Update from Washington

Bloomberg Telecom Day
Remarks of Commissioner Kathleen Q. Abernathy
New York, NY -- March 6, 2002

As prepared for delivery.

Thank you for this opportunity to visit with you this morning – my remarks today are designed to provide an overview of a few of the hot communications policy topics in Washington that are likely to keep us occupied at the FCC over the next year. My remarks obviously are not comprehensive or I would be here for many hours. But one notable exception that I should quickly mention is our Homeland Security effort. We take very seriously our obligation to ensure network security through redundancy and diversity. And we are also committed to ensuring adequate spectrum is available to public safety. But what I will focus on today are those proceedings that have a more direct impact on the capital community.

FIRST BROADBAND -- Broadband is one of the dominant policy issues we face at the Commission. I know you are all well aware of the debate in Congress over Tauzin-Dingell and last week's vote in the House – and although the Commission's broadband debate may be less dramatic and is certainly lower profile – the issues are at least equally complex.

Before I discuss the details of our pending broadband proceedings – let me also be clear about my goals as an FCC Commissioner – I have worked for CLECs and ILECs, wireless companies and satellite corporations – and I believe we have an obligation to develop policies that foster intermodal as well as intramodal competition.

Today we effectively have two major platforms providing broadband service – cable and telephone. Each, however, suffers from some technological limitations. And each has significant and distinct regulatory obligations. As I look at this market and consider its importance to consumers, I believe one of the FCC's goals should be facilitating the development of third and fourth broadband consumer "pipes." I also believe that wireless and satellites services offer significant promise as complementary and competitive broadband providers.

On the WIRELESS SIDE, there are two potential broadband avenues – fixed and mobile. With regard to fixed, the technology continues to evolve so that someday soon we will see additional capacity and operational flexibility in our current fixed wireless allocations. We also hope to continue to see the development of new non-line of sight broadband applications in the MMDS and ITFS bands. And similar fixed broadband deployment is likely to occur in the unlicensed wireless bands as well.

Meanwhile mobile wireless technologies are becoming an increasingly viable broadband provider. Third generation wireless technologies offer significant promise – and the Commission is increasingly committed to providing additional spectrum for these services. Within the year, we will conclude our so-called 3G proceeding that will allocate additional spectrum for mobile wireless applications. We are also scheduled to auction television channels 60-69 and 52-59 during the year and this will provide additional spectrum. In general the future licensees in these bands will be given significant flexibility to provide the types of services they deem the most valuable – so long as they do not interfere with other licensees' ability to utilize their rights.

And we must not forget that satellite technologies also offer promise as a broadband alternative. Satellites' unique ability to offer ubiquitous coverage means that – once launched and operational --- they can immediately offer a variety of services,

including broadband, to the most rural and underserved areas of the country. Today's satellite systems appear to offer competitive data speeds. And future generation satellites are likely to improve on this performance. In my view, the Commission must continue to develop regulatory policies that do not stand in the way of these new technologies – including speedier licensing proceedings, strict enforcement of milestones, and more rapid rulemakings. Our current licensing rules can mean that for some systems it can literally take ten years from the day a satellite entrepreneur walks in the door at the FCC with an idea – until they can walk out with a satellite license. This is simply unacceptable – particularly in today's fast-moving marketplace. Another area for regulatory improvement is enforcement of milestones. In the past the Commission has been somewhat lax on enforcement of these construction benchmarks – as a result, satellite spectrum squatters have had years of spectrum rights without ever constructing a system – only to have the spectrum returned to the agency years later without a single American consumer receiving service. We have recently initiated a rulemaking to examine how we license and monitor satellite services – and hopefully these reforms will assist in getting new satellites deployed and offering services to the American people more quickly - thus leading to the development of another alternative broadband platform.

In addition to encouraging intermodal competition – I also want to bring you up to speed on some of the issues we are looking at intramodally -- for the two current dominant broadband players: cable and telephony. Each group is saddled with fairly detailed and asymmetrical regulatory regimes. The new landscape that allows for voice and data competition across platforms has created some extremely difficult yet fundamental questions about the regulatory classifications of each – and the Commission will be tackling some of those tough issues in the year ahead. These proceedings have received significant attention over the past few weeks – and justifiably so – because these are very important

proceedings. But I believe the Commission has an obligation to examine these very tough questions – because failure to do so could undermine the competitive engines that will drive the new economy. With that context – let me talk specifically about a few of the big-ticket dockets --

In February, the Commission released an NPRM that asks important questions about the regulation of high-speed Internet access services offered by local telephone companies. The Notice tentatively concludes that wireline broadband Internet access services are information services, rather than telecommunications services. If ultimately adopted, this conclusion would mean that Title II Common Carrier regulations would not apply to such Internet access services, or would apply only in part. It is noteworthy, however, that almost all Internet access services — such as those provided by America Online or cable modem providers — *already* are free from Title II regulation. I recognize that our Notice tees up some very complex, politically sensitive issues but we must not refrain from asking the questions out of fear we might have to make some hard decisions. My private sector experiences taught me how important it is to have regulatory certainty to facilitate consistent capital support. Ultimately the marketplace will be better served because we have faced these questions and answered them.

