Bringing Regulatory Certainty to the Broadband Arena

Remarks of FCC Commissioner Kathleen Q. Abernathy
Alliance for Public Technology and High-Tech Broadband Coalition
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Thank you very much for giving me this opportunity to speak with you about the FCC's broadband policy initiatives. I will begin by providing a brief overview of the major proceedings pending at the FCC, and then I will discuss the core principles that will guide my decisionmaking in these matters.

Pending Proceedings Relating to Broadband Regulation

First, the Commission is taking steps to bring regulatory certainty to the classification of broadband Internet access services. Until recently, there was a longstanding dispute over the appropriate classification of cable modem services. Different courts of appeals had offered divergent views on this question. In March, we issued a declaratory ruling establishing that cable modem service is an information service under the Communications Act, rather than a cable service or a telecommunications service. That means it is not subject to the common carrier provisions in Title II of the Act or the cable regulations in Title VI.

We issued a notice of proposed rulemaking in conjunction with the declaratory ruling seeking comment on the regulatory implications of our information-service classification. For example, we sought comment on the scope of local franchising authorities' jurisdiction over interstate information services. We also asked whether the FCC should regulate access arrangements between cable operators and unaffiliated ISPs.

On the wireline telephony side, we have adopted a tentative conclusion that wireline broadband Internet access services — such as DSL-based services — are information services. The Commission is currently considering parties' comments on the appropriate classification of DSL Internet access as well as the regulatory implications of our classification. For example, we are considering whether to modify the access and nondiscrimination requirements known as *Computer II* and *Computer III*, and we are considering how our statutory classification would affect our assessment of universal service contributions.

I want to emphasize the fact that the Cable Modem Ruling and NPRM, on the one hand, and the Wireline Broadband NPRM, on the other, contain almost identical interpretations of the statute. After years of placing services in different buckets based on their legacy classifications, I am pleased that we have embarked on a path that focuses on the nature of the service being provided, rather than the identity of the provider. We haven't figured out every piece of the puzzle yet, but I believe that classifying all broadband Internet access services under Title I of the Act would not only represent the best reading of the Act, but also lead to increased harmonization of our regulatory approach to each service. As I'll discuss further in a moment, I

also believe that a Title I approach has the benefit of allowing the Commission to adopt a flexible and narrowly targeted regulatory regime, rather than the heavy-handed approach associated with common carrier regulation under Title II.

In a separate proceeding, known as the "Dom/Nondom proceeding," we are considering whether broadband transmission services provided by incumbent LECs should be regulated as dominant or nondominant. In some respects, this proceeding has been overtaken by the DSL classification proceeding I just described, because if we rule that wireline broadband Internet access service is a Title I service, rather than a Title II service, then the concept of dominant carrier regulation will be moot for the most part. But incumbent LECs provide broadband transmission services apart from their provision of Internet access services, and the Dom/Nondom proceeding should determine the extent to which those broadband transmission services are subject to dominant carrier regulation.

Lastly, our pending Triennial UNE Review proceeding raises a number of important regulatory issues concerning broadband services. While the NPRM focuses generally on incumbent LECs' network facilities, rather than particular services, it specifically sought comment on the appropriate regulatory approach to facilities used to provide broadband services. This proceeding has obviously been complicated by the recent D.C. Circuit decision remanding our previous unbundling order. The court held that the Commission failed to justify its national, all-or-nothing unbundling rules and failed to justify other aspects of the rules. We are still evaluating the implications of the court's decision and considering appellate options. But it seems clear that the unbundling proceeding, which already was enormously complex, presents an even greater challenge in the wake of the court decision.

Guiding Principles for Broadband Regulation

Because all of these proceedings remain pending, I can't tell how precisely what positions I will take. But I can tell you about the basic principles that will guide my decisionmaking in this arena.

1. **Promoting Regulatory Certainty.** One of my primary goals when I took office was to increase regulatory certainty. That goal prompted my strong support for the Commission's efforts to clarify the regulatory regime that applies the provision of broadband services. I believe that one of the most important steps we can take to encourage the deployment of broadband services — consistent with the mandate in section 706 of the Act — is to bring clarity and stability to the regulatory environment. Some have criticized the Commission's broadband proceedings as *reducing* regulatory certainty, but it is important to keep in mind that the question of how to classify cable modem services had been raised in numerous proceedings before the FCC and in the courts over the past several years. In fact, our failure to resolve the question led to divergent rulings in the courts of appeals. Worse, it prevented broadband providers from developing business plans and investing capital with an understanding of the rules of the road. For example, it was unclear whether an access arrangement with a third-party ISP would turn the cable operator into a common carrier subject to Title II, or whether instead such an arrangement would be considered private carriage. By the same token, the question whether DSL Internet access is an information service or a telecommunications service has

prevented the Commission from resolving regulatory disputes and carriers from making investments with an understanding of the rules that will apply.

