My View of the FCC's Public Interest Obligation

PLI Conference Remarks of
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Thank you, Henry, for that kind introduction. For so many years, I was sitting on the other side of this podium — and at this stage of the morning usually drinking a Diet Coke and hoping that the first speaker was not a complete "yawner." Little did I suspect that one day I would be standing up here — measuring up against the "yawner" test. But it is a tremendous privilege for me to be here today sharing some of my thoughts and ideas with you.

My general surprise at being named an FCC Commissioner and my close identification with being out there in the audience is actually quite relevant to my topic this morning. Because having been out there — in private practice, in industry, in a high-tech field — greatly informs what I do now at the FCC. And I think there is a profound risk of getting it wrong if we divorce what happens in the FCC's regulatory world from what is happening in the real world.

Attempting to mold my real-world experience into a regulatory philosophy was a tremendous challenge. In part, because in the marketplace, regulation is often seen as an obstruction — a restraint that business units buck up against when attempting to maximize the bottom line. When working in private practice or as an in-house attorney, it's certainly not difficult to discern your client's or company's position on a given issue — maximizing value to the shareholders. Of course my task is now far more difficult — discerning the *public's* interest in a given issue and maximizing the net public welfare.

Fortunately, an FCC Commissioner is given some guidance in discerning the public interest. First is the structure of the agency itself. The FCC is an independent agency — independent from the executive branch and designed to be an expert agency implementing the law as promulgated by Congress. The Commissioners are not elected — but rather appointed

and distributed across both political parties. Therefore, in my view, Commissioners do not have carte blanche to interpret the public interest.

Indeed, the public's interest is directly reflected in their elected representatives in Congress. Our system of representative government is premised on the notion that Congress speaks for the public, and in our case Congress has memorialized its views regarding the scope of U.S. communications policy in the Communications Act. The specific statutory mandates take on added importance in an agency that is independent and, by statute, bipartisan. Therefore, perhaps even more than the executive branch agencies, I believe the FCC has a particular obligation to adhere as closely as possible to the statute in order to discern the public's interest.

Although at times I wish I could end my inquiry into the public interest with the plain language of the statute, more is required from the Commissioners. Indeed, the statute specifically delegates certain decisions to the discretion of the Commissioners and in other cases specifies only that the Commission regulate in the "public interest." Deciding how to exercise our discretion in the public interest in these circumstances once again brings me back to the structure and role of the agency — and its relationship to the people's representatives. The President reflects the public's interest by appointing FCC Commissioners that bring experience and expertise to the FCC and share key aspects of his regulatory philosophy. I am fortunate to be one of those appointees. And my regulatory philosophy begins with the fundamental notion that competitive markets function better than regulation to maximize the public welfare. Markets encourage innovation, punish and reward providers, increase consumer choices and the availability of information, and respond far more quickly to changed circumstances than is possible through regulation.

Therefore, to summarize, I believe the most accurate approximation I have for discerning what best serves the public interest includes two components:

> First, a comprehensive and faithful implementation of the plain language of the Act — which outlines the public interest as defined by Congress; and

Second, relying on competitive markets whenever possible under the statute — an approach that is consistent with the regulatory philosophy of the President that appointed me.

I am sure that all of you have carefully reviewed the materials provided by PLI, and in there you will find an advance copy of a law review article that will be published this March in the FCBA Law Journal. It sets out five key aspects of my regulatory philosophy. Those five principles include two that I will discuss today.

I. Implementing the Mandates of the Act

The first principle is that the FCC should focus on implementing the agenda set by Congress through the Communications Act. This principle — as I've noted — is grounded in the foundations of representative government. This principle is actually more controversial than one might suspect at first blush. This philosophy, not surprisingly, requires us to stay within the confines of the statute and leads me to construe the statute more narrowly than others might. However, it also has real world ramifications for the Commission's priorities.

For example, in many portions of the statute, Congress specified that the agency "shall" take certain actions to implement the Act. In other places, the Act confers discretion — the Commission "may" take certain actions. I believe the Commission has an obligation to concentrate on fulfilling our specific mandatory acts (the "shalls") before it devotes resources to proceedings that are purely discretionary (the "mays") and certainly before we initiate proceedings that go beyond the scope of the statute.

This regime only goes so far, however. For example, once these tiers of responsibility are established, the statute does not provide guidance on how to distinguish among the various "shalls." Therefore, I believe the Commission may responsibly establish priorities *within* the categories of the shalls, the mays, and the discretionary proceedings. But we lack the discretion

to reprioritize a "may" above a "shall" — or to elevate a proceeding based on statutory silence above an obligation that we have been specifically directed to undertake.

