The Transformation of a Typewriter Repair Shop in a Computer Driven World

Remarks of FCC Commissioner Kathleen Q. Abernathy
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Thank you very much for inviting me here today. After completing my first year in office at the FCC, I stepped back to consider the lessons I have learned and how I should apply those lessons to the regulatory challenges the lie ahead. In particular, I have thought about how the FCC can craft a regulatory approach that removes unnecessary impediments to investment and intervenes in the market only to the extent necessary to protect competition and consumers. I have also spoken in recent months about how to apply these principles in developing a coherent spectrum policy, and I have discussed how we can nurture nascent platforms and technologies through a policy of restraint.

Today I will focus on a related topic: the importance of the FCC keeping pace with technological changes and marketplace developments. By this I mean we need to avoid applying yesterday's regulatory answers to the technologies of tomorrow. Instead, we must make *real-time* assessments of markets and technologies so that we can identify and eliminate barriers to infrastructure investment and facilitate the deployment of innovative new services. Only by keeping pace with the rapidly changing state of technology and competition can we ensure that we remain faithful to the statutory goals enacted by Congress. The policies that made good sense five, ten, or twenty years ago may represent exactly the wrong approach today. In addition, we cannot address the regulatory uncertainties that can paralyze business plans and deter investment unless we step up to the plate and take a crack at the challenging questions posed by today's technological and marketplace changes.

But this is not an easy task. Indeed, the dramatic technological changes we have seen in the last 10-15 years have been unprecedented. Think about this: When I went off to college in 1975 my mother gave me the same typewriter she used in college in the early 1950s. And it was fine. I used it, my friends used it, and the fundamental technology did not change over a period of over 100 years. In contrast, 12 years ago we sent my stepson off to college with a brand new portable computer and today the electronics in my car key surpass the electronics in his computer. So we are living in an era of extraordinary technological change.

Despite the significant challenges we face, we must step up to the plate to respond to change. I will discuss two primary examples that illustrate the importance of keeping pace with the industries we regulate and with the technologies they offer. First, I will talk about our pending proceedings on how to classify broadband Internet access services, and second, I will discuss our review of the various media ownership restrictions.

1. Defining Broadband Services

Over the past year, I have been a leading proponent of clarifying the regulatory regime that applies to broadband Internet services offered over cable and DSL platforms. Let me explain why this is so important. When Congress enacted the Telecommunications Act of 1996, it unfortunately did not define broadband Internet access services. As a result, for the past several years parties have debated the applicability of the service classifications Congress *did* provide: that is, information

services, telecommunications services, and cable services. Over the course of several years, as providers began deploying broadband Internet services, the previous Commission declined to weigh in on this classification issue. This left providers in the dark about the rules that apply: Were these services going to be subject to common carrier regulation? Must cable operators and other network providers give competitors nondiscriminatory access to their facilities? Did bankrupt providers have any obligation to notify their customers before terminating service?

Without answers to these and other questions, it has been difficult for companies to establish coherent business plans. It likewise has been difficult for investors to understand the rules of the road. Worse, federal courts eventually stepped in to fill the void left by the FCC — and they reached divergent answers. One court declared that cable modem service should be regulated as a telecommunications service, while another said it was an information service. In addition, several municipalities took it upon themselves to declare these services cable services and they imposed fees and other regulatory requirements based on that designation. So the result of the FCC's delay in addressing the cable modem classification issue was not simply regulatory uncertainty, but perhaps worse, conflicting rules arose depending on the geographic location of the company providing the service.

The situation was not much clearer with respect to DSL Internet services. In some contexts, the FCC seemed to have taken the view that these services included a distinct telecommunications service subject to regulation under Title II. In other contexts, however — most notably in a 1998 Report to Congress — the Commission took the position that Internet access service, regardless of the facilities over which it is provided, consists of an information service, which by definition has a telecommunications *component* but does not entail the provision of a separate telecommunications *service*.

Faced with this uncertainty concerning both cable modem services and DSL Internet access, I am heartened that the current Commission has stepped up to provide some answers. The Commission decisively ruled that cable modem services are information services, rather than telecom or cable services. Similarly, in the Wireline Broadband NPRM, the Commission tentatively concluded that DSL Internet access is an information service.

To be sure, adopting the cable classification and the tentative ruling in the DSL Notice left many questions unanswered. Most importantly, we still must resolve critical issues regarding access by unaffiliated ISPs, universal service contribution obligations, and disabilities access issues, among others. But I believe the Commission did the right thing by establishing an analytical framework on which the appropriate regulatory structure can be built. Only by wading into the definitional debate could the Commission turn to these ancillary questions.

The Commission not only was right to tackle these issues, but we have finally developed a framework that gets beyond the old regulatory silos defined by the analog services of days gone by. There has been much talk of "convergence" over the past several years, and it means different things to different people. To me it means the death of silos. Those legacy service categories — wireline, wireless, cable, and satellite — are rapidly losing their significance as providers from different platforms are competing in each others' markets and are all moving closer to providing integrated offerings of voice, data, and video. It means that in crafting regulations we must focus on the *functional nature* of the service being offered rather than the *legacy category* to which the provider happened to belong.

