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Keynote Address of FCC Commissioner Kathleen Q. Abernathy
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As Prepared for Delivery.

Good morning. I can't tell you what a thrill it is for me to return to my alma mater as a keynote speaker.

Since this is my first appearance at this conference, and I am a relatively new commissioner, I thought it would be helpful if I outlined my basic approach as a regulator, and then I will discuss how that approach might apply to some of the major issues that are pending before the FCC.

I have developed five core principles to guide my actions in office. I described these principles at length in a recent article in the Federal Communications Law Journal, which you are welcome to read if you want a more detailed account. But let me provide the CliffsNotes ® version for you.

1. First, Congress sets the FCC's agenda in the Communications Act, and our job is to implement the statute, not to pursue our own policy preferences. This may sound uncontroversial, but it has not always been followed by previous commissions. A commissioner may have many good ideas about how to pursue the public interest, but if the policy preferences set forth in the statute point in a different direction, the commissioner's own views must yield. The key fact underpinning this principle is that we are appointed, rather than elected officials. Congress is directly accountable to the voters, and, as such, it is entitled to make the top-level choices about how to direct our national communications policy.

I also believe that our priorities and agenda should be determined to the extent possible by reference to the statute. Congress, in a number of instances, has established clear mandates for the FCC to act, sometimes even on a fixed timetable. Where the statute provides that we ***shall*** take a certain action, I believe that we should concentrate on fulfilling such mandates before taking action within the many areas where Congress granted us discretionary authority — in other words, where the statute says we ***may*** do something.

The FCC has damaged its credibility and prestige on occasion by focusing on discretionary acts to the detriment of implementing statutory mandates. For example, at a time when the agency was overwhelmed with mandatory proceedings arising from the 1996 Act, the FCC spent a considerable amount of time exploring a proposal to compel broadcast networks to provide free advertising time to political candidates. Devoting resources to the pursuit of such a proposal should occur only to the extent that it does not burden or interfere with the fulfillment of Congress's express statutory directions.

2. My second core principle is that, where the Act *does* give us discretion, we should rely wherever possible on market forces, rather than prescriptive regulation. I generally favor

market-based solutions over regulatory intervention because unfettered competition is the best tool we have to deliver benefits to consumers. Regulation of course is necessary in some circumstances — for example, to eliminate structural entry barriers or to achieve congressional policies such as universal service that are unrelated to competition — but in most cases consumers would be better served if regulators intervened in the marketplace only in limited, narrowly targeted ways. A competitive market unimpeded by regulatory distortions delivers to consumers the benefits of improved services, lower prices, more innovation, and more choice.

Many times, regulators are concerned about the potential exercise of market power or other threats to competition, and with the best of intentions they impose safeguards designed to protect consumers. In my view, however, regulators too often disregard the inevitable unintended consequences associated with regulation — as well as compliance costs that sometimes outweigh the purported benefits. In addition, this requires designing regulations around what might happen. Thus, I am circumspect when advocates come to the FCC proposing new regulations. I want to make sure that intervention in the market is truly necessary, because I know that such intervention inevitably distorts the marketplace and may sacrifice efficiency and innovation.

3. My third principle is that we should regulate with enforcement in mind. This means adopting a small number of clearly written rules and enforcing them vigorously.

Despite our general efforts to deregulate portions of the communications industry, the FCC will continue to adopt a significant number of new rules in the foreseeable future. My goal is that these rules be as streamlined and clear as possible to advance the public interest.

I was often frustrated in private practice when I encountered needlessly complex rules that were difficult even for experts to decipher. The FCC's rules should address our core priorities in a concise manner. Our rules should not attempt to address every conceivable situation that may arise, because an overly complex set of rules will prompt companies to spend more time complying with regulations than focusing on ways to deliver value to consumers.

Now, assuming we move toward greater clarity, it 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 must be 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. This is much like raising a child. If there is no cost associated with violating a rule, then the rule is meaningless.

Effective enforcement mechanisms also have the advantage of being narrowly tailored. As I previously stated, 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.

I do recognize that a tension exists between crafting more streamlined rules and beefing up our reliance on enforcement mechanisms: The same absence of detail that can make 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. What I mean by this is that we should write rules that establish clear expectations, and we should strictly enforce those expectation. But where we have chosen to adopt broad provisions setting forth only general parameters, we must be prepared to accept a broad range of conduct that satisfies the general intent of such rules. We cannot insist on strict compliance with expectations that exist only in the minds of the regulatory staff — and not within the four corners of the rule itself.

4. The fourth principle is that the FCC needs to be humble and recognize the limits of what it knows and can achieve, particularly during this time of rapid technological change. The communications industry is perhaps the most technologically advanced sector of our economy. Regulators cannot keep up with the myriad developments and innovations by the thousands of communications providers. For example, we cannot know all the latest research on packet-switching technology or spectrum re-use. But we ***can*** put structures in place that maximize the information available to the agency in charting its regulatory course.

We need to reach out as broadly as possible to improve the flow of information into the Commission. We need to reach out to consumers, licensees and other regulated entities, trade associations, and the Bar. To this end, I believe the Commission should only reluctantly invoke its authority to make proceedings restricted. I have found, based on my experiences at the Commission and in the private sector, that ex parte meetings are critical to ensuring a full understanding of all the relevant issues.

5. Finally, the FCC is a service-based organization and should act like it. Regulated entities and all consumers generally are our customers. We should strive to provide you with the same high level of service as a for-profit business would. Our customers deserve prompt, well-informed answers to regulatory inquiries. We owe you quality process, even if we can't always give you the substantive answers you seek.

When I was in the private sector, long delays were what I worried about most. Even if I got an adverse decision, at least my company or client could move forward and revise its business strategy as appropriate. It was regulatory uncertainty that was the most damaging and frustrating. Based on that experience, I will do everything in my power to push the Commission to deliver answers as promptly as possible.

