

**The Jurisprudence of Innovation**  
**Prepared Remarks of Jon Sallet,\* General Counsel, FCC**  
**Delivered June 23, 2014**  
**FCBA Year in Review CLE**  
**Washington, DC**

**I. Introduction**

*[In enacting the Communications Act] Congress was acting in a field of regulation which was both new and dynamic[,] ... a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding.* – Felix Frankfurter, J. in *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 219-220 (1943).

My goal in talking with you today is to share some thoughts and to work through some ideas on how the FCC should think about our own legal processes in a time of dynamic innovation. This talk is called “The Jurisprudence of Innovation.” What does that mean? I am going to discuss four principles: certainty, flexibility, access (or accessibility), and learning. Each of these has been discussed in particularized contexts or on their own. But I am interested in trying to identify the way in which these same four issues come up in context after context so we can see how they can be applied to the complicated law and policy issues facing the Commission. More to the point, I am interested in thinking about how these principles *should* be applied and what the best way to seek outcomes is – and I welcome input from the bar on these questions.

The starting point of anything called “The Jurisprudence of Innovation” has to be innovation. As we know and experience daily, we are living through a period of rapid and dynamic innovation – in technology, in business models, in consumer expectations. Our task as regulators is to reconcile cross-cutting and sometimes opposing desires. Stakeholders, including markets, industry, consumers, and our friends in the legislative branch – whatever their political leanings – tell us they want regulatory certainty. (They may mean very different things when they say this, by the way.) And yet detailed prescriptive rules that provide no allowance for individual circumstances are thought to be overly rigid. Certainty, that is, does not necessarily align with dynamism of innovation.

Certainty v. flexibility. This is the classic administrative law dichotomy, and it is critical to the way that the FCC operates. In earlier times, the reconciliation of these two ideas may not have been as important. But today we live in a time of constant innovation. Strict standards offer a form of certainty, but they leave little leeway for handling the exceptional or unanticipated case – and innovation is almost by definition hard to anticipate.

---

\* Madeleine Findley, Associate General Counsel, provided invaluable assistance in the preparation of this presentation, which does not necessarily reflect the views of the Federal Communications Commission.

Case-by-case enforcement offers a potentially more dynamic approach, permitting the Commission to respond to and learn from the rapid pace of change in the communications market. This approach allows the Commission to assess the specific facts involved in an actual, real-world scenario and provides flexibility in determining whether a particular practice comports with the legal standard, but it could lead to unpredictability and inconsistency. And yet, although I am myself enamored of the common-law tradition, we do not have the luxury of hundreds of years to work out, for example, the law of trespass.

And there is a third dynamic that must also be acknowledged. Decades ago, in times of the Ma Bell era of regulatory monopoly, the government stood in the shoes of consumers. Without consumer-driven innovation, the regulated entity and the government operated in a closed sphere. This was the era when consumers could choose any color phone they wanted, as long as it was black. But today, millions of Americans feel an intense personal interest in how their broadband networks operate. And the impact of FCC actions can have major impacts on the rest of the Internet ecosystem, including smaller edge providers, who may be distant from Washington D.C. in geography and resources. How can the FCC ensure that it is effectively accessible to all?

As we – both at the Commission and in the market generally – grapple with issues that are new and novel, we need to ensure that we are accessible to the public, consistent in our approach across areas, and are able to balance competing objectives. Public interest in FCC processes has only increased, making thoughtful attention to these issues more relevant now than ever.

Access to our processes is only part of the story, of course. We must also think about access in a more substantive way. How can we be sure that competition is well-served by access to critical inputs, such as spectrum for wireless companies?

Finally, in a fast-moving world of technological and economic change, a critical requirement of government is that it is constantly learning and monitoring its prior actions against new market, technological, and social evidence. But how can we accomplish that as well?

Here is my starting point: We can make our processes accessible to as many participants as possible. We can gather facts and information from as many sources as possible. We can craft rules to ensure that small and regional wireless providers have an opportunity to participate meaningfully in an auction for highly desirable spectrum. We can propose an ombudsperson office that will advocate for small edge providers and other entities in the Open Internet environment. We start, of course, with the language of our statutes. We can ensure that we promote competition and that we follow the Network Compact as enunciated by Chairman Wheeler: access, consumer protection, interconnection, and public safety and security.