Another key issue outlined in the Broadband NPRM concerns the current unbundling rules that apply to incumbent LECs' information services. Existing rules require ILECs to make available to independent ISPs, on nondiscriminatory terms and conditions, the telecommunications pipe underlying the ILECs' information services. We are now seeking comment on whether these rules should be modified in light of recent competitive and technological developments.

This docket is also examining whether to assess universal service charges based not only on the provisioning of "telecommunications

services" to end users — as we do now — but also on the self-provisioning of the "telecommunications" component of Internet access services. This is a complicated yet critical issue because, right now, incumbent LECs contribute to universal service based on the assumption that there is a distinct telecommunications service embedded in their provision of DSL Internet access. If we rule that broadband Internet access services contain only a telecommunications component — and no separate telecommunications service — that would have a profound impact on the contribution base if we do not also begin assessing contribution obligations on the self-provisioning of telecommunications. So we have also sought comment on whether to assess such contribution obligations on cable operators and others that provide broadband services that ride over a telecommunications functionality. Once again the question is how to adapt our regulatory policies to an evolving marketplace – while maintaining critical policy goals like universal service.

In addition to our wireline broadband proceeding, the Commission is also examining broadband policy from the cable perspective. Next week we are likely to release our cable modem proceeding item and it addresses the regulatory classification issues for broadband provided over the cable platform. The Commission must define whether cable modem services are information services, cable services, or telecommunications services under the Communications Act. It also must determine the regulatory consequences of that classification, just as it must for DSL providers.

We also have a pending Triennial UNE Review. The Commission launched this major proceeding in December to take a fresh look at our requirements concerning unbundled network elements. The NPRM seeks comment on the appropriate application of the statutory "necessary" and "impair" standards, which guide us in

determining the particular elements that ILECs must make available to CLECs. It also seeks comment on alternative approaches to regulating facilities used to provide broadband telecommunications — including whether an alternative to TELRIC pricing might be appropriate for newly deployed fiber-optic facilities.

This proceeding challenges us to balance two competing statutory objectives. On the one hand, the Act requires the FCC to ensure there is nondiscriminatory access to facilities that new entrants need to provide service. On the other hand, both the impairment clause regarding UNEs and the congressional directive to spur broadband deployment recognize that too much regulation may stifle investment incentives.

It is too early to say exactly how we will strike this balance. But we have indicated that we are considering taking a more granular approach to the analysis than in the past. What this means is that, rather than adopting all-or-nothing rules concerning elements such as switching and interoffice transport, we might decide to impose unbundling obligations in some markets, but not in others, depending on the particular competitive characteristics that are present.

Now let's move on to another topic near and dear to our hearts, Universal Service. As I mentioned before, one of the challenges we face as an agency is to adapt new market realities and technologies to continuing policy directives like universal service. The Commission has therefore launched several important proceedings that examine these issues.

Perhaps most importantly, the Commission is examining the methodology for collecting contributions to the federal support mechanisms. We have sought comment on a proposal by long distance carriers and business users to switch from a revenue-based assessment to a flat per-line charge of $1 for residential wireline

and wireless connections. Business contributions would be set in proportion to the capacity of the connection. I haven't decided yet whether to support this proposal and that is why we are seeking comment. I have concluded, however, that our existing contribution methodology is not sustainable over the long term. With rapidly declining long distance revenues – due to competition from wireless substitution and vigorous competition among the long distance providers themselves -- and the eventual migration from stand-alone telecommunications services to an information service platform that has only a telecommunications component, a methodology based on revenues from interstate telecommunications services appears outdated. As chairperson of the joint board on universal service, I have already begun discussing this issue with my colleagues and I look forward to their continued involvement in addressing these problems.

Believe it or not there are several other issues pending besides broadband. For example, later this year we will decide whether or not to grant satellite providers flexibility to utilize terrestrial spectrum for ancillary use. Recall that under the ORBIT act the Commission is barred from auctioning off spectrum used for international satellite services. So now the auction-exempt satellite providers are seeking permission to put up terrestrial facilities to fill in gaps in satellite coverage in urban and other "hard to reach" areas. Not surprisingly the traditional terrestrial service providers have cried foul – because they must pay for their spectrum – and would like access to the terrestrial component of the satellite spectrum for 3G. For me the critical question will be whether sharing between satellite and a third party terrestrial service is possible. If sharing is not possible, then the public policy choice is to let the spectrum lie fallow (not very appealing) or to allow the satellite providers to use it.

