

My View from the Doorstep of FCC Change

Address to the Indiana University
by Commissioner Kathleen Q. Abernathy
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As prepared for delivery.

Thank you for inviting me out to Bloomington to visit with all of you. As a former president of the FCBA and a current FCC Commissioner, the FCBA Law Journal has always been very important to me. The Journal serves an integral function in the intellectual health of the Bar by fostering a healthy and spirited debate between competing philosophical visions of telecommunications policy. And it is an honor to be able to join that dialog as an author in this edition of the Journal.

I cannot say that I had planned my entire life so as to become an FCC Commissioner – in fact, some would argue I barely planned anything at all before my appointment last year. Certainly I was surprised and thrilled. Instead I had planned a career much like the ones you all face as you look to your futures in the Bar. I came out of law school, worked for a few firms, determined that telecom policy was the place for me and eventually moved to government, and then to the private sector. In the course of my career I have worked on satellite, wireless, common carrier, and international issues. Throughout much of my career, I was called upon to advance a client's interest – most often as defined by a corporation's Board of Directors. Working in corporate America posed far different challenges than those I now face as a FCC Commissioner. As a result of my appointment to the Commission I am called upon to represent a new client – the American people – and to craft a communications policy that advances the public interest.

In assessing how best to advance the public interest I have drawn on all of my experiences to craft a five part regulatory philosophy that will guide my Commission decision making. First, Congress sets the FCC's priorities in the Communications Act, and the agency should faithfully implement those priorities rather than pursuing an independent agenda. Second, fully functioning markets invariably make better decisions than regulators. Therefore, unless structural factors prevent markets from being competitive,

or Congress has established public policy objectives (such as universal service) that are not market-based, the FCC should be reluctant to intervene in the marketplace. Third, where the FCC promulgates rules, it should ensure that they are clear and enforce them vigorously. Efficient markets depend on clear and predictable rules, and a failure to enforce rules undermines the agency's credibility and effectiveness. Fourth, a regulatory agency — particularly one with jurisdiction over a high-tech sector like communications — cannot possibly duplicate the knowledge base of those it regulates. Therefore, the FCC must be humble about its own abilities and reach out to consumer groups, industry, trade associations, and state regulators to maximize the information available in the decisionmaking process. And finally, the FCC, as a government agency in service of taxpayers, should strive to provide the same degree of responsiveness and effectiveness that is expected of an organization in the private sector.

Guiding Principles

I. The FCC Should Focus on Implementing the Agenda Set by Congress in the Statute

The FCC is a creature of Congress, and as such its priorities are defined not by the predilections of the commissioners, but by the text of the Communications Act. Like any institution, the FCC has a finite amount of resources. We should expend those resources implementing congressional priorities, and only after those are fulfilled should we pursue objectives that lie within our discretionary authority. Statutory language often reflects a clear guide for the Commission's priorities. The landmark legislation enacted in 1996 provides an excellent example: Congress in many provisions set forth explicit timetables for the FCC's execution of statutory mandates, including a six-month deadline for implementing the market-opening duties in Section 251, and a two-year deadline in Section 254 for overhauling the universal service subsidy scheme. In these sections, Congress decreed that the FCC "shall" implement specific provisions of the Act. Other provisions, by contrast, state that the FCC "may" take certain actions. In my view, in assessing its priorities, the FCC should concentrate on fulfilling specific mandates (the "shalls"), before it devotes resources to proceedings that are purely discretionary (the "mays").

On occasion, the FCC has damaged its credibility and prestige by focusing on discretionary acts to the detriment of its implementation of statutory

mandates. Such freelancing is particularly indefensible in light of the FCC's failure in recent years to fulfill all of its statutory obligations. For example, in 1992, Congress enacted the Telephone Consumer Protection Act, which outlawed, among other things, unsolicited faxes. You do not need to be a FCC commissioner to recognize that, for over a decade, American consumers have fought a losing battle with fax advertisers. Despite the obvious pervasiveness of the problem, it took the Commission no less than seven years to bring its first enforcement action. Unsolicited faxes certainly do not grab headlines in the way some other issues do, but that is not the standard by which we should assess the FCC's job performance. Our performance must in the first instance be measured against the responsibilities that Congress charged the Commission with carrying out.

In this regard, the FCC should be wary of adopting significant new regulations in areas where the Congress has not spoken. While the statute gives the FCC broad general rulemaking authority on matters that are "necessary" to the execution of its functions, this is a weak reed on which to base new policy initiatives. I believe that the FCC rarely, if ever, should reach out to assert authority in this manner. If the core substantive provisions of the Act do not authorize agency action, our response should be to refrain from broad interpretation of the will of Congress. We must not grant ourselves authority that is denied under a fair reading of the Act.