Those values tell you why the actions that the FCC takes are so very important. They tell you *what* we decide. I want to talk with you about *how* we decide. What does the FCC ultimately do, after all, if not establish the legal culture governing communications networks? We want to enable all of those networks. Our statutory mandate is to maximize entrepreneurship, competition, innovation and consumer benefits. Our goal is to permit new markets to be created under law, and to allow existing markets to be challenged by the process of creative destruction.

The four procedural imperatives that I mention – certainty, flexibility, accessibility and learning – are, I believe, the ingredients of the jurisprudence of innovation at the FCC. They are the ingredients in a recipe that is not yet finished. Consider how they inform three forms of Commission process that I will discuss: 1) dispute resolution; 2) mergers and transactions; and 3) waivers.

## II. Dispute Resolution

Resolving policy disputes is one of the key functions that the FCC performs. Sometimes it is consumers bringing complaints to us; sometimes it is service providers seeking relief from conduct that harms their business. Often, however, it is the FCC weighing competing concerns and conflicting demands, and attempting to set a policy course. Resolving policy disputes is a complicated undertaking, and requires balancing the parties’ need for certainty with a competing need for flexibility, an overarching interest in making the dispute process accessible to all parties, and a need to learn from our experience.

### a. Certainty

The Commission has a responsibility to provide certainty, guidance, and predictability to the marketplace and to consumers. The most important form of such guidance comes through the adoption of a particular legal standard, providing a “rule of the road.” Such rules allow all parties to measure conduct against a known rule of law.<sup>†</sup> But the Commission is also mindful of the distinction between the authority to adopt a standard and its subsequent application. Let’s take a look at a concrete example.

As many of you know, the FCC has issued a Notice of Proposed Rulemaking addressing what it calls its Open Internet rules. The proposed Open Internet rules are threefold: an enhanced transparency rule, a no blocking rule, and a bar on commercially unreasonable practices. This is not the first time the agency has grappled with how to promote and protect competition in the broadband marketplace. In 2010, the Commission adopted a no “unreasonable discrimination” rule to prevent fixed broadband providers from engaging in bad conduct when transmitting lawful network traffic over a consumer’s broadband Internet access service. The DC Circuit vacated that rule because it found that the rule improperly relegated fixed broadband providers to common carrier status.

Put another way, the court rejected the particular rule that the Commission adopted in 2010. But it did not reject the Commission’s authority to adopt a rule. In fact, it suggested that a rule preventing certain types of conduct by broadband providers might be acceptable, particularly if it more closely resembled the “commercially reasonable” standard adopted by the Commission in the data roaming context.

---

<sup>†</sup> Supreme Court watchers among you know that the Court recently granted *cert* in *Perez v. Mortgage Bankers Association*, which poses the following intriguing administrative law question: Whether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation.

In the NPRM, the FCC has *proposed* requiring broadband providers to use “commercially reasonable” practices in the provision of broadband Internet access service. This “commercially reasonable” rule would be an enforceable legal rule prohibiting broadband providers from engaging in harmful practices. The NPRM’s proposed approach contains three essential elements: (1) an enforceable legal standard of conduct barring broadband provider practices that threaten to undermine Internet openness, (2) clearly established factors that give additional guidance on the kind of conduct that is likely to violate the enforceable legal standard, and (3) encouragement of individualized negotiation and, if necessary, a mechanism to allow the Commission to evaluate challenged practices on a case-by-case basis, thereby providing flexibility in assessing whether a particular practice comports with the legal standard. It would take the ingredients of certainty and flexibility and then try to bring them together in balance.

The proposed rule would require broadband providers to use “commercially reasonable” practices in providing broadband Internet access services. It is not a lengthy or convoluted rule. It would prohibit only commercially unreasonable practices. Providers, edge providers, customers, and consumers would know that broadband Internet access providers may serve customers and engage in individualized negotiations as long as they are commercially reasonable.

The proposed rule would provide certainty; its application would provide flexibility.

#### **b. Flexibility**

How does the application of a rule provide flexibility? For one thing, it allows parties and the Commission to learn from the experience of the present as well as the logic of the past. One of the hallmarks of rules is that they reflect the state of knowledge at one fixed moment in time. They do not anticipate the future. This is why they begin to “lag behind” as our understanding of past and present trends grows more complex and as we experience more and more of the “future.”

