

Thoughts on the Proper Role of Federal Regulation in the Age of Digital Convergence

Remarks of FCC Commissioner Kathleen Q. Abernathy

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Good afternoon. It's a pleasure to be able to be with you today to discuss a topic that's likely to monopolize a lot of time and effort over the next several years: rewriting the Communications Act.

The working paper released by the Progress and Freedom Foundation's Regulatory Framework Working Group is a thoughtful reassessment of the proper role of federal regulation in the age of digital convergence. It contains a number of principles which I have found in my experience, both in and out of government, to be sound, true, and -- in most cases -- long overdue.

The Report essentially deconstructs the regulatory approach of the current 1934 and 1996 legislation and reframes it in light of the technical and marketplace realities of today's digitally-converging telecommunications industry. It takes a sweeping, *de novo* look at how many of the regulatory principles and structures developed in the depths of the Great Depression may no longer further the interests of consumers in the Digital Age.

When it comes to new technologies and new competitors, the FCC has seen the benefits of minimal regulation. Where we have been able to abandon the notion of dominant providers, apply a light regulatory touch, and resist calls to micromanage the marketplace, consumers have benefited.

The shining beacon for me has always 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. Instead of imposing a heavy-handed regulatory regime on incumbent cellular providers to "create" a competitive market for new PCS providers, the FCC opted for a narrower approach focused on interference prevention, and otherwise 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, thereby paving the way for national service plans.

These policy choices put us on the right path. There is no doubt in my mind that we would not have seen the robust price competition, widespread use, and high degree of innovation we enjoy today if not for Congress' preemption of traditional state utility regulation and the FCC's decision to refrain from imposing heavy-handed common carrier regulation on wireless services.

Another model of successful de-regulation involves the Commission's decision to refrain from subjecting broadband network facilities to the sharing obligations known as "unbundling" requirements. As a consequence of this decision, 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 have also stepped up plans to deploy fiber deeper into the network. I am confident that eliminating the specter of burdensome unbundling obligations will continue to have a very positive effect on lagging DSL deployment, which in turn will speed the adoption of faster and more exciting consumer applications.

From commercial wireless service to broadband deployment, competition has thrived, innovation has flourished, and consumers have been the beneficiaries. By contrast, historic 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 lobbyists.

The Working Group's Report adds an important new voice to the call for a statutory model that would treat like services the same, and abolish the existing regulatory silos for wireline, wireless, cable, and satellite services. And if past experience and side-by-side comparisons of the disparate effects of uneven regulation were not enough to convince policymakers of the need to do this, the emergence of IP-based services would. When voice, video and data can flow indistinguishably over wired and wireless broadband platforms, there are truly no longer any separate "lines of business," and legacy service categories are irrelevant.

The elimination of historic line-of-business monopolies is also the best possible argument for deregulation. For where structural impediments to competition are removed -- in this case, by digital technology -- it is counterintuitive to conclude that competition will not develop organically. As the Working Group's Report says, we should be steadfast in our search for ways to minimize extrinsic regulation.

This is consistent with views that I have long held and often spoken about. In fact, with apologies to constitutional law experts, I have recommended that in this environment, Congress and the FCC should apply a "strict scrutiny" test to any proposed regulation: that is, regulate only where necessary to promote a compelling government interest, and then narrowly tailor any rules needed to achieve that interest.

However, when it comes to precisely which issues would constitute the kind of "compelling government interests" that the competitive market cannot achieve absent regulation, responses vary dramatically across personal and political lines. For me, and I suspect for many others, the list would be technology-neutral and limited largely to E911, access by law enforcement officials and individuals with disabilities, and universal service obligations. And I am willing to entertain the possibility that even in this kind of deregulatory environment, wireline technologies might need a greater degree of

regulation in achieving these goals given the realities of embedded technology and regulation and the extent to which consumers continue to rely on them for certain “backbone” services.

I have hoped that such a commonsense approach will move us beyond the contentious battles that have plagued the industry over the last several years, and produce greater consensus on an appropriate regulatory approach for the Digital Age. But it has become clear that, even if we safeguard core social policy goals, many individuals used to old-line economic regulation still have a difficult time accepting such a distinctly deregulatory environment. This may be because the new model essentially requires that consumers accept a certain degree of messiness (to use a term of art) while competitive markets sort out things that directly impact them, like contractual terms, billing practices, service quality, and the like. Some policymakers prefer to cushion this perceived consumer confusion and pain by regulating prices, entry and exit, and business practices, even where competition exists.

This is well-intentioned but short-sighted, for several reasons. First and foremost, competition, as many people say, is a process, not a product. You don’t mix together rate regulation, structural rules and behavioral rules in the right proportions and produce a product called “competition.” Only companies responding to the initiatives of other companies in the market produce the ever-changing condition we call “competition.”

Another reason regulating competitive markets is unproductive is that there’s no such thing as a free lunch. Any incremental amount consumers might save thanks to economic regulation is more than counterbalanced by ensuing regulatory costs, as well as the cost of foregone investment and innovation -- all of which are, of course, ultimately paid for by consumers.

Most economic regulation comes from the rulemaking process and the notion that we, as regulators, can always make things just a little better, no matter how competitive the market may already be. So the Working Group’s recommendation that the FCC function largely through adjudication rather than rulemaking is especially provocative.

Now clearly, competition delivers tremendous benefits, but it can also confuse consumers as they face unprecedented choices among technologies that may, or may not, provide the same functionalities to which they have become accustomed. I have spoken previously about the need for the FCC to improve its consumer outreach and education efforts. The FCC plays a vital role in informing consumers of their rights and opportunities so that they can better navigate the competitive marketplace.

Another function of the FCC that needs to be reemphasized as economic regulation declines is our enforcement responsibility. With fewer prescriptive rules, there is a heightened need for stringent enforcement of the core mandates that remain. This will produce a leaner, better FCC as we focus on the policies that are most important and ensures strict compliance with them.

Besides focusing on the core social policy responsibilities of network owners and other service providers, in rewriting the Act we should also focus on their basic rights. Such rights should 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 -- while avoiding traditional economic regulation -- is consistent with my call for the regulatory equivalent of strict scrutiny in this arena. For this reason, I am pleased to see the Working Group's recommendations include a federally-enforced right of interconnection. This most basic component of Digital Age competition must be assured if the central pro-competitive premise of the recommendations is to be achieved.

And of course, there are many other topics that we could discuss, but they fall within the parameters of the other Working Groups, and that makes them ripe for discussions on another day. For today, I congratulate the Progress and Freedom Foundation and its Regulatory Framework Working Group for producing a paper that surely challenges all those interested in rewriting the Act to think outside the statutory box. We must walk away from the comfort zone of our traditional regulatory framework, endorse ground-breaking efforts like the Progress and Freedom Foundation's and engage with Congress to ensure a rewrite that recognizes the liberating impact of new technology. Thank you.