The Nascent Services Doctrine

Remarks of FCC Commissioner Kathleen Q. Abernathy
Before the Federal Communications Bar Association
New York Chapter
New York, NY - July 11, 2002

As prepared for delivery.

My job as an FCC Commissioner has numerous challenges — there are all those acronyms to learn, where to go to lunch near our isolated D.C. offices, and jurisdictional limitations that can spoil our fun. Actually, I do think one of the core challenges of the job is stepping back from the heat of individual proceedings to develop and fine tune a more comprehensive regulatory philosophy than any one proceeding can provide. I believe such a philosophy — clearly articulated and debated in the public sphere — lends predictability to agency decisionmaking and allows me to refine my thinking *before* I am called upon to apply it in a given proceeding.

So today I will describe what I have labeled the "nascent services doctrine" of communications regulation.

I have often spoken about the importance of developing policies that promote facilities-based competition, because robust competition across platforms delivers benefits to consumers far more effectively than regulators. And as we have seen in the wireless and long distance sectors, while resellers play an important role, facilities-based competitors are the most viable and beneficial to consumers in the long term because of their ability to innovate, drive varying pricing models, and respond quickly to marketplace demands.

I have also spoken often about my general deregulatory philosophy — which begins with the premise that current providers are regulated more than they may need to be, to the extent that they operate in competitive markets.

The Nascent Services Doctrine

Building on these two premises, I have been thinking about many of the regulatory dilemmas faced by the Commission and have noticed that a recurring challenge we face is how to craft regulations for new technologies and services. In response to this challenge I have developed the Nascent Services Doctrine. This doctrine holds that regulators should exercise restraint when faced with new technologies and services. Such restraint should facilitate the development of new products and services without the burden of anachronistic regulations, and in turn promote the goal of enhancing facilities-based competition. Once the new facilities-based competitor has demonstrated its viability, regulators must reexamine the overall regulatory scheme applicable to all providers in the marketplace in light of the new provider to assess whether existing regulations can be modified or repealed. This is not a matter of picking winners and losers; it is about exercising regulatory restraint to create an environment

conducive to investment in new infrastructure, because new platform providers create competition and innovation that ultimately benefits consumers far more than prescriptive regulation. In essence, short-term regulatory disparities are tolerated to generate long-term facilities-based competition.

There are two distinct applications of this doctrine. It applies both to *nascent technologies*, which appear in the market without any clear sense of the services they will ultimately support or the markets in which they will ultimately compete, and to *nascent platforms*, which I think of as new competitors to incumbents in already-defined markets. Ultra-wideband is an example of a nascent technology. We do not know precisely how this technology will be used, but we do know that it has tremendous potential and we should approach it in a restrained manner. An example of a nascent platform is satellite broadband service, which is just beginning to compete with more established cable modem and DSL providers. As I have said before, government is not a very good predictor of technological innovation and how it will affect the marketplace. Therefore, when faced with a nascent technology or platform, the Commission is best served by taking a hands-off approach or applying a light touch until the contours and capabilities of the new service or application are better understood.

The Commission often has done the right thing and exercised regulatory restraint with respect to nascent technologies and platforms in the past. For example, when wireless voice services were first developed, the Commission refrained from imposing detailed price and service-quality regulations, despite many calls to do so in order to establish "parity" with wireline regulation. Similarly, the Commission generally took a hands-off approach to DBS services as they emerged as competitors to cable in the MVPD market. Congress also has recognized the benefits of restraint in each context: when the wireless platform began offering voice services in competition with wireline telephony, Congress did not reflexively impose the equal access requirements to which wireline providers are subject. Nor did Congress extend many cable television regulations to the DBS platform.

Goals Underlying the Doctrine

Taken as a whole, the nascent services doctrine seeks to achieve two key goals: (1) deliver benefits to consumers by developing facilities-based competition, both intermodally and intramodally; and (2) reduce unnecessary regulatory burdens and ultimately achieve regulatory symmetry for all providers.

Developing Facilities-Based Competition

As I have noted, incubating new technologies and platforms helps establish new facilities-based competitors, and the increased competition ultimately delivers to consumers the benefits of lower prices, better service quality, more innovation, and more choice. Regulatory restraint is a necessary part of fostering such competition, because there is little doubt that overregulation can do substantial damage to nascent technologies and platforms. As the recent turbulence in the capital markets has shown, companies take enormous risks when they invest billions of dollars in communications networks — such as the cable, wireline, and wireless broadband networks being built today. To avoid creating additional disincentives to invest — beyond those risks that are inherent in the marketplace — we must resist the reflexive tendency to apply legacy regulations to new

platforms. This tendency is often motivated by a desire to achieve immediate regulatory parity. However, applying heavy-handed regulations to new platforms can chill investment and threaten to stifle the development of new facilities-based competitors.

As I will discuss in a moment, regulatory parity is an important *long-term* goal, because applying different regulations to providers in a single market inevitably causes marketplace distortions and leads to inefficient investment. As a *short-term* policy, however, accepting some degree of disparity is not only tolerable, it is essential. For example, when the DBS platform was created, it was appropriately exempt from most of the legacy regulations imposed on cable operators. This regulatory restraint allowed those nascent platforms to develop into effective competitors. Today, as companies work toward bringing a third and fourth broadband pipe to the home via new satellite and wireless technologies, it will be equally important to avoid stifling those nascent platforms with the heavy-handed broadband regulations associated with the wireline telephony platform. Just as you would not build a tree house in a sapling — because you might kill the tree and hurt yourself in the fall — it does not make sense for regulators to immediately and reflexively burden new providers with a full regulatory load. If the ultimate goal is to develop sustainable facilities-based competition — and I think it is — it seems reasonable to me to allow the new service to develop free of most legacy regulatory burdens.