How does an agency like the FCC address the need to provide certainty in the form of rules, yet also allow for flexibility? We can focus on grounding our generally applicable rule in our enduring values and our statutory mandate. For example, among the factors that the NPRM articulates are consumer protection, protection against anti-competitive behavior, and protection against impingement of non-economic interests, such as the free exercise of speech. We can engage in case-by-base enforcement, looking at the totality of the circumstances of a particular situation. To guide such case-by-case adjudication, we can articulate factors that we will use in applying our rules and propose rebuttable presumptions. We can identify *per se* violations to clarify the limits of “commercially reasonable” practices.

As I mentioned, the proposed rule would prohibit as commercially unreasonable those broadband providers’ practices that, based on the totality of the circumstances, threaten to harm Internet openness and all that it protects. Well, the first question is: what does that mean? The key point is that the Commission would start with a legal standard – commercially reasonable practices – and then apply that standard to the particular facts of any given dispute. Taking a case-by-case

approach to enforcement offers the Commission flexibility to account for the totality of the circumstances, including innovation, evolution, and learning over time.

As in the data roaming context, the NPRM proposes to identify factors that the Commission can use to administer the proposed commercially reasonable practices standard. Articulating such factors is a way to categorize a series of behaviors that the Commission believes are particularly important in protecting the Open Internet. These pre-defined factors would provide guidance to encourage commercially reasonable individualized practices. If disputes were to arise, the factors would provide the basis for the Commission to evaluate whether a particular practice satisfies the enforceable legal standard. Among the factors that the Commission proposes to consider are: the effect of broadband provider practices on present and future competition; the impact on consumers; the impact on speech and civic engagement; the technical characteristics of broadband provider practices; good faith negotiation; industry practices; and a catch-all category for other relevant considerations.

Providing factors or other forms of guidance serves both the need for certainty and flexibility. But articulating such factors is not the end of the work. Factors may lead to further rulemaking or rulemaking interpretations, but may also lead to case-by-case precedent. We would anticipate providers seeking additional guidance. T-Mobile, for instance, filed a petition last month seeking additional guidance on the criteria the Commission will use when applying the “commercially reasonable” standard for data roaming agreements. (Comments on that petition are due July 10, and replies are due August 11.)

Presumptions also offer a useful way to articulate some of the factors that the Commission may look to in administering the commercially reasonable standard. These are a long-used adjudicatory tool, most familiar from litigation. The Commission has proposed using rebuttable presumptions as a tool to focus attention on the likely impacts of particular practices on the Open Internet. For example, the Commission has proposed a rebuttable presumption that a broadband provider’s exclusive (or effectively exclusive) arrangement prioritizing service to an affiliate would be commercially unreasonable. Other rebuttable presumptions might focus on exclusive contracts, specific forms of service degradation, or conduct foreclosing a rival’s entry into the market.

Say that I operate an ISP and you are my customer. You are experiencing service that you perceive to be below the level for which you contracted, and you believe that I am favoring my own traffic and content over the traffic and content of the websites and apps that you prefer to use. You bring a complaint against me before the Commission, and the Commission examines the facts about my service, your usage, and everything relevant to that dispute. The Commission may look at the effect of my practices on the market now and in the future. It may look at whether my ISP is vertically integrated with related entities that compete with third-party providers’ services. Whether I am transparent with you about my practices and the amount of control and choice you have would also be factors in its review. The Commission would look to see if my practices harm free speech or civic engagement. The technical characteristics of my service would matter, as would my willingness to engage in good faith negotiations with you or with other providers. My peers’ practices would be relevant to the FCC: are my practices consistent with “industry practice,” and who gets to define what that is?

Case-by-case enforcement of this kind provides guidance for broadband and edge service providers but also flexibility in allowing providers to engage in individualized dealing. A critical hallmark of Anglo-American jurisprudence has been that courts and adjudicators learn from the cases that come before them and reflect that learning in their evolving case law. Case-by-case enforcement enables the FCC to examine closely—and learn from—technological and innovative advances, and to respond with evolutions in the marketplace, rather than lagging behind. As a back-stop to its enforcement, the Commission has proposed identifying certain *per se* violations of the commercially reasonable standard. If I committed one of those violations, that would be the end of the inquiry. Identifying *per se* violations would help delineate the outer boundaries of the commercially reasonable standard: it encompasses a whole range of practices in this area, but not beyond this line.

