

*The Telecommunications Act of 1996: A Case of Regulatory Obsolescence?*

**Keynote Address of Commissioner Kathleen Q. Abernathy**

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Thank you very much for the nice introduction. I am always happy to return to my alma mater, and I am particularly honored to be the keynote speaker today at this terrific event. I know our audience will be treated to an extremely informative program.

I was fortunate to be able to participate in last year's symposium, at which my remarks focused on the convergence of formerly distinct regulatory silos and the resultant challenges facing the FCC. This theme remains just as critical today, as the FCC continues to grapple with a host of issues that fall under the convergence rubric. And it ties in well with this symposium's focus on legislative reform. To my mind, the regulatory debates being waged at the FCC and the ongoing legislative reform efforts center on the same fundamental question, namely: In a world where multiple competitors offer bundles of IP-enabled services over broadband platforms — including voice, video, and data services — what is the appropriate regulatory framework? Should we continue to apply traditional common carrier principles at the federal and state level to wireline telecom carriers and perhaps *extend* such requirements to other network owners, such as cable operators, wireless broadband providers, and BPL system operators? Or should policymakers phase out these traditional forms of regulation and adopt instead a far more streamlined regulatory framework that concentrates on core social policy obligations? I have consistently argued that the latter approach is more rational, better for the industry,

and, most importantly, better for consumers. And I have tried to ensure that the FCC is moving in this direction in its proceedings on broadband networks, IP-enabled services, broadband Internet access services, and related matters. So as the legislative reform effort heats up, I hope that Congress will adhere to a similar policy blueprint when it considers new legislation.

Before describing that blueprint in more detail, I thought it would be helpful if I reviewed some of the key FCC proceedings that have taken place in recent years, and then try to extract some lessons that can be applied in the legislative context. For the FCC's successes and failures tell us a lot about what regulators can achieve and what is better left to the marketplace.

### **Successes and Failures in the Regulatory Arena**

Let me begin with some regulatory success stories that we should try to emulate. The shining beacon for me always has been the FCC's treatment of commercial wireless services and, more recently, wireless broadband services. I have often spoken about the wisdom of the Commission's lightly regulated model for wireless services. In the early 1990s, when PCS services were introduced, the FCC was at a critical juncture. Some argued that the entrenchment of cellular incumbents called for a heavy-handed regulatory approach characterized by controls on pricing and service quality. Instead, the FCC adopted a narrower approach focused on the prevention of interference, and it generally let go of the regulatory reins. Congress provided critical assistance by enacting section 332 of the Communications Act, which preempted state regulation of rate and entry regulation, thereby paving the way for nationwide service plans. These policy choices unquestionably put us on the right path. 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 Congress's preemption of traditional state utility regulations and the FCC's decision 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. Last June, we provided increased flexibility in the MMDS and ITFS bands to create the possibility of innovative new uses, including commercial broadband services. Moreover, in cooperation with NTIA, the Commission allocated new 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 additional unlicensed spectrum at 5.8 Gigahertz for Wi-Fi. Thus far, Wi-Fi systems tend to 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.

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 clearly set us on the right course by fencing off information services from regulation. The result is a vibrant, innovative marketplace that is highly competitive. The Commission's order last year regarding Pulver.com's peer-to-peer Voice-over-IP 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 VOIP service. I am also encouraged that the Commission's NPRM on IP-enabled services signaled an intention to preserve the environment of minimal regulation that has allowed information services to flourish.

A third model of successful regulation involves the Commission's decision to refrain from subjecting broadband network facilities to the sharing obligations known as "unbundling" requirements. In the *Triennial Review Order* and a series of follow-on decisions, 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.

Based on discussions with carriers and equipment manufacturers, it appears that the Commission's deregulatory action is already bearing fruit. Verizon and SBC announced plans to invest billions of dollars in new fiber-to-the-home and other deep-fiber architectures that will support very-high-speed Internet access services as well as competitive video programming services. Smaller carriers also have stepped up plans to

deploy fiber deeper into the network. This increased investment has brought new life to the equipment vendors and should spark a revitalization of research and development activity. 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.

The common thread in these success stories is that, where there was competition, 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 information services marketplace, and in the broadband arena — 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, as I'll discuss in more detail in a few minutes, the Communications Act establishes core social policy goals that are not market driven and require direct regulatory intervention. And some bottlenecks may exist in some instances that prevent markets from developing in the first place. But my philosophy has always been that where the structural impediments to competition have been removed 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 minimized where 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. One cautionary example is the effort in many states to regulate wireless services. While such actions are well-intentioned, I cannot quite figure out what it is that they are trying to fix, and why they think regulators will be able to drive better service quality and prices. There are several wireless providers in most markets throughout the country, and these 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 states will pay heed to this principle.

Until the FCC took action in the *Vonage Order* last year, a related concern arose from the efforts of several states to impose traditional utility regulations on 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 seemed 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.

### **A Blueprint for the Future**

As we look back at past successes and failures, what lessons should we draw — both for the FCC’s continuing regulatory proceedings, and for the legislative reform process? It seems clear that when the Commission applied a light regulatory touch and found the courage to resist calls to micromanage 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 battles 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 competition is a given in the converged broadband marketplace, the justifications for many 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.”

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 it is important to recognize that network owners and other providers of IP telephony services that are a substitute for traditional voice services should not only 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. Again, we have to ask ourselves repeatedly, what’s broken that we are trying to fix?

These principles, besides being relevant to FCC rulemakings, also would provide a sound basis for a rewrite of the Telecom Act. The FCC must proceed as if legislation is *not* forthcoming, because it may take years before a consensus emerges. But there may well be limits to what we can achieve without legislative change. The NPRM on IP-enabled services appropriately 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 statutory 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. That case and the prospect of others introduce uncertainty that inevitably chills investment to some degree.

So it is plain to me that the industry would benefit greatly from updated legislation. And I believe that such legislation should harmonize the disparate treatment

of network owners that traditionally fell within different silos — as illustrated by the significant differences between the treatment of cable modem services and DSL services. If Congress were to define the core rights and responsibilities of network owners in a more neutral fashion, it would likely be possible to do away with most legacy utility regulations at the federal level. Specifying a need to comply with social obligations such as E911, law enforcement access, access for persons with disabilities, and universal service will be sufficient for most technological platforms. Wireline networks likely will require some additional regulatory scrutiny, given the thicket of common carrier regulations and the dangers associated with a flash cut away from wholesale regulations, such as unbundling obligations and the oversight over interstate access services. But even in the wireline arena, I believe significant streamlining is appropriate, and a more streamlined regulatory environment 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. I also believe that states have an important role to play in conferring with federal authorities regarding the development of federal regulatory requirements, as we do through Federal-State Joint Boards, Joint Conferences, NARUC meetings, and in other fora. But it has become a significant matter of debate whether states should be permitted to impose economic regulations where the intrastate component of a service cannot practically be severed from its interstate or global

components. This concern formed the basis for Congress's preemption of state entry and rate regulation of wireless services, and it also motivated the FCC's preemption of state utility regulations in the *Vonage Order*. But the *Vonage Order* is subject to appeal, and in any case it did not purport to be the final word on the role of state public utility commissions in the newly converged marketplace. So many of the debates pending at the FCC center on jurisdictional matters — these include the fate of state do-not-call lists, the FCC's ability to adopt comprehensive intercarrier compensation reform, and many other issues. So I hope that, as Congress considers reform proposals, it gives serious thought to clarifying the role for state regulators in the age of convergence. Congress is best positioned to address this issue in a broad and authoritative manner.

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.