The Commission unfortunately has allowed many discretionary proceedings to prevent it from implementing some specific mandates in a timely manner. For example, in the Hearing Aid Compatibility Act, Congress directed the Commission to assess periodically the continued need for ongoing exemptions from the compatibility requirements. In 1989, the FCC indicated it would do so every five years. But it was not until 2001, twelve years later, that we issued the first NPRM.

Similarly, the Commission just released an order earlier this week that finally completes our implementation of the mandates in the Telephone Operator Consumer Services Improvement Act of 1990. The statute unambiguously requires that providers of operator services, at the start of any interstate call, identify themselves to consumers and disclose their rates, collection methods, and dispute-resolution procedures upon request and at no charge. After adopting rules to implement these requirements, however, the Commission stayed the effect of some rules in response to petitions filed by the Bell operating companies. The Commission reaffirmed this week that the statute means what it says: providers must disclose their rates for ***any*** interstate call. I am pleased that we have faithfully implemented the text of the statute; my only disappointment is that the Commission allowed carriers to disregard a statutory mandate for several years.

I recognize that this view of the public interest affords the agency less discretion to prioritize various goals and sometimes there is a sense of frustration at being unable to right a perceived wrong. Moreover, my approach may require us to focus on issues — such as unsolicited faxes, slamming, and do-not-call lists — that some may perceive to be less exciting than others. These issues may not be among the more dynamic and challenging legal issues presented to the agency, nor are they likely to grab headlines. But, in my view, that is not the test for the Commission's obligation to act. We must fulfill our core obligations under the statute — nothing less should be expected and in my view the public interest requires it.

II. Faith in Fully Functioning Markets

That brings me to my second guiding principle that I want to discuss this morning: fully functioning markets deliver greater value and services to consumers than heavily regulated markets do. Despite the noblest of intentions, government simply cannot allocate the resources, punish and reward providers, and encourage innovation as efficiently as markets. The history of our nation, and the demise of those that adopted centrally planned economies, makes this proposition indisputable. While there is a critical role for regulation, we should strive to rely on, and trust, markets forces whenever we can do so consistent with the statute.

Therefore, in each proceeding in which new regulation is proposed, I will ask: Is this regulation truly necessary? Is there a market failure? Will the burdens imposed by the proposed regulation outweigh its anticipated benefits? Will it preserve incentives for companies to innovate, and thereby deliver better services and lower prices to consumers? Would a less regulatory approach, paired with an emphasis on strict enforcement of existing rules, produce greater consumer welfare? Similarly, I will continually endeavor to examine our existing regulations to ensure that the original justification for regulatory intervention remains valid.

It is essential to keep in mind that the Congress has effectively legislated my preference for market forces, through promulgation of the 1996 Act, particularly the biennial review and forbearance standards. Both sections are designed to facilitate the rolling back of regulation in the face advancing competition that renders the regulation unnecessary.

My experience in both the private and public sectors leads me to believe that, more often than not, the answers to these questions will indicate that prescriptive regulatory intervention in the marketplace is *not* warranted. Even if proposed regulation appears to have sound justifications, we must keep in mind that all regulations have costs and may produce unanticipated consequences. And in many cases, those consequences are sufficiently negative as to outweigh the benefits that regulators originally envisioned.

My general approach in this area stems in large part from my experiences in the wireless arena. There, the Commission under Section 332 of the Act decided against a heavy regulatory hand — against, for example, price and service regulation. Instead the Commission allowed the marketplace to develop, albeit with some broader regulatory constraints — such as the spectrum cap, designated entity auctions, and the cellular cross interest rule. Today we have an incredibly robust CMRS marketplace — with six national providers, a number of significant regional carriers, and a number of niche players. Prices have continued to fall, while usage continues to rise. Consumers switch providers in response to market changes at a significant rate, and carriers have continued to build out their networks and offer innovative suites of services.

Similar regulatory success can be found in the long distance marketplace. Since 1984, AT&T's market share has fallen from over 90% to about 38% last year. WorldCom's share is now 23%, Sprint's 9%, and more than 700 other long distance carriers together served the remaining 30% of the market. As a result of this competition and the access charge reductions that allowed prices to move towards costs, prices have fallen to approximately 11 cents a minute on average, or almost 50% less than the average price from the early 1990s. And those prices are continuing to fall.

Both the long distance and wireless markets yield important lessons for local wireline competition. In applying these lessons, though, one must also consider the differences. Most notably, local wireline has a far more significant last mile bottleneck than do other platforms. Long distance has no last mile issues. Wireless was able to ensure multiple last mile providers through the FCC placing more spectrum into commercial hands (effectively increasing the number of "last miles"), establishing the spectrum cap, setting eligibility limits in auctions, and implementing the cross-interest rule. At least for now, wireline by necessity requires more significant intervention in the last mile than other platforms.