II. Fully Functioning Markets Invariably Make Better Decisions Than Regulators Do

My second core principle derives from my experience observing the ability of market forces to maximize consumer welfare. Despite the noblest of intentions, government simply cannot allocate resources, punish waste, or spur innovation as efficiently as markets. The history of our nation, and the demise of those that have adopted centrally planned economies, makes this proposition indisputable. While there is a critical role for regulation in ensuring that markets are open to competition, we should rely on market forces in lieu of regulatory mandates wherever we can do so consistent with Congress's explicit instructions and where competitive market forces are at work.

A. Placing Trust in Market Forces

Regulators should have a healthy skepticism towards any attempt to displace

market forces with regulation. That is why in each policy debate, I 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? Will a less regulatory approach, paired with an emphasis on strict enforcement of existing rules, produce greater consumer welfare?

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 a proposed regulation appears to have sound justifications, we must keep in mind that all regulations produce unanticipated consequences. And in many cases, those consequences are sufficiently negative as to outweigh the benefits that regulators originally envisioned. I believe that consumers usually are better served if regulators shift their emphasis from imposing prescriptive rules — which by their nature are inflexible and overbroad, and therefore tend to hamper innovation — to reliance on a regime with fewer rules and a greater emphasis on enforcement mechanisms. Enforcement mechanisms have the advantage of being narrowly tailored to specific anticompetitive practices, leaving companies free to engage in other, procompetitive conduct that may have been barred by a prescriptive rule.

Several examples inform my skepticism about relying on regulatory mandates as a means of promoting consumer welfare. Historically, where the FCC has eschewed a heavy regulatory hand in favor of market forces, the results generally have been excellent. Perhaps the best example is the explosive growth of the wireless sector. When Congress passed Section 332 in 1993, the Commission faced a key choice of how to regulate PCS and other new wireless services. Some argued for strict Title II common carrier regulatory constraints on pricing and service terms and conditions, and this approach was based on the supposed entrenchment of incumbent cellular providers. The FCC did not impose traditional regulatory constraints, however, and the consequence has been that consumers now enjoy unparalleled choice, improved calling plans and service quality, and dramatically lower prices.

In contrast to these success stories we have seen over regulation impede the development of competition and innovation. I believe that has been the case with respect to some of the FCC's efforts to jumpstart local telephone

competition. To be sure, this is a complicated issue: Local telephony is an arena in which incumbents previously held state-sanctioned monopolies, and Congress has charged the FCC with introducing competition where many economists previously asserted it could not flourish. But I believe that, in its zeal to facilitate competition by new entrants against incumbent local telephone companies, the FCC has erected an overly complex regulatory regime (for example the Section 271 process) that has impeded, rather than facilitated, competition. In striving to stimulate *some* perceived form of local telephone competition, by creating expansive resale and unbundling opportunities, we have adopted rules that have failed to engender, and may have hampered, *facilities-based* competition — which is the only strategy that is clearly viable in the long term. As one CEO of a small independent telco once told me, friends don't let friends resell.

The lesson we take from these examples should be a commitment to rely on market forces unless there is a clear and convincing case for regulatory intervention — as opposed to mere speculation about potential anticompetitive effects.

B. Where Does Regulation Remain Necessary?

There are, however, three categories where this presumption against regulatory intervention in the marketplace is generally overcome. These three overarching categories are regulations that (a) ensure that markets are free of structural barriers to competition, (b) prevent the imposition of negative externalities on consumers and competitors and address other market failures, and (c) implement specific congressional policy choices that may be entirely unrelated to the question of competition.

1. Regulations Aimed at Eliminating Structural Barriers to Competition

Since a regulatory model that relies predominantly on market forces presupposes the existence of competition, we must resort to regulatory intervention if structural barriers impede competition from developing in the first place. For example, achieving competition in local wireline telephony requires governmental intervention, because incumbent local exchange carriers' control of essential network facilities (particularly the last mile, local loop) would preclude competition from other wireline carriers absent such intervention. Congress accordingly enacted section 251(c)(3) of the

Communications Act, which directs the FCC to ensure unbundled access to incumbent local exchange carriers' network facilities where an absence of such access would "impair" a competitor's ability to provide service. In the same vein, section 251(c)(6) grants competitors the right to "co-locate" equipment in incumbents' central offices to the extent necessary for interconnection or access to unbundled network elements. These examples illustrate the types of structural competitive barriers that will remain absent direct regulatory intervention.