And it is important to note that, while I have described the approach proposed by Chairman Wheeler, the NPRM asks very expressly for comments about the best legal standard – whether Section 706 or Title II. Indeed, the NPRM contains a detailed set of inquiries about the potential use of Title II, including seeking comment on both its application and the use of forbearance were it to be applied. As most everyone knows, initial comments on the Open Internet NPRM are due on July 15<sup>th</sup>; reply comments are due on September 10<sup>th</sup>. Almost 130,000 comments have been submitted already.

### **c. Access**

This takes us to my third point about dispute resolution, access. To be effective, the dispute resolution process must be accessible to diverse array of affected parties. It must account for the tremendous disparity in size and economic and legal resources among entities ranging from large ISPs to individual app developers to small startup businesses to a family living in a rural community in the Midwest. To that end, the Commission has invited comment on additional forms of dispute resolution that might make the Commission’s processes more accessible.

In our example, again, I am acting as your ISP and you would like to bring a complaint against me over my provision of broadband services to you. You could complain to me directly or you could file a complaint at the FCC. I’m one person and I think I’m relatively approachable. Imagine, however, that you are not my retail customer, but rather an edge provider or an app developer. Perhaps you don’t have – and don’t want – a contract with me. You might not be sure whom to call or in what format to submit your complaint. You may not have access to the same legal resources as your ISP does. What steps can the Commission take to ensure that its processes are accessible to you?

The FCC has proposed creating an ombudsperson to advocate on behalf of small edge providers and other entities. The ombudsperson’s duty would be to act as a watchdog to protect and promote the interests of those entities. The FCC has also asked if it should relax the procedural and initial pleading requirements for such entities. Finally, the FCC has asked for suggestions on how to improve its informal complaint process to make it easier for small entities and individuals; and on whether other forms of alternative dispute resolution would be appropriate.

And the FCC has asked if it should permit individuals to report noncompliance anonymously or take other steps to protect the identity of individuals where retaliation is a threat.

### **III. Mergers and Transactions**

The second context where I see the four ingredients coming together is in the transaction space. Fortunately for the FCC, this summer brings no shortage of opportunities to think about these issues. There are two large transactions currently before us, as well as continuing work on two significant spectrum auctions. And we all read the same newspapers and industry publications, which suggest that more may be coming the Commission's way sometime soon.

Transactions provide another scenario in which the Commission has a responsibility to provide certainty, guidance, and predictability to the marketplace and to consumers. Some steps involve providing certainty around our processes. What the FCC's expectations are should be clear and public. Parties should know the "rules of the road" so they may rely on them in making strategic business decisions. To that end, the FCC can take steps to articulate legal standards and clear procedures. But certainty and flexibility, accessibility and learning do not exist independently. They are interconnecting aspects of the Commission's work, and this is perhaps most obvious in the transaction review process.

#### **a. Certainty**

When reviewing a proposed transaction, the Commission evaluates whether the Applicants have demonstrated that the proposed transaction will serve the public interest, convenience and necessity. Applicants, in other words, bear the burden. This is Congress's mandate to the agency. The Commission considers whether the proposed transaction could result in public interest harms – through, for example, substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes, or of public interest benefits.

The Commission's public interest standard is substantive. As part of its analysis, the Commission analyzes the proposed transaction's effects on both current market conditions and likely future competition and innovation. It accomplishes this through a fact-based analysis of the evidence that the Applicants have submitted in support of the proposed transaction. It then balances any potential public interest harms from the transaction against any potential public interest benefits. This is necessary to enable the Commission to determine whether the Applicants have met their burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest. If the Applicants fail to meet their burden, then Congress has required (§ 309(e) of the Act) that the Commission designate the transaction for a hearing.