Another major spectrum proceeding will look at the possibility of creating additional flexibility in the secondary spectrum market.

Today licensees are subject to a forty-year old legal test (Intermountain Microwave) to assess whether a spectrum leasing arrangement amounts to a legal transfer of control that requires Commission approval. We are looking at this issue on two tracks . . . first whether to overhaul Intermountain to allow a greater degree of flexibility in leasing arrangements that do not amount to transfers of control – and second, whether we can do anything to speed approvals of transfers of control (via lease or sale) that do not raise competitive concerns. Taken together, these policies together will hopefully provide for a more vigorous secondary market in commercial spectrum and allow spectrum to get into the hands of those that will use it most productively.

One other spectrum issue that looms large this week is the continuing Nextwave controversy. Obviously the Supreme Court's decision this week to grant cert will mean another round of legal wrangling before a final (I hope) judicial resolution of this odyssey.

Finally, I would also like to touch briefly on some of the media issues that are likely to garner significant attention in the coming months. As many of you may know, the Commission has had a rough few months in the Court of Appeals – and that less-than-stellar record, combined with significant market and technological change – make a number of our structural media rules ripe for modification in the coming year.

The Commission recently issued several Notice of Proposed Rulemakings addressing our ownership rules. First, we have an NPRM looking at whether our newspaper/broadcast cross-ownership rule continues to be "necessary in the public interest as a result of competition." The NPRM notes the changes in the local marketplace since the rule was adopted in 1975. Today there are fewer daily newspapers, but an increase in number of radio stations, television stations, television networks, cable television systems, satellite carriers, and weekly newspapers. In addition, the

Internet is now available. Although the number of media outlets has grown, so has concentration in ownership. The NPRM seeks comment on the relevance of the changes in the marketplace and the relevance of consolidation to the continued need for the rule.

The Commission also has an outstanding NPRM that reconsiders our cable horizontal and vertical ownership limits. In order to enhance effective competition, Congress required the Commission to establish reasonable limits on the number of cable subscribers a cable provider is authorized to reach through its owned or attributable systems. The horizontal limit adopted by the Commission barred a cable operator from having an attributable interest in more than 30% of nationwide subscribers to multi-channel video programming providers. The vertical limit barred a cable operator from carrying attributable programming on more than 40% of channels up to 75 channels of capacity. The D.C. Circuit Court of Appeals remanded the rules to the Commission, finding that the limits interfere with cable operators' speech and that the Commission failed to meet its burden to justify this interference. The D.C. Circuit held that the Commission did not establish record evidence to support the limits, did not draw the necessary connection between the limits established and the alleged harms of concentration and integration that the limits were designed to address, and did not take into account the market conditions of a changing industry. The D.C. Circuit also stated that the principle objective of the statute was to foster competition and the agency could not rely on diversity alone to justify its rules. Other than that I think the court really loved our Order. Anyway, our recent NPRM seeks comment and empirical evidence on which to base the formation of new rules.

In November 2001, the Commission also issued an NPRM to look at our local radio ownership rules. The Act directed the Commission to revise its regulations to provide new limits on the number of radio stations a party may own, operate or control in

certain size markets. While this NPRM is pending, we are processing the pending radio merger applications in accordance with existing precedent. If the Commission determines, however, to set an application for hearing, the parties will have the option not to go to hearing and instead wait for the Commission to conclude its rulemaking.

And of course I should touch on last week's decision by the U.S. Court of Appeals in *Fox v. FCC*. The Court held that the Commission's decision not to modify its national television station ownership and the cable/broadcast cross-ownership rules was arbitrary and capricious. The national television ownership rule prohibits one entity from controlling stations with a combined reach in excess of 35% of television households. The cable/broadcast cross-ownership rule prohibits a cable television system from carrying the signal of any television broadcast station if the system owns a broadcast station in the same local market. The court remanded the television ownership rule to the Commission for further consideration and vacated the cable/broadcast cross ownership rule because it found it unlikely that the Commission will be able to come up with any legitimate justification to retain it. Perhaps the most far reaching aspect of the Court's decision was its interpretation of the Commission's obligations under our biennial review statute. According to the court, our broadcast biennial review statute "carries with it a presumption in favor or repealing or modifying the ownership rules." The Court concluded that the Commission may retain a rule only if it reasonably determines that the rule is 'necessary in the public interest." This analysis may have far reaching consequences because we have similar biennial review obligations for other sectors.

So that is our plate for the coming year – and it looks to be a busy one. I would be happy to take any questions . . . .