2. **Adhering to the Statute.** Another core principle that has been highly relevant to these broadband proceedings is my belief that the FCC's primary duty is to implement the policies set forth in the Communications Act, rather than to follow the policy preferences of individual commissioners. My support for classifying broadband Internet access services as information services stems from my view that this is the most faithful and straightforward reading of the statute. The Act draws a distinction between a "telecommunications service," which entails the transmission of information for a fee directly to the public, and an "information service," which involves the manipulation of information *via telecommunications*. In essence, telecommunications services offer pure transmission, or a dumb pipe, whereas information services offer a bundle of transmission *plus* information processing. Our precedents have always made clear that the categories of information services and telecommunications services are mutually exclusive. Thus, since it seems incontrovertible that Internet access services entail the manipulation of information, and not simply pure transmission, it follows that these services are information services with a telecommunications *component*, and they do not include a distinct telecommunications *service*.

3. **Relying on Market Forces Where Possible.** A third guiding principle is my preference for relying on market forces instead of prescriptive regulation where the statute grants us discretion to do so and markets are generally working. This preference becomes even stronger when applied to a nascent platform such as broadband.

The reason I generally favor market-based solutions over prescriptive regulation is that 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 many 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 they impose safeguards designed to protect consumers. In my view, however, regulators too often fail to consider the unintended consequences associated with regulation and downplay costs that sometimes outweigh the purported benefits. The core flaw in the previous Commission's unbundling rules, according to the D.C. Circuit, was the Commission's singleminded focus on the *benefits* of unbundling without regard for the costs. Without getting into whether that is a fair characterization of the order on review, it is clear that we need to be circumspect when it comes to imposing new broadband 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.

My concerns about regulatory distortion are more urgent where we are dealing with a nascent market and a nascent technological platform. When a market is just emerging, there is a heightened risk that overregulation will stifle the deployment of new facilities and innovation

and thereby prevent the market from fully developing. In the long term, consumers benefit most when a facilities-based competitor enters the market and disrupts the status quo. If our regulations are not conducive to the kinds of investment necessary to launch new platforms and services, we will deprive consumers of the benefits associated with price and service competition.

In contrast, the FCC's approach to cellular and PCS services has been a great success story and for me offers a model of how FCC regulation should work. The wireless market has six nationwide competitors and dozens of regional and niche providers. Consumers reap the benefits of this robust competition — 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 in 1993, 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, it 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 that there was no regulatory intervention. The FCC ensured a diversity of providers through its spectrum cap and it established strict interference rules to prevent competitors from externalizing their costs. The policy overall was deregulatory, but the Commission intervened in the market in limited ways to address threats to competition and consumers.

The lessons offered by our experiences with PCS services are invaluable as we stand at a new crossroads concerning the regulation of broadband Internet access services. 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. As I stated earlier, I am guided in this debate first and foremost by the text of the Communications Act, which strongly supports an information services classification. But I also believe that, from a policy standpoint, a Title I classification has substantial merit. By ruling that broadband Internet access services do not involve the provision of a distinct telecommunications service, we are freed from the confines of having to apply the full panoply of common carrier regulation.

While some argue that common carrier regulations should be imposed to ensure that all Internet service providers can share the network owners' facilities at regulated rates, it is important to recognize the substantial costs of such regulation, 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. 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 they in turn produce.

A critical consideration for me is that we are not faced with a choice of common carrier regulation or *no regulation at all* for facilities-based broadband Internet service providers, whether they be incumbent LECs or cable operators. When it comes to the ability of independent ISPs to obtain access to wireline or cable facilities, the Commission has the authority to adopt a narrowly tailored regulatory regime under Title I of the Act if such regulation proves necessary. We have sought comment on whether to impose access obligations on cable operators, and whether to maintain our existing *Computer Inquiry* nondiscrimination rules on the wireline side. For me, the answer to these questions hinges mainly on whether the network owners have market power and whether they will be able to exercise it to the detriment of consumers. In other words, is there a market failure? Unless we have legitimate reasons to believe that a market failure exists, we should not subject a nascent platform to regulation.

Let me close by emphasizing that it is extremely difficult to determine the proper role for regulators with respect to broadband services. We are forced to balance competing objectives. On the one hand, we must ensure that providers with market power cannot exercise that power to the detriment of competition and consumers. On the other hand, we must ensure that any safeguards we devise to deal with this threat don't impose costs that outweigh their benefits. We are working hard to develop policies that strike an appropriate balance between these important policy goals.