The Importance of Being Unpopular

Telecom Hub Conference
Remarks of Commissioner Kathleen Q. Abernathy
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(As prepared for delivery)

Good morning, and thank you for inviting me to speak with you today. As many of you may have noticed, it has been quite an exciting year at the FCC. In fact, after the Triennial Review and media ownership proceedings, even people outside my immediate family seem to think I have an important job.

In all seriousness, given the significance of these and other issues to our nation, it *is* a critically important job. In fact, the controversy surrounding some of our rulemakings has led me to reflect on the appropriate role for the Commission in this challenging environment. One important lesson I draw from my experiences this year is that commissioners must be resolute in remembering that an independent agency should follow the law prescribed by Congress and the reviewing courts. We must be willing to be unpopular when the course charted by the statute and court decision is at odds with the political winds. I believe that is the essential purpose of an independent agency: By relying on our substantive expertise and operating within the parameters of the Communications Act, we will best serve the public interest. Of course, Congress is always free to change the law, but until it does, we must pay heed to the limits of our authority.

The Triennial Review and media ownership proceedings illustrate the difficulty of adhering to this principle. The Commission came under tremendous pressure to take actions that, in my view, run afoul of the direction we have received from the courts of appeals. Before I discuss the specifics of these rulemakings, I would like to explain the

dangers of giving into the temptation to elevate personal or political preferences over statutory mandates.

It is often said that the FCC is a creature of Congress, and what this means to me, as an appointed official, is that my job is to implement the intent of Congress, not to follow my own policy predilections. Of course, being an FCC Commissioner requires me to exercise a great deal of discretion in determining what Congress intended. But there are concrete limits on what the FCC may choose to do, and the courts of appeals have not hesitated to remind us of these limits. In fact, it sometimes seems that FCC decisions do not receive the deference that is called for by the law. If so, it may well be our fault — the courts appear to have determined that the FCC has not been sufficiently mindful of statutory limitations in recent years, so they are not inclined to give us the benefit of the doubt.

The primary problem with failing to recognize our statutory limits is that the courts *will* vacate our decisions, and that causes tremendous disruption and uncertainty. In the telecommunications context, for example, seven years after the passage of the 1996 Act, the FCC still does not have judicially sustained unbundling rules in place. The previous Commission's efforts were set aside by the Supreme Court, and then by the D.C. Circuit the second time around. The uncertainty caused by these successive reversals has undoubtedly slowed the flow of capital into the wireline sector. Moreover, carriers have justifiably tailored their business plans to rules adopted by the FCC only to have the rules subsequently vacated, and it is very difficult to continually make adjustments as the rules of the road change. As I will discuss in a moment, the appropriate response to this problem is not to preserve old rules to avoid causing pain to those who relied on them; that only buys time until the rules are set aside once again.

Rather, the only reasonable response is to redouble our efforts to ensure that our rules are sustainable. Unfortunately, in the Triennial Review, I believe the Commission has failed once again at that task.

In some ways, the tendency of the FCC to ignore statutory constraints parallels recent corporate scandals involving questionable accounting practices. This may sound odd, but bear with me. In a drive to make the short term look as rosy as possible, a number of corporations damaged their long-term credibility. They inflated present earnings to please analysts and investors with the hope that someone else would clean up the mess down the road. While the FCC obviously has not engaged in this kind of activity, it has shirked its responsibility when it has tried to push the envelope too far in construing the statute. I believe that, rather than making decisions that we know are likely to be reversed, we should interpret the statute reasonably, even conservatively, because the downside risks of pushing the envelope are so great. Corporations that were conservative in their accounting practices did not see their stock prices soar during the banner years of 1998-2000, but they have emerged as the survivors in the long term. By the same token, the FCC's policymaking will best serve the public interest if we resist the urge to focus on short-term results.

So what does this mean in concrete terms? I have tried to approach the policy debates waged at the FCC with this perspective in mind. I think the Triennial Review and the media ownership rulemaking both illustrate the dangers of short-term thinking and the importance of adhering to the law, even when that makes us unpopular.