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Now that I have described my regulatory philosophy in general terms, let me provide a few examples of how these principles might apply to the various proceedings that come before the FCC.

I'll begin with an example I like to cite as a model of how regulation should work, and that's the FCC's regulation of wireless telecommunications services. The wireless market has six nationwide competitors and dozens of regional and niche providers, and consumers reap the

benefits — more than 90% of Americans have a choice of three or more providers, and consumers enjoy declining prices, improving service quality, and a high degree of innovation.

The FCC obviously can't take all the credit for this success story, but regulators did succeed in creating policies that allowed competition to flourish while also intervening in narrowly tailored ways to achieve important public policy goals. When Congress passed Section 332 of the Communications Act in 1993 providing for federal oversight of the wireless industry, the Commission was at a key crossroads: It could have imposed strict Title II common carrier regulations on incumbent cellular providers, based on their supposed entrenchment. That is, the FCC could have imposed price regulation, service quality controls, mandated certain technologies, or required carriers to file tariffs based on cost studies. But the FCC instead let go of the reins and relied on market forces to govern pricing and service terms for PCS and other mobile services.

This is not to say, however, that there was no regulatory intervention. The FCC continued to place additional spectrum into the marketplace — and with each new license the FCC granted it created another wireless last mile to compete with existing providers. Included in this policy was a spectrum cap that guaranteed, at least initially, that there would be a minimum of four distinct providers in each market. The Commission also developed and enforced strict interference rules that prevented companies from externalizing costs by interfering with their competitors.

So while the approach to wireless was largely deregulatory, the Commission also engaged in limited intervention to ensure, for example, that there was a diversity of providers of the "last wireless mile" and to prevent competitors from externalizing costs onto one another or consumers. In sum, the wireless experience illustrates how Commission policy ought to work: We establish policies that encourage entry into the marketplace; firms compete with one another based on price and service quality; and consumers make choices that maximize their welfare. In the end, some firms succeed while others fail, and it is the role of regulators to referee between carriers and consumers and among providers — not to pick winners and losers.

Another issue I would like to discuss this morning is the appropriate regulatory framework for broadband Internet access services.

When you examine the broadband marketplace, in many respects we are at the same kind of crossroads now that the Commission faced with wireless in 1993. We could subject broadband Internet access services to the full panoply of Title II common carrier regulations, or we could opt for a more flexible approach under Title I.

I want to emphasize that I am guided in this debate first and foremost by the text of the Communications Act. I believe that the most faithful interpretation of the Act places broadband Internet access services — whether provided over a cable or wireline telephone platform — in the category of information services, as opposed to telecommunications services or cable services. This legal interpretation results in a more relaxed regulatory framework for broadband services than would apply if broadband services were classified as Title II telecommunications services.

But apart from the legal question of how to interpret the statute, there are important policy reasons for favoring an information services classification for broadband Internet access services. This is an instance where I am influenced by my general preference for market forces, and where I find the wireless experience particularly instructive. Just as the Commission was urged to impose Title II common carrier regulations on PCS providers, we are being urged by some advocates to regulate all broadband providers under Title II. These advocates focus on the purported benefits of a common carrier regime, primarily that it would enable multiple providers to share the incumbent's network facilities at regulated rates.

But common carrier regulation imposes substantial costs, as well. One need only look at the experience under the 1996 Act to understand that implementing a forced sharing regime exacts a huge toll in terms of the resources devoted to hammering out the terms and conditions on which the network will be shared. As Justice Breyer noted in *AT&T v. Iowa Utilities Board*, "Even the simplest kind of compelled sharing . . . means that someone must oversee the terms and conditions of that sharing." He further noted that "a sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor."[i] Particularly when we are considering a nascent market like the one for broadband Internet access, we need to consider the impact of such costs and diminished investment incentives and whether it is even necessary from a competitive perspective. This is not to say that there should be no regulation at all, but the fact that we are dealing with an emerging market does favor the more flexible regime of Title I than the heavy-handed regulation associated with Title II.

I don't know whether imposing common carrier regulation on the broadband marketplace would stymie competition and deployment altogether, but I do believe that there is a significant risk that excessive regulation would create a drag on investment and ultimately harm consumer welfare. In contrast, by showing regulatory restraint, I believe we will help unleash competitive forces and innovation that ultimately will deliver great benefits to consumers.

As a final example, I'd like to comment on the FCC's pending proceedings concerning the establishment of national performance measurements for incumbent LEC provisioning of unbundled network elements and special access circuits. This proceeding is exploring whether the FCC should impose specific metrics to govern the wholesale provision of facilities and services by ILECs — including such matters as the ordering process, service order accuracy, and repair and maintenance performance.

This issue presents a tension between some of my guiding principles. On the one hand, I generally do not want to micromanage the relationships between ILECs and CLECs, because the Act established a system of private negotiations and, as I have explained, I believe that heavy-handed regulation often does more harm than good.

On the other hand, I am a strong proponent of writing clear rules and enforcing them stringently, and it may be the case that we are hampered in our ability to detect and punish discrimination by ILECs because our existing rules are vague and therefore difficult to enforce. Thus, my interest in vigorous enforcement might prompt me to support adopting a small number

of national performance metrics to ensure the faithful implementation of the key statutory provisions in section 251 of the Act.

I do not know at this point exactly how I will balance these competing objectives, but I do find it helpful to have guiding principles to help me think through the various arguments. By adhering to these principles throughout my tenure at the FCC, I hope to make decisions that will maximize consumer welfare.

Thank you very much for the opportunity to speak with you today. I would be happy to answer a few questions.

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[i] *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 753 (1999) (Breyer, J., concurring).