2. Regulations That Limit Negative Externalities and Address Other Market Failures

A similar need for intervention arises where, notwithstanding the existence of competition, competitors impose negative externalities on third parties or other market failures occur. A textbook example of a negative externality is spectrum interference. Where one service provider's use of spectrum — say, to provide a wireless communications service — causes interference on other spectrum bands, the FCC must intervene to ensure that each licensee remains able to enjoy the full bundle of rights granted by an FCC license.

In other instances, the justification for intervention is not a negative externality, but a public policy goal defined by Congress that does not lend itself to a market-based solution. For example, Congress has mandated that manufacturers of telecommunications equipment and service providers ensure that their equipment and services be "accessible to and usable by individuals with disabilities, if readily achievable." Thus, while one could posit that market forces should determine the availability of such equipment and services to individuals with disabilities, Congress has determined that access for individuals with disabilities is too important to run the risk of market failure and general government intervention is necessary. Where these situations do arise the FCC should adopt a small number of simple rules to implement congressional intent while also allowing markets to operate as efficiently as possible.

3. Regulations Implementing Congressional Policies Unrelated to Competition

Of course, not everything the FCC does (or should do) relates to facilitating competition. The Communications Act sets forth various policy goals that are independent of — or even in tension with — competition policy. One

such goal entails the preservation and advancement of universal service support for consumers living in high-cost areas, for schools and libraries (the “e-rate” program), and for underserved areas such as Indian tribal lands. Congress has also called on the FCC to implement many other distinct policies: It enacted the Communications Assistance for Law Enforcement Act, or CALEA, to ensure that carriers cooperate with law enforcement investigations; it has acted to preserve video programming diversity by imposing public interest obligations on broadcasters and “must carry” requirements on cable and satellite operators, among other requirements; and it has enacted provisions to protect consumers from unauthorized changes in their long-distance service (“slamming”). In these cases, regardless of the role of market forces, the Commission has an obligation to carry out its statutory responsibilities.

III. We Should Ensure That Our Regulations Are Clear and Vigorously Enforced

Even a deregulator has to recognize that the FCC will continue to adopt a significant number of new rules in the foreseeable future. My goal is to ensure that these rules are as streamlined and clear as possible.

While an order’s length and complexity is not *necessarily* a vice, I do believe, for example, that efforts to micromanage every aspect of local communications competition is misguided. The FCC’s rules should address our core priorities — such as ensuring that incumbent telephone companies comply with the market-opening duties set forth in the Act — as concisely as possible. Our rules should not address every conceivable situation that may arise, particularly where Congress envisioned a system based on private negotiations, backed by mediation and arbitration before the state public utility commissions. Thus wherever possible I believe we should start with a discrete number of straight forward rules.

An important corollary of my preference for a regime with fewer, clearer rules is my belief that the FCC needs to place greater emphasis on enforcement of the basic rights afforded by the statute. We cannot rely on competition to allocate resources and maximize consumer welfare if particular entities are able to gain advantage by violating our rules with impunity. Penalties for such violations must be swiftly administered and sufficiently severe to deter anticompetitive conduct. Failure to engage in stringent enforcement breeds disrespect for the FCC’s authority and

undermines the agency's credibility.

Effective enforcement mechanisms also have the advantage of being narrowly tailored. As I have explained, relying on prescriptive rules to foster competition has the disadvantage of prohibiting conduct that may benefit consumers. In other words, fixed rules are by their nature overbroad. By relying more on enforcement mechanisms, the FCC can tailor its intervention to particular circumstances, thereby allowing markets to operate with minimal regulatory distortion.

To be sure, there is a tension between crafting more streamlined rules and beefing up our reliance on enforcement mechanisms: The same absence of granularity that makes a rule streamlined creates gray areas that make enforcement of unarticulated expectations unfair. I believe we can resolve this tension in large part by crafting our rules with enforcement in mind. Adopting such a mindset has two key components. First, where the FCC determines that fulfilling congressional provisions requires the agency to promulgate relatively complex and detailed rules, the agency should be prepared to commit the resources necessary to enforce every component of those rules. And second, where the FCC decides to adopt broad rules setting forth only general parameters, it must be prepared to accept a wide range of conduct, even if it conflicts with the agency's (or particular staff's) specific — and unarticulated — expectations.

As an initial matter, most statutory provisions can be implemented with a small number of concise rules, particularly if we bear in mind that a regulatory agency should not micromanage the conduct of the entities it regulates. Furthermore, a commitment to stringent enforcement should act as a check on any bureaucratic preference for complexity for its own sake: That is, the recognition that additional detail will lead to a vast increase in enforcement proceedings without any particular public interest benefit should provide an additional reason to question whether such detail is truly necessary.