This was the staff recommendation in the AT&T/T-Mobile transaction and it is worth reviewing how the staff came to its conclusion. After reviewing the parties' submissions, FCC staff concluded that the transaction was likely to result in significant harms to competition. Those likely harms included increased prices for consumers, reduced incentives for innovation, and decreased consumer choice of wireless providers and service offerings. The staff found that the

parties had not adequately supported their claims regarding potential benefits of the transaction, including potential economic efficiencies and consumer benefits. As a result, the staff found that AT&T and T-Mobile had failed to carry their burden of proving that the proposed transaction would, on balance, serve the public interest.

The Commission's public interest standard provides certainty about the standard that Applicants must meet for a transaction to be approved. But, as is the case with dispute resolution, the other three ingredients—flexibility, access, and learning—are also important.

### **b. Flexibility**

Flexibility comes when decision makers seek to provide guidance that goes beyond general legal standards. As discussed, the Commission can also identify certain factors or rebuttable presumptions guiding how it applies the public-interest standard. One example comes from transactions involving mobile spectrum licenses. These transactions receive case-by-case review under the FCC's public interest standard, subject to certain triggers that provide additional regulatory flexibility. One of those triggers is the so-called spectrum screen, which evaluates how much spectrum the acquiring firm would hold, after the transaction, that is "suitable" and "available" in the near term for providing mobile telephony or broadband services. The screen does not create a bright-line rule that no provider may hold more than X amount of spectrum. Rather, it serves as a trigger for additional FCC scrutiny when a transaction will lead to a single wireless licensee holding 1/3 or more of the total amount of suitable and available spectrum in a given market. Knowing which spectrum bands are included in the spectrum screen permits wireless spectrum licensees to evaluate potential transactions – mergers or acquisitions – in advance, and to plan investments and business decisions. The spectrum screen provides guidance to providers without setting an absolute rule.

But the spectrum screen is not a static, unchanging standard. Rather, it must change as the wireless ecosystem changes. In that way, it reflects the dynamic innovation in our world. Recognizing that fact, the FCC last month evaluated the screen in light of the continuing evolution in the wireless market, recent and upcoming auctions and rule changes. It was updated – removing some spectrum bands and adding others –based on the Commission's experience and understanding about whether specific spectrum is available for mobile broadband use currently or in the near term. The ability of the spectrum screen to evolve with innovation, technology, and market conditions enables the FCC to provide guidance and predictability to the market even as market conditions change.

Articulating and updating transaction-review factors offer another way the Commission can apply what it learns from changing market conditions. For example, the FCC recognizes that spectrum located in the below-1-GHz bands is extremely attractive because of its favorable propagation characteristics. This spectrum is also available to the market in limited supply, making the upcoming 600 MHz Incentive Auction central to the development and deployment of mobile broadband for years to come. Recognizing these facts, the Commission decided that going forward, below-1-GHz spectrum holdings will become an enhanced factor, not just a factor, receiving particular review in the Commission's transaction evaluations. Treating such holdings as an enhanced factor permits the Commission the flexibility to distinguish between the



characteristics of different frequency bands without imposing a weighting schema that may fail to accurately reflect their competitive significance.

### c. Access

In addition to setting standards and identifying factors involved in reviewing transactions, the Commission can take steps to make scarce resources more widely available. It is important to recognize that the form of access I am going to talk about here is distinct from accessibility to FCC processes. The FCC's efforts in this area have taken many forms throughout the agency's history, but most salient to our current work is ensuring that scarce spectrum licenses for the most attractive low-band spectrum are as widely available to as many bidders as possible in our upcoming incentive auctions. Spectrum is a scarce resource, and the FCC takes seriously its responsibility to protect against excessive concentration of spectrum at the cost of competition.

Smaller, regional, and rural wireless providers need access to additional spectrum, particularly to below-1-GHz spectrum, in order to build their next-generation networks and deliver these offerings to consumers in both rural and urban areas. The propagation characteristics of the 600 MHz spectrum that will be available in the Incentive Auction make these licenses extremely attractive for providers serving less densely populated or rural areas, and needing reliable in-building coverage. The FCC determined that replacing the standard individualized review after the auction with an upfront band-specific spectrum reserve for the upcoming 600 MHz spectrum licenses would encourage participation and competition and promote the public interest.

