Remarks of Commissioner Kevin J. Martin
21st Annual Institute on Telecommunications Policy & Regulation
December 5, 2003

Thank you, Dick, for that kind introduction. And thanks to the PLI for inviting me to speak to you today. At this conference last year, I said I hoped to spark a healthy debate. I think I did that. I'll try to make my remarks as interesting this year.

I thought I would touch on two things this morning. First, I'm going to talk briefly about one of the media issues that has been getting an increasing amount of attention lately and that I think will be in the forefront of the next year: broadcast indecency. I'll then spend a little more time on what I see as one of the biggest issue confronting the telecommunications sector: the deployment of broadband services.

Broadcast Indecency

Most of you likely are aware that there has been an increasing concern about the appropriateness of today's programming on television and radio. Indeed, some have recently described the Commission as loosening its indecency standard. For example, it has been reported that recent Commission decisions mean that the "Seven Dirty Words" are now OK to use on broadcast.[1] Some observers have begun to make fun of this trend. The Parents' Television Council filed a copy of the following show with the FCC, pointing out that it was taunting the Commission and poking fun at the agency's reasoning. I hope my airing of this clip does not offend anyone.

[Transcript of video:

> Ms. Choksondik: Alright, children. In lieu of the common usage, I'm supposed to clarify the school's position on the word "shit."
>
> Stan: Wow! We can say "shit" in school now?!
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> Kyle: This is ridiculous! Just because they say it on TV, it's alright?
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> Ms. Choksondik: Yes, but only in the *figurative noun* form or the *adjective* form.
>
> Cartman: Huh?
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> Ms. Choksondik: You can only use it in the non-literal sense. For instance, *[turns and writes on the board]* "That's a shitty picture of me." is now fine. However, the literal

[1] *See, e.g.*, Jennifer Armstrong, "Curses! Dirty words are sneaking into TV," *Entertainment Weekly*, Oct. 24, 2003 at 21; Nell Minow, "Standards for TV language rapidly going down the tube," *Chicago Tribune*, Oct. 7, 2003 at C2.

> noun form of *[writes]* "This is a picture of shit." is still naughty. *[crosses out the sentence]*.
>
> Cartman: I don't get it.
>
> Stan: Me neither.]

Unfortunately, I fear some at the Commission thought the show actually was advocating a new line of reasoning. Listen to a recent Bureau-level Order (and again, I apologize for the language):

> The word "fucking" may be crude and offensive, but, in the context presented here, did not describe sexual or excretory organs or activities. Rather, the performer used the word "fucking" *as an adjective or expletive* to emphasize an exclamation…. Thus, because the complained-of material does not fall within the scope of the Commission's indecency prohibition, we reject the claims that this program content is indecent.[2]

I don't get it, either.

There is something wrong when our agency draws technical lines that even the people "on the edge" find laughable. I cannot comment on the specifics of this case, but I am not sure that a word otherwise considered indecent becomes acceptable merely because it is used as an adjective.

Our concept of what constituted "indecent" material changed from the "Seven Dirty Words" because the Commission thought that definition was too *narrow*. We took context into account in order to *broaden* what would constitute indecent material. But now we seem to be saying even the most objectionable of those words is OK?

The FCC plays an important role in protecting Americans, particularly children, from indecent programming. We have a statutory mandate to prohibit indecency on broadcast, and I take this responsibility seriously.

I am concerned that the Commission is not doing all it should in this area. We may be interpreting the statute too narrowly. We also may need to enforce our rules more stringently. For instance, I have been advocating counting each indecent utterance in a broadcast program as a separate violation, as the statute on its face appears to call for.[3] In fact, in the clip I just showed, you might have noticed a counter in the corner

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[2] *Complaints Against Various Broadcast Licensees Regarding Their Airing Of The "Golden Globe Awards" Program*, File No. Eb-03-Ih-0110 (EB Oct. 2003) (emphasis added).

[3] *See*, *e.g.*, Statement of Commissioner Kevin J. Martin, *Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan,* Notice of Apparent Liability, 18 FCC Rcd 6915 (2003). *See also* 18 U.S.C. § 1864 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both").

adding up the number of times the swear word was used. Counting each utterance as a separate violation could significantly increase the amount of fines that we could levy.

If we were implementing our statutory mandate effectively, our rules would serve as a significant deterrent to broadcasters considering the airing of obscene, indecent and profane material, and our fines would punish violators sternly. I am concerned that we are failing on both fronts. Just this past quarter, for instance, indecency complaints increased from 351 to 19,920. Clearly, consumers are concerned.

I also am concerned that use of such profanity reflects a regrettable coarsening of the language and images on television today. Many observers have commented on the increase in gratuitous sexual, violent, and offensive programming on broadcast television.