On the other hand, an enforcement-based approach to rulemaking entails recognizing that broad rules require the agency to permit a broad range of conduct consistent with the new rules. In other words, where the FCC makes the judgment that an open-ended rule is appropriate, it must accept all practices that comply with the rule, even if those practices differ from the agency's own expectations. Again, the test is compliance with the rules.

Broad rules should not be treated as empty vessels to be filled in by subsequent staff policy preferences - or worse, ever-changing preferences based on staff turnover. For example, the Commission's rules require that AM, FM, and television broadcast stations maintain a "main studio." Leaving aside the question whether there is a sound reason to have such a rule, the rule itself is quite broad: It does not set forth any specific requirements as to when and by whom such main studio shall be staffed. However, the Enforcement Bureau fined a radio station for violating this rule because the studio was not staffed by its only full-time employee during lunch each weekday. While the Commission canceled this proposed forfeiture on review, it exemplifies the need for greater flexibility in enforcement of our rules when parties comply in good faith.

All this being said, most of the recent history of the newly created Enforcement Bureau has been positive. The Bureau handles formal complaints, occasionally on a "rocket docket" basis; offers a mediation program that has an increasingly high settlement rate; and conducts confidential investigations. While formal complaint proceedings still move too slowly, the Bureau has managed to diminish its backlog substantially. By negotiating substantial consent decrees — including a \$3 million decree with Verizon concerning its New York Section 271 application — and issuing relatively large forfeitures, the Bureau has taken important strides toward deterring anticompetitive conduct. I would like to see faster resolution of complaint proceedings and increased penalties for instances of willful violations of our rules, but I am greatly encouraged by the Bureau's direction.

IV. Government Must Be Humble in the Face of Rapid Change

Government must find new ways to adapt to the pace and complexity of issues presented by those companies operating in the technology sector. The FCC faces tremendous challenges as it attempts to manage the increasingly fast-paced telecommunications industry. The challenges we face today — E911 deployment, broadband access, the demand for 3G spectrum, the nature of the DTV transition — all were barely known four short years ago. The complexity and speed with which these issues arise and the FCC must respond further inform my approach to regulation. Thus my fourth basic regulatory principle is that government must be humble about what it "knows" and what it can achieve.

Government humility should manifest itself in two areas: (1) a reluctance to intervene where competitive forces are working, and (2) where intervention is required, an eagerness to reach out to a broad array of groups to maximize the information available. The FCC should be reluctant to intervene in the marketplace — particularly where emerging technologies are concerned — because government is a very poor predictor of the direction of industry and technology. For example, when the FCC licensed PCS it envisioned the wireless business as a highly segmented and localized operation amenable to small business preferences and set asides. As a result, the FCC auctioned off the nation’s airwaves in 493 small geographic segments, it set aside certain spectrum for small businesses, and it granted bidding credits and installment payments to other small entities. Unfortunately, government guessed exactly wrong: wireless turned out to be generally a national business with now six national megacarriers vying for the consumer dollar. The “small business” set-aside program combined with installment payments did not play out the way it was anticipated -- leaving bankruptcies and underutilized spectrum in its wake.

It is not that government is ill-intentioned or lacks intellectual capacity; rather, it is just extremely difficult to predict the twists and turns of the marketplace. In light of this fundamental difficulty, I believe government humbly should recognize its limits and exercise restraint based on the dangers of exceeding those limits. Of course, the FCC always should strive to attract talented and knowledgeable staff, and I applaud Chairman Powell’s efforts to recruit top-flight engineers, economists, and technologists. But there is little doubt that, even with a staff that is second to none, the FCC will not be able to predict how technologies will evolve and how the marketplace will adapt.

Government’s humility also must extend to the deliberative process itself. Government simply cannot replicate the knowledge base of those it regulates. Government in general, and the FCC in particular, should strive to create procedures that maximize the flow of information to and from the regulator. These procedures include a commitment to transparent information gathering and dissemination to all interested parties. On the government side of the ledger, the FCC can aid the information-gathering process through more open and transparent proceedings. More tangibly, the Commission should only reluctantly invoke its authority to make proceedings “restricted,” or closed to ex parte presentations. Correspondingly, the FCC should require that outside parties file more

comprehensive and meaningful notices of ex parte presentations, rather than the cursory filings that we routinely see today. Transparency also would be aided by an Internet docket-tracking system that would allow parties to learn the procedural status of a given draft Order (*i.e.*, whether the item is being considered in the Division, the Bureau front office, or by the commissioners). In the end, quality decisionmaking requires quality and timely information and the FCC must ensure that it maximizes its ability to obtain that information at every turn.

