returned to it as a result of the Nextwave settlement. Once again, our goal is to free up more spectrum for new and innovative uses. Ultimately consumers benefit through the deployment of new services, such as advanced wireless services, and increased capacity for current providers.

In an on-going effort to move away from a command and control approach toward spectrum we adopted a new flexible regulatory framework for MMDS and ITFS services, including enabling these licensees to deploy broadband wireless services. As you may be aware, over the years, the ITFS and MMDS bands have been hindered by outdated and overly restrictive regulation. Under our new plan, ITFS and MMDS licensees have contiguous spectrum available which enables the deployment of both existing and emerging technologies. We also allow both high and low-power operations in the band, thereby preserving the opportunity for incumbents to maintain existing operations.

Another critical issue that we addressed this past year as part of our spectrum reform efforts involved the 800 MHz band. For three years we have struggled to identify the best way to resolve public safety interference problems in the 800 MHz band –

interference problems that arose despite the fact that all licensed users of the band operated in compliance with our rules. After reviewing the voluminous record it became clear to me that: 1) the adoption of enhanced best practices for mitigating interference would be inadequate to protect critical public safety communications; and 2) any rebanding solution would be costly, complex and controversial. I ultimately embraced the decision we took because it puts public safety's interests first. While I recognize that the rebanding plan is costly, complex and, in some respects, controversial, it is the only solution that adequately addresses the needs of public safety while realigning other uses of the 800 MHz band.

When we initiated this proceeding, I stated that there were four key considerations which would likely guide my analysis. First, the plan had to aggressively attack the public safety interference issues. Second, our approach should strive to minimize costs. Third, if possible, we should attempt to minimize the disruption to other bands. And fourth, if we were to consolidate public safety into a contiguous band and there is a demonstrated need in the record, we should identify additional interoperability channels for public safety. I believe that the solution we adopted addresses each of these considerations.

As an initial step we adopted mandatory best practices that will diminish, but not wholly eliminate, the potential for harmful interference to public safety. Over the longer term, we are implementing a rebanding plan that completely eliminates harmful interference and provides additional spectrum for public safety. Rebanding will be paid for by Nextel, thus ensuring that public safety does not incur any new costs, and the processes we have adopted should minimize service disruptions.

Because of both the importance of achieving a workable solution for public safety and the American public, and the complex technical issues, this has not been an easy proceeding to resolve. I believe, however, that the plan we adopted is the best mechanism available to the Commission to solve the public safety interference problem in the 800 MHz band. I have always considered the 800 MHz proceeding to be a top priority for resolution by the Commission and I am very happy that we were finally able to reach a unanimous decision on how to proceed. I am also looking forward to quickly resolving some of the issues that have been brought to our attention since the release of the 800 MHz Order.

Now to the media side of our work. A major area that the Commission continues to focus on is the digital television transition. We have made great strides in furthering the transition. This past summer the first phase of our DTV tuner mandate went into effect. This requirement ensures that television sets have the ability to receive over-the-air digital television signals, much as they can receive over-the-air analog television signals today. The phase-out of analog only television sets from the market gives consumers access to digital broadcast signals during the transition and protects consumers from disruption of service at the end of the transition. Thus, adopting a tuner requirement limits the number of new sets being purchased today that will become obsolete at the end of the transition.

Cable "plug and play" sets are also being introduced into the market. Our new rules ensure that consumers will have access to digital cable services through a digital television set without the need for a set-top box. This allows consumers who purchase a digital television set to experience the same easy access to HDTV and other digital services that they currently have for their analog programming.

We also recently adopted a requirement that television receivers must recognize the "broadcast flag." This is a technical means for content providers to prevent mass indiscriminate redistribution of content over the Internet. Mindful of our ongoing obligation to speed the digital transition and to promote the viability of free over-the-air broadcasting in the digital age, we navigated a solution that embraces protection and deters piracy without sacrificing innovation or frustrating consumer expectations. By protecting against digital piracy, we encourage entertainment companies to deliver via free over-the-air broadcast its most valuable programs. In the meantime, consumers will continue to receive broadcast programs over their existing television receivers and record such programs as they do today.