For the 600 MHz band incentive auction, the FCC established a market-based spectrum reserve of *up to* 30 MHz in each license area designed to ensure against excessive concentration in holdings of low-band spectrum. The exact size of the reserve will depend on the as-yet-unknown outcome of the reverse and forward auctions in the Incentive Auction. The reserve, unlike some other potential options for promoting competition, gives wireless providers significant latitude to bid on the spectrum licenses they may need in each area to meet their network requirements. The reserve also provides flexibility because it is dynamic; that is, its size – even its existence – depends not on a regulator's bright-line rule but on real-world bidding in the reverse and forward auctions.

Given the current pattern of spectrum holdings among U.S. wireless providers, the FCC concluded that it was not appropriate to apply the market-based spectrum reserve equally to every wireless provider. That is, some wireless providers hold very large quantities of spectrum, including significant amounts of attractive low-band spectrum, while others are much more dependent on the efficiencies of low-band spectrum.

To address these asymmetries, the FCC adopted rules largely based on bidders' existing mobile spectrum holdings to grant access to the market-based spectrum reserve. In sum, bidders may bid on any amount of unreserved spectrum in a market, but may only bid on the reserved spectrum if they are eligible for it. Any nationwide provider that holds approximately 1/3 or more of available low-band spectrum in a license area will be able to bid on all unreserved spectrum in that area, but not on any reserved spectrum. In license areas where a nationwide provider holds less than 1/3 of available low-band spectrum, it will be able to bid on all

unreserved spectrum, *and* all reserved spectrum in that license area. Non-nationwide providers will be able to bid on both reserved and unreserved spectrum in all license areas.

The FCC has emphasized that these conditions reflect the current marketplace structure. This is important, because if this structure changes significantly or a proposed transaction is filed with the FCC in the future affecting the top four nationwide providers and their spectrum holdings, the Commission may revisit its decisions regarding the reserved spectrum provisions. The conditions will evolve with the market and technology.

#### **IV. Waiver Authority**

I have been talking about specific areas of Commission action, but any one of our rules can be subject to individualized consideration if necessary to foster innovation or ensure fairness. Section 1.3 of our rules permits the Commission to waive any of our rules at any time for good cause shown.

Providing guidance to the marketplace is one of the FCC's important functions. But any effort to be predictable or to provide certainty loses its attractiveness if the resultant rules are unduly rigid or unable to accommodate unique or individualized circumstances. That is where the FCC's waiver process plays an important role. Waivers offer an important safety valve in scenarios where uniform application of a rule might lead to inequities. A recent example of the Commission's approach to waivers illustrates this point.

##### **a. Certainty**

In March, the Commission amended its ownership attribution rules to reflect its conclusion that television Joint Sales Agreements ("JSAs") may convey sufficient influence to warrant ownership attribution. Additionally, the Commission required that such JSAs shall be filed with the FCC.

A JSA, for the non-media-types, is an agreement that authorizes a broker to sell some or all of the advertising time on the brokered station. Say that you own a television station, but you prefer not to handle all of the ad sales yourself. It so happens that I own a television station in the same market as you, and I have a very strong sales team. You might enter an arrangement with me, where I agree to sell some percentage of weekly advertising time on your station for you. I pick the sales people, and I set the price, but you have the right to reject the ads I sell. This is a relief for you because you no longer have to try to sell that portion of your advertising time, but you now have to depend on me to sell it for you.

At some point, I may come to you and say, you know, your programming is really nothing but shows about taxidermy, and that's making ad sales difficult; but if you would include a few of these fun reality shows about junk yards and abandoned storage units, I would be able to sell ads for you at a significantly higher price. I may not mention this, but my revenues from selling ads for you also depend on what price I can get. You may not particularly want to change your programming. But if the ads I sell for you are sufficiently important to your bottom line, you may be willing to agree to my suggestion and cancel a few hours of *Taxidermy Tips* in favor of

*Storage Shed Wars*. Our agreement thus may give me the opportunity, ability, and incentive to exert significant influence over you. This is the situation the Commission addressed with its JSA attribution and disclosure rules.