V. The FCC Is a Service-Based Organization

My fifth and final principle is that the FCC is a service-based organization and it should act like it. The American taxpayers — our bosses — should expect prompt and well-reasoned decisions from the agency. Similarly, the agency should manage its resources efficiently to maximize public benefits. Government should structure its operations and mission to achieve these goals.

The Commission too often has failed to deliver prompt decisions, which has resulted in public harm based purely on inaction. In many cases, as a businessperson I would have preferred an answer contrary to my regulatory position rather than no decision at all. As an economic matter, the uncertainty created by indecision is perhaps the most damaging and frustrating outcome conceivable.

For example, for the recently commercially-introduced satellite radio service, the Commission concluded in 1997 that the satellite companies would be permitted to deploy terrestrial repeaters – to repeat at stronger power the satellite signals in places such as urban canyons that may have had difficulty with the direct satellite signal. However the Commission for the past five years has failed to promulgate rules for these repeaters. In the interim, the satellite operators have launched their services and now rely on an extensive terrestrial repeater network that causes significant interference to the adjacent WCS licensees. But without rules the satellite companies had no guidance on deployment and they needed to get into the marketplace as quickly as possible. The resulting mess – which is pending before us today – can be traced directly to the lack of Commission action for all those years when the WCS and satellite companies business plans could still have been altered without significant disruption. We must do better.

In an effort to enhance our quality of service, I will strongly encourage the Commission to develop a docket management tracking system that ensures decisions do not “fall through the cracks.” I have also been working with the General Counsel’s office on the use of short form orders to deal with repetitive pleadings. I think the Commission also would benefit from exploring ways for petitions for reconsideration to be systematically addressed in a more prompt fashion. For example, I would favor time limits or a system whereby petitions for reconsideration pending longer than some predetermined period of time — perhaps six or nine months — are deemed denied. The irony of much of the backlog is that the pending decisions are often completely insignificant (*i.e.*, a petitioner raises the same argument that has been rejected by the Bureau twice and the Commission once) and justifiably were placed at the bottom of the “to do” box. Unfortunately, however, our decisions on these matters are often conditions precedent to judicial review. Over time, reducing the backlog soaks up vast Commission resources as years-old orders are reviewed and reanalyzed often long after meaningful relief is even available. Some presumptive rules and more effective tracking should greatly enhance our ability to be a more responsive agency.

In order to help deliver on the promise of prompt decisions, the agency also must focus its energy on its core mission and competencies.

In assessing which problems to tackle, the FCC first should funnel its resources to those areas where the Commission occupies the field. For example, no other entity is responsible for preventing harmful radio interference to licensed radio services; the Commission therefore should fully fund those efforts. In contrast, the FCC should be reluctant to interfere in areas such as advertising regulation, where state and other federal government entities have the jurisdiction, expertise and resources to respond. Nor should the FCC exhaustively duplicate the analysis of competitive issues undertaken by the Justice Department or Federal Trade Commission in merger proceedings; the FCC instead should focus on communications-specific issues within its core competency.

Finally, the FCC also should look to private-sector efforts that achieve public interest goals without FCC funds. For example, for almost 20 years the United States Telecommunications Training Institute (USTTI) has been offering significant training opportunities to telecommunications professionals in the developing world. To date, USTTI has trained

approximately 6,000 graduates from 162 countries around the globe. As a Commissioner, I hope to encourage the FCC to work cooperatively with nonprofits like USTTI to achieve common goals and to avoid duplicating their fine efforts. The Commission should always explore the availability of private sector solutions that will allow the agency to more specifically focus its resources on its core mission.

Conclusion

Public service is a tremendous privilege. That privilege has corresponding responsibilities. The President selected me to execute those responsibilities consistent with my principles — which I believe reflect his policy goals as well. The agency faces immense challenges and the rapid pace of technological change only serve to exacerbate their impact. However, as in all difficult things, the agency should strive to establish and maintain core consistent guideposts along the policy path. For me, there are at least five such guideposts: (1) the Commission’s derives its mission first and foremost from the statute; (2) within the confines of the statute, the FCC should defer to markets first and opt for regulatory intervention only when truly necessary; (3) we must promulgate clear and enforceable rules and ensure that they are followed; (4) government must be humble about what it “knows” and what it can achieve; and (5) the FCC should be a service-based organization. In the years ahead, the policy issues will no doubt evolve and the marketplace will be transformed. My hope is that these principles will survive intact.

That concludes my formal remarks I will be happy to take any questions.