Despite these accomplishments, there is still work ahead of us. The Commission must resolve outstanding issues on precisely what part of a broadcaster's signal a cable operator "must carry," and further define how a broadcaster's public interest obligations should be enforced in the digital age. In addition there has been no determination of when broadcasters must return their analog channels and thereby free up spectrum for public safety and wireless uses. The statute provides a timeline for the end of the transition – the later of December 31, 2006 or when 85% of homes in a market can receive a digital signal. We have sought comment on precisely what type of reception would qualify toward that 85%. For instance, if a digital signal is down converted to analog by the cable operator to be displayed on a analog set in a consumer's home, should that qualify? Or did Congress envision that such down conversion would have to occur at enough consumers have purchased digital TV sets? In defining the "end" of the digital transition, the Commission faces a choice of whether we are guided by reclamation of spectrum for wireless and public safety uses, allowing the benefits of digital television to occur over time, or whether the broadcasters should continue to broadcast in analog channels until 85% of consumers have already embraced this new technology. And it's 'not just FCC looking at this issue. Congress is also in the midst of the debate.

Finally, I would just note that government, the industry and public interest groups all need to work together to create more consumer awareness of the digital transition and how it will affect the public. I have released consumer newsletters on these issues and the Chairman recently kicked off a digital television educational campaign. My goal is not to promote the purchase of new television sets, but to ensure that when consumers do make the investment, they have enough information to know what questions to ask and how to make smart choices.

On the wireline side, the Commission has been spending a lot of time in recent months looking into IP-enabled services, such as VOIP. This past February, the FCC adopted a broad NPRM that seeks comment on categories of IP-enabled services and the

jurisdictional status, statutory classification, and regulatory framework for each. This item covers VOIP provided over all technologies and both domestic and international services. So, it is extremely far-reaching.

One of the points I have tried to stress in this area is that, before we get too fixated on VOIP services, we need to remember that broadband networks must first be deployed. Because VOIP is simply a broadband application, deploying broadband networks is a prerequisite to a more widespread migration from traditional circuit-switched telephony. This reality underscores the need to continue our efforts to remove impediments to investment in wireline broadband networks – something that began with the Triennial Review proceeding and that is still ongoing. Just last week we released a decision on how we would treat Fiber to the Curb. We also need to encourage the growth of other platforms to supplement cable and DSL offerings, and that is why we are working so diligently on proceedings that allocate additional spectrum for broadband so that services such as BPL, wi-fi and advanced wireless services can be deployed. In short, the promise of VOIP is one more reason why furthering the deployment of broadband networks is one of the Commission's top policy goals.

When it comes to the regulation – or non-regulation – of VOIP services, it is too early to predict exactly how the FCC will approach the various categories of services. But I have certain overarching principles that will guide me in this proceeding.

First, I believe that the regulatory framework for IP-based service must be predominantly federal. A federal scheme will facilitate nationwide deployment strategies and avoid the burdens associated with inconsistent t state rules. Moreover, most forms of IP communications appear to transcend jurisdictional boundaries, rendering obsolete the traditional separation of services into interstate and intrastate buckets. I hope that the Commission will soon address the jurisdictional nature of IP-enabled services. While we ultimately need to develop a comprehensive regulatory framework, a good first step would be clarifying the interstate nature of the service and considering whether preemption of some state regulation is necessary.

Second, I am deeply skeptical about the application of economic regulation to these nascent services. Public utility regulations have traditionally been imposed on local exchange carriers to restrain their market power. Services such as VOIP, by contrast, appear to have low barriers to entry and it does not appear that any provider occupies a dominant market position. Rather than reflexively extending our legacy regulations to VOP providers, we need to take this opportunity to step back and ascertain whether those rules still make sense for any providers, including incumbents.

Third, notwithstanding my interest in maintaining a light touch, I am committed to ensuring that our regulatory approach meets certain critical social policy objectives. As most policymakers a the federal and state level have recognized, we will need to find solutions to guarantee access to 911 services, maintain the ability of law enforcement agencies to conduct surveillance, preserve universal service, and ensure access by persons with disabilities. Some of these goals may well be achieved without heavy-

handed regulation, but I am willing to support targeted governmental mandates when necessary.

These are just some of the "hotter" issues we are addressing at the Commission. As you imagine, it's been quite a busy year and I am sure this trend will continue. I appreciate your attention and if time allows, I would be happy to answer any questions you might have.