The rules provide guidance to the market. Specifically, the FCC found that JSAs permitting the sale of more than 15 percent of the advertising time per week of the brokered station create the potential to influence the brokered station and provide incentives for joint operation similar to those created by joint ownership. Accordingly, the FCC found that such JSAs constitute attributable ownership interests under its ownership rules. This is consistent with the 15 percent threshold the FCC applies to JSAs in radio markets, among others. So if you and I had agreed to a JSA where I sold 20 percent of your weekly advertising time, then I would have an attributable ownership interest in your station. The JSA rule also provides a bright-line requirement: subject to OMB approval, the Commission will require going forward that attributable TV JSAs be filed with the FCC within 30 days after the JSA is entered into.

Some broadcasters have pre-existing JSAs that exceed the 15 percent threshold and would violate the FCC's ownership limits. Those parties will have two years from the Order's effective date to come into compliance with the rule.

#### **b. Flexibility and Accessibility**

And here is where the waiver process comes into play. Many entities argued in comments to the FCC that the JSA rule would work an unfair result. The FCC provided that parties that believe the application of the attribution rules to their particular circumstances would not serve the public interest may seek a waiver. The FCC's waiver analysis will consider the totality of the circumstances, including specific facts submitted by the applicant showing that the broker station lacks the incentive or ability to influence the brokered station's operations and demonstrating that the brokered station has the incentive and ability to retain independence over operations and programming decisions. A waiver applicant might demonstrate that a waiver would support diversity, or would enable a school, community college, or other community support organization to own a station, and that the public interest benefits of such ownership outweigh the harms of common ownership. In general, a waiver request that is limited in scope (e.g., percentage of station's advertising sales) and duration so as to minimize or eliminate any influence on operations or programming is more likely to succeed than an open-ended request. The waiver option provides a safety-valve for the extraordinary circumstance where application of the local television ownership rule in a particular situation would adversely affect competition, diversity, or localism.

But a waiver is not a Get Out of Jail Free pass. The Commission has an obligation to take a hard look at whether enforcement of a rule in a particular case would serve the rule's purpose or would frustrate the public interest. The Commission may not grant waivers without a principled basis for doing so. As the D.C. Circuit held in *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990), before the FCC can grant a waiver for good cause, it must explain why waiver serves the public interest and describe the nature of the special circumstances supporting the waiver, so as to avoid discriminatory application of the agency's rules. The court has reminded us that unjustified departures from our rules, even for laudable purposes, cannot be

sanctioned. A waiver applicant must provide evidence of the particular circumstances demonstrating why granting a waiver, in light of the totality of the circumstances, serves the public interest.

## **V. Learning**

When I began, I told you there were four procedural imperatives that are the ingredients of the jurisprudence of innovation at the FCC. The fourth of these is learning. The agency must learn – from its experience and from the issues it confronts. The approach I have described – articulating a legal standard and using case-by-case adjudication – should be a familiar common-law approach. For good reason. The common law offers a mechanism of oversight that combines logic and rigor with flexibility and learning. It is particularly well-suited to the challenges the FCC faces as it navigates the transformational changes occurring in our communications networks. It values information and evidence, through experimentation and information-collecting, and it is flexible enough to adapt to changing market conditions. The Commission is encouraging what Commissioner Rosenworcel aptly describes as the “sandboxes of experimentation,” including the direct access to numbers trials for VoIP service providers, and the AT&T service experiments. By experimenting, the Commission—and everyone else—will be able to see if innovative new approaches produce the “expected results.” We can gather evidence about whether – and how much – government action may be required. We can compare any unexpected adverse outcomes on innovation. Sandbox thinking creates an incentive for us—as regulators—to continually learn how best to achieve our public policy aims.

## **VI. Conclusion**

My personal request is that the bar engage with us in a discussion of the jurisprudence of innovation. I have listed four factors – not always obviously consistent – that I believe are essential ingredients: Providing certainty; providing flexibility; providing accessibility; and ensuring that the Commission is a learning institution. There are cross-currents here.

But that is our fate for living in a time of innovation. And we should make the best of it.

In the “Common Law,” Justice Holmes told us that “the most difficult labor will be to understand the combination of [history and existing theories of legislation] into new products at every stage.” That is the labor now before us: we are engaging in understanding the combination of our past and our present into our future. We are articulating standards and rules, educating ourselves about the current and the coming environment, and balancing the competing needs of certainty, flexibility, and access. We are learning as we go, and we will learn best, if we have the views of lawyers who participate in our processes.

Thank you.