Reduce Regulatory Burdens and Achieve Symmetry in the Long Term

As I have noted, the interest in developing nascent platforms cannot justify regulatory disparities indefinitely. The Nascent Services Doctrine not only helps facilities-based competitors develop, it also promotes the reduction of regulatory burdens and increased regulatory symmetry in the long term. If we succeed in spurring investment in new platforms — and robust facilities-based competition takes hold — we can then begin to dismantle regulations imposed on incumbent providers and replace them with more appropriate rules. In this way the Nascent Services Doctrine provides a laboratory to assess the necessity of our regulatory intervention on the incumbent provider when compared with its nascent competitor. In contrast, if we were to extend legacy regulations immediately in a reflexive drive toward symmetry, that would assume the ongoing need for the underlying regulation and never allow us to assess deregulation in the real world. Indeed, reflexive symmetry actually institutionalizes the legacy regulation by imposing it on more providers across all platforms, ultimately making it all the more difficult to remove regulations from the books — even after they have outlived their usefulness. The nascent services doctrine places the burden on the regulator to re-institutionalize the regulations after a new competitor has established itself in the marketplace.

Such an approach is also most faithful to the 1996 Act, which called on the FCC to develop a procompetitive, deregulatory policy framework. Congress established specific mechanisms to ensure that as competition develops we will strip away legacy regulations. Sections 11 and 202(h) direct us to conduct a biennial review of all regulations and eliminate any that have been rendered unnecessary as a result of meaningful economic competition. And section 10 requires us to forbear from enforcing any regulation or statutory provision that is no longer necessary to protect consumers and

the public interest. At the end of the day, there is no doubt in my mind that facilities-based competition eventually will render many of our legacy regulations unnecessary and ultimately obsolete.

Targeted Regulation Is Consistent With the Nascent Services Doctrine

It is important to note, however, that this doctrine does not call for avoiding regulation altogether. My point, rather, is that the FCC must be sensitive to the need to incubate new technologies and services, and we also must intervene in the market only to the extent necessary — and in a narrowly tailored manner. As I have explained in defining my core regulatory principles, even a proponent of deregulation must recognize that circumstances exist that will require regulatory intervention.

I have previously identified three broad categories where regulators must intervene in the marketplace. First, we must adopt regulations to implement public policy goals unrelated to competition, or even at odds with competition. Universal service and access for persons with disabilities are examples of this kind of regulation. These public policy goals generally are set forth in the Communications Act, and they should accordingly be applied to *all* service providers, regardless of the nascency of their platform.

Second, we must intervene to prevent competitors from imposing externalities on one another and to protect consumers where market failures are identified. Although, as I have noted, the Commission was right to refrain from imposing heavy-handed price and service-quality regulations on PCS services in 1993, it was also right to adopt strict interference rules to prevent competitors from externalizing their costs. By ensuring that the regulations were narrowly tailored to the particular governmental interests at stake, the Commission not only helped ensure that mobile wireless customers would benefit from innovative calling plans and falling prices but also helped establish wireless as an intermodal competitor to providers of local and long distance telephony.

Finally, consistent with the Act, regulators must intervene to eliminate structural barriers to entry. As an example, we have required the unbundling of local loops and sought to ensure that adequate competitive safeguards exist during the transition from monopoly or duopoly to robust facilities-based wireline competition. I recognize that a policy of regulatory restraint with respect to nascent platforms may not be sufficient by itself to ensure the development of multiple facilities-based platforms, because market demand and technological capabilities will determine ultimate success. And so, in the broadband arena, although we took a hands-off approach to cable modem services when they were first introduced and we have generally avoided regulating satellite and wireless broadband services, we still do not yet have a viable alternative to cable modem service and DSL in most markets.

In these circumstances, as we strive to incubate new platforms by finding new wireless spectrum and licensing new satellite services, we must be mindful that cable modem and DSL providers may possess market power that can be exercised to the detriment of consumers. If such conditions are found to exist, we must determine whether there is a need for competitive safeguards notwithstanding our long-term goal of *reducing* regulatory burdens. We must also be wary of deregulating an incumbent platform too soon based merely on the existence of a second platform, because the sort of

robust competition that renders regulations unnecessary may well require more than a duopoly.

In light of these concerns, there are times when regulators must intervene to ensure that intramodal competition survives in circumstances where market forces have yet to produce multiple facilities-based choices for consumers. That is why I supported the issuance of an NPRM in the Cable Modem proceeding seeking comment on the possible establishment of a nondiscriminatory access requirement for independent ISPs. Without more extensive intermodal competition, I believe this is a policy question we are bound to at least consider. By the same token, while we have sought comment on the possible elimination of the *Computer Inquiry* unbundling and nondiscrimination rules that apply to incumbent LECs' broadband information services, I will consider the strength of and prospects for intermodal competition before supporting any decision to eliminate existing intramodal safeguards. We may very well decide that market forces alone are sufficient to ensure that consumers can choose from among several broadband ISPs, but I believe that some observers and analysts have been too hasty in assuming that this is a foregone conclusion.

In the end, these are very difficult policy choices, but I believe the Nascent Services Doctrine should serve the American people well by fostering an environment that encourages new investment in facilities-based providers, moves towards further deregulation by fostering competition, and eventually allows all platforms and services to compete on an equal basis in the drive to deliver innovative and valued services to the American people.