I have been troubled by this trend for some time now, and have been actively encouraging broadcasters and cable operators to offer more tools for parents to deal with this trend. For example, in an article I wrote at the end of 2002 and in my remarks before the National Association of Television Program Executives last January, I expressed my disappointment in the choices facing parents who want to watch television together as a family.[4]

I encouraged broadcasters to bring back the Family Viewing Hour – to devote the first hour of prime time to family-friendly programs. Yet, according to a recent study, it is during this hour that the greatest increase (95%) of inappropriate language has occurred.[5]

But I would not place the burden on broadcasters alone; I also have called on cable and satellite operators to offer a family-friendly programming package, so that parents could enjoy the excellent family-oriented channels available without being forced to subscribe (and pay for) the channels they believe have less appropriate programming. Together, these steps would empower parents and enhance the value that television can offer.

I believe that this issue will increasingly become the center of debate at the Commission and on the Hill.

Broadband: Where We Are Today

Last year, I had the privilege to speak before this conference. I noted that the Commission was at a "crossroads." We were about to embark on fundamental policy decisions regarding local competition and broadband issues. In that speech, I urged the

[4] Copies of these documents are available on my website at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-234613A1.doc and http://www.fcc.gov/Speeches/Martin/2003/spkjm301.pdf.

[5] The Parents Television Council tracked the use of common swear words in 400 hours of prime time programming shown on the 6 largest broadcast networks in 1998, 2000, 2002. The use of these words increased in the 7-8 p.m. time slot increased 94.8% from 1998 to 2002. Nell Minow, "Standards for TV language rapidly going down the tube," *Chicago Tribune*, Oct. 7, 2003 at C2.

Commission to make its top priority promoting new investment and the deployment of advanced network infrastructure. I noted that we should focus first on creating the right incentives for companies to invest in and deploy advanced services.

That call for action was based mainly on the advocacy of incumbent telephone companies, who argued *with vigor* that they would not build new infrastructure nor roll out new advanced services unless they received regulatory relief for that new investment. The message delivered by the incumbent phone companies was simple: they claimed they wanted the opportunity to roll out broadband facilities throughout America, but they were hampered by a federal regulatory framework that, at best, created disincentives to investment in new infrastructure.

Much has happened since last December. In the past year, the Commission took important steps to craft a package of balanced regulations that would help encourage investment in next-generation broadband infrastructure, and also preserve existing competition for local telephone service—the competition that has enabled millions of consumers to benefit from lower telephone rates.

The critical policy decisions made during the course of this past year create a "window of opportunity" for incumbent telephone companies – an opportunity for incumbents to invest their way out of legacy regulation.

As many of you are aware, in the 1996 Act, Congress established a careful balance: if incumbent monopolists opened up their local voice telephone market to competition, in return, they would receive the opportunity to compete for new revenue streams in new markets. By demonstrating the existence of competition, the RBOCs would be allowed to enter new markets and provide services subject to less regulation. Competition first, then deregulation.

The framework created by Congress necessarily required the loss of the incumbents' exclusive monopoly franchise. I frequently am struck by analyst reports that cite unexpected line loss by the incumbents. By definition, opening their markets to competition would result in access line loss and a potential decrease of market share for local voice services. However, those losses would be offset by entrepreneurial opportunities created in new markets, such as long distance and data.

Today, under this framework, all the RBOCs in every state have the opportunity to offer bundled local and long distance service packages. Indeed, the Commission completed the Section 271 process this week. The competitive trade-off appears to be working successfully in the marketplace. While 13 million local access lines are now being served by competitive service providers using unbundled elements, nearly 29 million consumers have chosen to take bundled local and long distance service packages from the incumbent RBOCs. As these consumers choose bundled local and long distant offerings, they are selecting largely unregulated packages.

I believe it is the incumbents that are now at a crossroads. Do they remain providers of traditional voice services subject to regulation, or do they seize the

opportunity to enter new competitive markets and invest in, and deploy, advanced infrastructure in a minimally regulated environment?

Cable: A Case Story

In assessing the situation in which the incumbent phone companies find themselves today, they frequently compare themselves to the cable industry, which they assert is "deregulated." I think it is useful to look back at where the major cable operators stood around the time that the 1992 Cable Act and the 1996 Telecommunications Act were passed.

The cable operators had a near-monopoly of the multichannel video market (about 95%), but their monopoly status was threatened by new competitors – DBS providers – with superior technology. Moreover, Congress had placed a heavy hand on the scale of the competitors, creating a significant regulatory disparity in favor of the new entrants. For instance:

- The government set the rate of the cable operators' historical product, basic video service [*basic service rate regulation*];
- They had to *give* up to 1/3 of their capacity to carry every broadcast station in their market (their competitors in the market for viewers), and possibly even *pay* for that programming (through copyright fees) [*must carry regulation*];
- They had to give away additional capacity to public, educational, and governmental access channels [*PEG access regulation*];
- They had to lease additional capacity, upon request, to programmers at regulated rates [*leased access regulation*]; and
- They were forced to sell their programming – in some cases their most valuable asset – to competitors at a regulated rate, so that their competitors could sell the same "bundle" they did [*program access regulation*].

