The Importance of Federal-State Collaboration in Telecommunications Regulation

Remarks of Commissioner Kathleen Q. Abernathy
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Thank you very much for inviting me to speak with you today. It is really a struggle to spend time in such inhospitable surroundings! Seriously, though, my only regret in visiting this beautiful resort is that I cannot stay longer.

Today I thought I would talk about the importance of federal-state interaction in the telecom regulatory process. Not surprisingly, the state commissions play a critical role in just about every area of telecom policy we deal with at the FCC. I would like to highlight a few of those areas, and in doing so provide an overview of some of the major policy challenges confronting regulators.

Competition Policy

Let me begin with competition policy. There is perhaps no other area where the role of the state commissions, and the interaction between federal and state regulators, looms as large.

Section 271

Section 271 of the Communications Act sets forth a detailed, complex procedure that the former RBOCs must follow if they want to be able to offer long distance service in region. For those of you familiar with that process, it is clear that the work done by the state commissions is more challenging and important than the role played by the FCC. While the FCC spends a mere 90 days reviewing each section 271 application, the state commissions spend *years* conducting TELRIC pricing proceedings, establishing performance metrics, ensuring that the RBOC's support systems function properly, and so on. As a result, state commissioners have a far more detailed grasp of the factual record than federal commissioners can hope to attain.

I therefore rely heavily on the recommendations of my state colleagues in reviewing these applications. I firmly believe that my job is not to conduct a de novo review of a state commission's analysis of compliance with the TERLIC pricing model; instead, my role is to conduct a far more generalized review to ensure that there are no clear errors. Not only are state commissions more knowledgeable than the FCC on these issues, but they have more at stake in the sense that it is *their* consumers who will ultimately benefit from the enhanced competition in the local and long distance markets.

Of course, the FCC has an independent obligation to faithfully implement the requirements in the Telecommunications Act, but, to the extent that we have discretion to make judgment calls, I defer to a great extent to the views of the states.

At this point, I can tell what you all must be thinking: How is she going to vote on SBC's application for authority to provide long distance service in California? Well, I'm sorry to disappoint you, but I cannot comment on that pending application. Nor should you make any assumptions based on the general approach I have described. The California application apparently presents some unprecedented questions concerning preemption. At this point, all I can say is that I will consider these novel issues as well as the issues we are traditionally presented with *very* carefully.

Interconnection and UNEs

The role of the states in supervising the interconnection process between the incumbents and new competitors and the purchase of unbundled network elements (affectionately known as UNEs) is likewise critical. The FCC is charged with making several core policy determinations such as the questions at issue in our pending *Triennial UNE Review* proceeding concerning the particular network elements that must be made available to competitors. But Congress recognized that the FCC lacks the resources and knowledge necessary to resolve all of the highly fact-specific competitive disputes that arise under the Telecommunications Act. Thus, the state commissions arbitrate countless disputes under the Telecom Act, and in doing so establish most of the rules of the road for local competition.

While this role under section 252 is indispensable to the *implementation* of our local competition policies, perhaps the more interesting question is what role the states should play in *establishing* those policies in the first place. The D.C. Circuit Court of Appeals has directed the FCC to conduct a very granular analysis in the *Triennial UNE Review* proceeding, and several state commissions have proposed that the best way to do that would be to defer to the states to make key decisions about whether competitors are impaired in their local markets and what elements are necessary for competition. For example, the FCC could establish a short list of UNEs as a floor and direct states to add to that list, and perhaps also to make recommendations about subtracting from the list depending upon the competitiveness of the market. At the other end of the spectrum, many incumbent LECs have argued that the FCC not only should refrain from delegating any authority under section 251(c), but should *preempt* states from imposing unbundling requirements beyond those established by the FCC.

This set of issues is perhaps the most complex and challenging of all the issues raised in the *Triennial Review*. I have been carefully considering these questions, as has the Wireline Competition Bureau, and I would encourage interested parties to let us know their thoughts. Regardless of how the FCC decides to proceed, I have no doubt that the states will continue to play an invaluable role in promoting local competition.