Nonetheless, it is important to recognize that in the highly competitive worlds of wireless and long distance – pure resale has not proven to be a very lucrative long term business strategy – nor has it been capable of significantly driving down prices or spurring the marketplace to

innovation. Instead in both markets as more facilities-based competitors have taken hold including some carriers that have combined their own facilities with limited resale, the market conditions for 100% pure resellers has been made far more difficult. This is an important lesson for our approach to local wireline competition.

Thus the goal of greater facilities-based local wireline competition means a shift away from policies that actively encourage complete resale as a long-term business strategy. Excessive unbundling obligations at TELRIC rates can present the same risks. Too much sharing destroys the investment incentives of both incumbents *and* CLECs: Incumbents have little incentive to deploy new fiber to the curb, for example, if they will have to turn around and hand that fiber to their competitors at TELRIC rates. And CLECs will have little incentive to deploy their own networks when they can get access to incumbents' facilities at cost-based rates.

With proper incentives — like those that have typified our regulatory approaches in the wireless and long distance markets — competitors will have to choose a predominantly facilities-based strategy in order to compete over the long term. In our just-launched triennial review of our unbundling rules, we will try to ensure that carriers have sufficient incentives to invest in facilities, particularly those used to provide broadband services. Nonetheless I recognize that new providers cannot flashcut to a facilities-based environment overnight, and therefore our policies must reflect these long-term goals with sensitivity to the shorter term reality.

That is not to say we should walk away from market intervention. Quite the contrary, we must remain engaged. Unlike in the wireless context, where our bright-line rules prevented incumbents from gaining exclusive access to each last mile, here we are statutorily and, quite frankly, practically obligated to pry open the last mile. My point is that we'll do more to facilitate competition if we resist the urge to micromanage *every* aspect of the relationship between incumbents and new entrants — and instead, as in wireless, focus our attention on that very last mile.

I don't want to give you the impression that the FCC can bring about vigorous residential competition all by itself. The states also need to take significant steps, including rebalancing local rates and providing explicit and portable universal service support. And we must work together — the Commission, the states, and consumers — to ensure nondiscriminatory access at just and reasonable rates, and to ensure that incumbents cannot externalize costs onto consumers or their competitors without facing significant enforcement actions.

Although I do trust in market forces, that trust is not blind. There are certainly cases in which the unfettered market would lead providers to engage in conduct either contrary to the Act or harmful to consumers — or both. I will touch briefly on three areas.

As a specific example, and as I noted earlier, there are no market forces that give incumbent local exchange carriers incentives to open up their networks to competitors. It simply makes no business sense to say: "here, take part of my network and while you are at it why not take some of my best customers away." That will not happen in the open marketplace — and the market incentives require us to be vigilant in enforcing our rules to ensure compliance with the market opening conditions in the Act. In this regard, we have recently released a Notice that considers the adoption of national performance metrics to allow us to more effectively track compliance with our local competition policies.

Market forces also will not discipline providers when they attempt to foist externalities on their competitors. For example, there is no market incentive that will deter a wireless licensee from interfering with an adjacent channel competitor. In fact, there is every incentive to maximize its power level to garner the best footprint, while disrupting her neighbor's signal. Therefore it is essential that the Commission have and enforce rules that prevent licensees from externalizing these costs.

Similarly, there are certain prices that we pay for a competitive marketplace that do not exist under a monopoly regime. For example, there is little need for consumer fraud protection when there is no choice. The death of monopoly has also triggered a need to protect consumers from slamming and cramming and other untoward practices. These are essential and new

obligations for a competitive marketplace and they are reflected in the Commission's development of our Consumer Information and Enforcement Bureaus.

There are also policy goals that do not necessarily track market forces. For example, Congress has directed us to implement programs such as universal service, including the e-rate program; access to telecommunications services for people with disabilities; and protecting children from indecent programming. The market segments addressed by these provisions would likely not receive prompt attention in the marketplace absent regulatory intervention.

In conclusion, I believe that the FCC can best implement the public interest by adhering closely to the text of the Communications Act and relying on market forces where the statute grants us discretion to do so. This conservative view of the public interest, I believe, accords the proper and significant respect due to the legislative process with a corresponding appreciation of the role of an independent agency. This philosophy will guide me as the Commission faces the significant policy challenges on the horizon. I believe reaching the right result requires me to remember what it was like to be out there in the audience, while actively working to advance the interests of my current client: the American public.

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For more information on the speech above, or any of the Commissioner's past remarks, please email Bryan Tramont at btramont@fcc.gov. Also, these remarks mention an upcoming law review article to be published in the FCBA Law Journal. The website for the Journal is http://www.fcba.org/journal.html.