And, they were already in debt.

But, Congress gave them a light at the end of the tunnel. First, while Congress continued to regulate the product cable operators had been offering consumers (basic video service), cable operators would be freed of these regulations if they faced "effective competition" by new entrants.

More importantly, Congress recognized that technology was developing to allow cable operators to offer new services, creating new competition in existing markets (e.g., telephony) and as well as markets that were yet to develop (broadband, hundreds of channels of video). Cable operators therefore were given opportunity to enter these new markets, which would bring consumers lower prices and new, advanced services.

Specifically, if cable operators entered these markets, their offerings would face minimal-to-no regulation.

The cable operators seized this opportunity. They looked at the picture unfolding before them and saw that their real growth opportunity would come from advanced services – which meant heavy investment in their network architecture.

So the cable operators went to Wall Street and made their case: the only way to minimize loss of customers to competitors was to borrow more funds now to upgrade their network. New infrastructure would allow these incumbents to offer advanced services: more channels and new products. These new offerings would enable them to compete more effectively with the new entrants (satellite operators), retain (and perhaps re-acquire) customers, and, critically, drive customers to purchase the largely unregulated offerings – the ones with the much higher margins.

The infrastructure initiative was no small step. Most incumbent operators would need to *double* the size of their systems, knowing that while they did so, they would be losing market share to the new entrants. (And they did – from close to 95% of the multi-channel video marketplace to closer to 70%). Interestingly, at this point their debt-to-equity ratios actually were *higher* than the incumbent phone companies' are now, and their cash flow was much less.

But many analyzed their position and made the same conclusion. Despite their hefty debt-to-equity ratios and their shrinking share of the market, cable operators took their profits and invested them in upgrading their infrastructure, and the financial community supported them. From the early 1990s to last year, the major cable operators invested tens of billions of dollars in upgrading their infrastructure. Some estimates put this figure at over $80 billion.

Incumbent phone companies have the same opportunity now.

The incumbent phone companies today face a market and regulatory equation that closely parallels that faced by the cable industry in the mid-1990s:

- They are historical monopolists facing competition from new entrants;
- They have significant debt, a shrinking customer base and declining revenues;
- A regulatory disparity exists between them and the new entrants; that is, their traditional service offering is still regulated, while the same product offered by a new entrant is not; and
- They must share some of their infrastructure with potential competitors; and (on the positive side)
- Their provision of new services / entry into new markets will be minimally regulated, if at all.

In many ways, however, the incumbent phone companies are even better positioned today than the cable operators were in the mid-1990s:

- The incumbent phone companies have less debt and greater cash flow;
- If they upgrade their networks, their regulations require them to give away less of their network capacity than the cable operators (carrying competitors' voice traffic on a 64K channel will never eat up 1/3 of capacity);
- These regulations allow them to get paid for that part of the network they give to competitors; and
- New infrastructure will be minimally regulated (cable operators still must devote a significant amount of their digital system to carrying broadcast and PEG channels).

If incumbents want to seize this opportunity, they cannot sit idly by or wait for the Commission to save them. The way toward new revenue streams is not to focus on the market with the declining number of subscribers and shrinking margins. It is to invest in the infrastructure to provide new services that will be the growth areas in the future: increasing number of subscribers with higher margins, and bundling those services with traditional local voice services to retain their base. There, regulations will not hold you back.

Conclusion

One year ago, I stated that I thought we should place cable operators and incumbent phone companies on similar footing. I believe we have done so.

For years incumbents have been saying "Deregulate our provision of broadband, and we will invest." But now that broadband deployment is deregulated, they are saying "Deregulate our provision of our historically monopoly service – basic phone service – and we will invest in broadband." They essentially are saying, "Free us, and we will invest."

We have responded, "Invest, and you will be free."

As the Commission faces regulatory decisions in the coming year, I will try to view them through the following prism. Are the incumbents seeking the opportunity to invest in their network architecture, provide new services, and receive the benefits of that new investment? If so, I think the Commission should be encouraging. Indeed, I again support many of the premises of Tom Tauke's speech this week at the Schwab Investment conference, calling for deregulation of broadband. While I am not sure that

there is the same level of confusion about what we meant in recent orders, I agree we should address these issues. But, to the extent incumbents are seeking to get out of regulations that apply to their legacy infrastructure or to diminish competition for legacy voice services that Congress expected, I will be less inclined.

Again, thank you for inviting me here today.