Performance Metrics

The FCC also has two pending proceedings concerning national performance metrics and they have sparked a similar debate. One proceeding concerns ordering, provisioning, and maintenance and repair in the context of UNEs; and the other concerns such issues with respect to special access circuits. Just as parties disagree about the interplay between federal and state standards in the unbundling context, some parties argue that national metrics should serve as a floor and others argue that they should serve as a ceiling. And some say we should not have any metrics at all. We are still sorting through these issues, although it is my hope that we will complete the rulemakings expeditiously.

Universal Service

Apart from competition policy, universal service issues are at the top of our agenda at the FCC, and here the states play a very critical role. As Chair of the Federal-State Joint Board on Universal Service, I am proud of the collaborative processes we have developed, as well as our improved record in producing timely decisions.

In July, the Joint Board released the first Recommended Decision during my tenure as Chair, and it addressed the definition of supported services. In the very near future, we will release a Recommended Decision regarding the administration of the non-rural high-cost support mechanism. This proceeding raises some particularly interesting issues concerning federal-state interaction. The 10th Circuit Court of Appeals remanded our previous order establishing the non-rural support mechanism, in part because the Commission failed to establish a means of ensuring that states would do their part to preserve and advance universal service. I am confident that our upcoming Recommended Decision, and ultimately the FCC's order on remand, will address this concern. In addition to these proceedings, by the end of the year we hope to finalize another Recommended Decision concerning changes to the FCC's low-income assistance programs, Lifeline and Linkup. And we also have several other issues on the horizon.

In all of these proceedings, the federal and state members of the Joint Board have enjoyed a wonderful collaborative relationship. The administration of the federal universal service support mechanisms like just about everything we deal with involves complex, and often controversial, issues. But we work together extremely well, and the exchange of ideas is invaluable. I simply cannot imagine how the FCC could have responded to the 10th Circuit's directive to create mechanisms for inducing states to support universal service without such collaboration with the state regulators who will be subject to those mechanisms.

In fact, the process has worked so well, we have not limited the Joint Board's involvement to formally referred proceedings. In the FCC's ongoing review of the contribution methodology (how to support the Universal Service Fund), for example, we invited the state members of the Joint Board to participate in a public forum in June, and those state members later produced a joint recommendation in support of a connections-

based approach. We are still reviewing that recommendation and the rest of that record in that proceeding, and the Commission intends to take action in the near future.

Broadband

I would be remiss if I didn't talk a little bit about broadband services one of everyone's favorite subjects. The FCC is conducting a number of important rulemakings regarding the statutory classification of broadband Internet access services and the regulatory implications that flow from those classifications.

With respect to cable modem services, the FCC determined earlier this year that these services are information services under the Act, rather than cable services or telecommunications services. Under the Communications Act, services we regulate must fall into one of three buckets. While we did agree that cable modem information services contain a telecommunications *component*, we also found that they do not include a distinct telecommunications *service* and thus cannot be regulated under Title II of the Act. The Commission has a pending rulemaking regarding the implications of this decision, such as the impact on local franchise authorities' ability to impose franchise fees and the scope of their authority to manage rights-of-way.

The Commission has proposed a similar regulatory approach to the classification of wireline broadband services such as DSL Internet access by tentatively concluding that these services are information services. In a perfect world Congress would have defined broadband Internet access services for us -- but they didn't. But I believe that of the various definitions Congress did provide, the definition of information services provides the best fit. We are continuing to review the record in the Wireline Broadband proceeding, and I hope we are able to reach a decision on the classification issue by the end of the year. And then, once the classification issue is settled, we have a number of important issues to decide, such as whether to modify our nondiscrimination requirements under *Computer II* and *III*; whether broadband service providers should contribute to universal service; and whether the Commission should adopt regulations to ensure access to broadband Internet services for persons with disabilities. These are complex and important issues that will shape the future of telecommunications regulation, and I encourage you to share your views with your state commission and with the FCC.