Our information service classification does just that. It recognizes that broadband Internet access, regardless of the facilities over which it rides, *uses* telecommunications

as an input but does not provide end users with a pure telecommunications service. By focusing on this critical distinction between a pure transmission service, on the one hand, and transmission *plus* information processing, on the other, we are able to classify and regulate services based on their functional characteristics rather than the provider's traditional role as a cable operator, a telephone company, or even an electric utility.

In short, I believe our broadband proceedings represent the right approach to keeping pace with technological and marketplace changes. And I will give you two reasons why. First, the Commission had to step in to answer key questions of statutory interpretation, rather than leaving the matter to various courts and state and local governments to resolve; and second, the Commission must establish a framework that looks beyond silos to a functional, technology-neutral analysis. In time, this framework will help remove barriers to investment, reduce regulatory uncertainty, and ensure that we fulfill the core congressional goals of facilitating broadband deployment and competition.

2. Media Ownership

A second example that similarly illustrates the need to keep pace with technological and marketplace changes involves our various media ownership proceedings. No one doubts that the FCC should continue to pursue the traditional goals of competition, localism, and diversity in media markets. But the world has changed dramatically since the various media ownership restrictions were adopted, and whether those restrictions remain necessary to promote the public interest goals is now subject to considerable debate.

Most of the rules at issue were established decades ago — that is, before cable television became the dominant form of entertainment, news, and information that it is today, and before the advent of the Internet, direct broadcast satellite service, and satellite digital audio radio service. Even within the traditional broadcast world we have had an explosion of programming and we are on the verge of another revolution as the DTV transition is gaining momentum.

I don't know at this point precisely how these developments will affect our analysis of the justification for the various media ownership rules. In fact, we have only recently sought comment on studies that analyze today's media marketplace. But one thing is clear: We must ensure that our rules recognize the economic and technological forces driving the industry. We must ensure that our rules achieve the desired public policy goals. For example, we have to ask whether our rules drive up costs for broadcasters without delivering commensurate benefits to consumers. We have to ask can market forces protect consumers more effectively than regulatory mandates? We cannot simply *assume* that the ownership restrictions in place are *necessary* to serve the public interest goals identified by Congress. Remember, those rules were based on a fundamentally different society than what exists today. Moreover, the necessity of re-examining our regulatory framework has been spelled out quite clearly by both Congress and the courts. Congress enacted Section 202 of the Act, which requires that the FCC review its media ownership rules every two years and the D.C. Circuit has on several occasions overturned FCC orders for failure to justify existing ownership rules.

But even if Congress had not directed us to re-examine these rules — and even if the court had not made clear that this review must be rigorous — I believe that we cannot be effective as regulators unless we approach *all* our rules with a similar degree of questioning. The principal thrust of the 1996 Act was that Congress sought to do away with regulation where possible and substitute a reliance on market forces. Of course, this transition cannot occur all at once, and there likely remain a number of areas where continued market intervention is necessary. But my point is that we cannot *assume* that our regulations will forever serve the goals originally envisioned. To the contrary, as I have explained, the rapid pace of technological and marketplace changes makes it a

certainty that many regulations will, at a minimum require tweaking, and ultimately may become obsolete.

Congress had the wisdom to recognize this eventuality and accordingly institutionalized the obligation to review our rules every two years to ensure that they remain necessary. Not surprisingly the biennial review process has led to the elimination or streamlining of outdated regulations in several different contexts. One significant cut arising from the 2000 Biennial Review was the elimination of significant portions of Part 68 of the FCC's rules, which governed the connection of customer premises equipment to the telephone network. The FCC wisely recognized that the detailed regulations establishing technical criteria and requiring registration with the agency were unnecessary in light of the ability of private standards organizations to perform these functions. Other streamlining efforts entailed the detariffing of long distance services and an overhaul of our application procedures for wireless and broadcast services.

But we need to do better. We need to recognize that sections 11 and 202 of the Communications Act are a core part of the regulatory process.

To this end, I am pleased that the Commission recently revised the manner in which it conducts biennial reviews. In the past, Commission staff undertook the initial effort to review FCC regulations, identified candidates for elimination, and then sought comment on those candidates. But this led to an artificially cramped process, because the universe of potential cuts was limited by what we identified as outdated. We have now changed the process to bring commenters in at the front end. Last month, public notices went out seeking comment on *any* rule change that would serve the public interest. After the Commission reviews the comments, we will be able to issue notices proposing changes in response to the record. I am optimistic that the end result will be a more fulsome review of our regulations — a review with teeth.

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In closing, I will make it one of my top priorities as a commissioner to ensure that the FCC remains relevant as the world continues to change around us. Rather than clinging to old paradigms, we should set those paradigms aside when they cease to be of use. We can't survive and remain relevant if we think of ourselves as a typewriter repair shop. Only by sprinting to keep pace with changes in technology and in the marketplace can the FCC remain true to the core principles embodied in the Communications Act and only then can we deliver on our commitment to consumers.