All of these proceedings are being conducted with section 706 of the Communications Act in mind. That provision directs the FCC to facilitate the deployment of broadband services to all Americans. In pursuit of this goal, the FCC in 1999 established a Joint Federal-State Conference, which includes FCC officials and members of various state commissions. The Joint Conference exchanges ideas and assists the FCC in its annual reports to Congress on the status of broadband deployment.

Regulatory Accounting Safeguards

Another issue I would like to touch on is accounting safeguards. The statute directs the FCC to oversee a uniform system of accounts, and so this is another area where federal-state interaction is key.

Since "accounting" has become such a hot-button issue lately, I should point out that the *regulatory* accounting rules I'm referring to here have nothing to do with the *financial* accounting rules that have been at the epicenter of business scandals involving Enron, WorldCom, Global Crossing, and various other companies. The SEC ensures that public corporations comply with generally accepted accounting principles and disclosure requirements. Our role is far more limited. The FCC's regulatory accounting requirements are designed to ensure that the incumbent LECs do not impose unreasonable interstate access rates. These accounting rules were established when carriers were subject to traditional rate-of-return regulation, and were designed to prevent improper cross-subsidization. While they continue to play a role in promoting competition, this function is quite narrow and entirely distinct from financial accounting rules.

Last year, when the FCC adopted its Phase II Order concerning reform of the uniform system of accounts, the accounts that we eliminated and the new ones we created were largely the result of close collaboration between federal and state commissioners. My staff and I spent many hours speaking with state commissioners and their staff to understand the ways they rely on the federal accounting and reporting rules. Not surprisingly, we did not develop a consensus on every single issue. But I have no doubt that our order, in the end, was stronger because of the close coordination we had with our state colleagues.

I was also pleased to support the FCC's recent order establishing a Joint Federal-State Conference on Accounting Safeguards. As we conduct Phase III of our review of the uniform system of accounts, this joint conference will institutionalize the important role played by the states. I look forward to participating in this process.

Carrier Bankruptcies

Finally, I thought I would say a word about federal-state interaction in the context of dealing with carrier bankruptcies. When a carrier goes bankrupt and seeks to stop providing an interstate telecommunications service, section 214 of the Communications Act requires that the carrier obtain authorization from the FCC. Our rules require the carrier to provide at least 31 days advance notice to customers, after which point the Commission may permit the carrier to terminate service but also may order the carrier to continue operating for some period of time to avoid service disruptions while alternative providers step in. The Commission has not hesitated to exercise this authority to protect consumers.

In doing so, the FCC has worked hand in hand with state commissions. The states have helped identify the customers that may be at risk and have helped oversee the transition process to new service providers. State commissions also have relied on their own authority to prevent service disruptions.

The FCC is presently considering a number of issues relating to carrier bankruptcies. Several incumbent LECs have filed tariffs proposing to require advance payments and security deposits in the event that customers purchasing access service experience a downgrade in their credit rating. These tariffs have been suspended and are under investigation. In addition, Verizon has filed a petition for a declaratory ruling seeking guidance on the lawfulness of these measures and other proposed means of limiting exposure to bad debt.

As the FCC examines these questions, our paramount goal will remain ensuring that consumers have adequate protections against disruptions of critical services. The ILEC proposals challenge us to determine whether we can achieve this goal while simultaneously accommodating the interests of incumbent LECs in getting paid for the services they provide and balancing the interests of competitors in avoiding commercially unreasonable demands for protection. This is a tall order, and I am confident that we will benefit from input from state regulators on their experiences.

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As I hope this overview demonstrates, the FCC does not exist in a vacuum. The Telecommunications Act creates a unique partnership between the FCC and the states. The legal questions arising from this divided jurisdiction are often fascinating, and I find the process of working with the states extremely rewarding. Thank you again for inviting me to join you. I would be happy to answer a few questions if we have time.