Triennial Review

In the Triennial Review proceeding, I thought it was critical for the FCC to let go of the short-term fixation with what the D.C. Circuit called "synthetic" competition, and instead take a long-term approach that relies on *facilities-based* competition. The courts have twice warned us, in no uncertain terms, that providing blanket access to the incumbent LEC's network cannot be justified under the impairment standard. Rather, the courts made clear that the statute requires us to impose *meaningful limits* by unbundling network elements only where entry otherwise would be uneconomic.

To CLECs that have built a strategy around the unbundled network element platform, or UNE-P, the D.C. Circuit's *USTA* decision was obviously an unwelcome development. Particularly in the current economic climate, some of these providers would be unable to raise the capital needed to build networks of their own. The FCC thus was confronted with a barrage of arguments in favor of preserving access to UNE-P, in spite of the court decision. UNE-P providers focused on the lower retail prices they offer as a result of getting access to a finished service at TELRIC rates. And parties predicted that higher prices would result from any decision to cut back on the availability of unbundled switches.

This is where the importance of being unpopular comes into play. Naturally, I do not relish making decisions that may harm individual competitors and possibly even increase telephone rates in some markets. But if the statute and directives from our reviewing courts compel such decisions, we should not shy away from them. I am concerned that the majority's decision to adopt a standard that appears likely to preserve UNE-P in all markets failed to comply with the clear instructions we have received from the Supreme Court and D.C. Circuit. What concerns me most is not that this decision is

likely to be reversed on appeal, but that, in delegating key decisionmaking authority to the state commissions, the majority deprived incumbent LECs and competitors alike of regulatory certainty. Instead of responding to the FCC's order with revised business plans, the carriers will spend the next year engaged in fact-intensive proceedings before each and every state commission. The states inevitably will come to different conclusions, even when the underlying facts are comparable. These state proceedings will be followed by a period of litigation in district courts throughout the nation, and eventually in the courts of appeals. Thus, while giving state commissions the final say over key aspects of the analysis may have been more politically palatable than making the crucial decisions ourselves, I believe we had an obligation to craft clear rules that will allow providers to plan for the future.

As I made clear in my dissenting statement, the FCC could have adopted a granular impairment analysis at the federal level that put in place meaningful restrictions on the availability of unbundled switching, while also addressing any potential impairments associated with the hot cut process or low customer densities. The majority unfortunately was unwilling to require CLECs to bring anything to the table, possibly because of a concern that cutting back on UNE-P offerings would be bad for consumers. But our job is to apply the statute and court decisions faithfully.

In any event, far from protecting consumers, the majority's failure to impose meaningful restrictions on UNE-P actually will *harm* consumers over the long haul. As noted above, the FCC eventually gets its comeuppance in the courts when it disregards statutory limits, and I think this case will be no different. So we're in store for further uncertainty and disruption, which will be bad for ILECs and CLECs alike. Wall Street

appears to agree, given that the announcement of the UNE-P decision was followed by the evaporation of billions in market capitalization in the telecom and equipment sectors.

Moreover, it is myopic to focus on short-term price competition created by UNE-P. By analogy, customers surely enjoyed getting free services from dot-coms during their heyday. But the market figured out soon enough that such business plans were unsustainable, and none of us were pleased when the bubble burst, companies went belly-up, and our retirement funds were hammered by the ensuing stock market collapse. By the same token, the goal of fostering local competition would be better served by the slow and steady development of facilities-based competition. Even if UNE-P providers can slash prices for consumers in the short term, I fail to see how such a resale model, based on deeply discounted TELRIC prices, can be sustained over the long term. Whenever a business model depends entirely on regulations for its survival, that's a sure sign of trouble.

While my principal objection to my colleagues' decision on UNE-P concerns the substance of the decision, I also believe that the procedural aspect of the last six months reflects a similar disregard for the administrative process. After the Commission voted on the Triennial Review back in February, we should have quickly completed the Order and released it to the public. In any case, and especially in a proceeding of this magnitude, parties put important decisions on hold in anticipation of our orders. For example, carriers contemplating investing in new facilities delayed those decisions until they could see how the details of our decisions would affect their plans. So it behooves us to act quickly, given the importance of the telecom sector to overall economic health.

Unfortunately, the majority spent several months refining their decision and later changing it in response to Chairman Powell's and my dissents. Even the appellate

process has been affected: While clear precedent favors transferring an appeal of a decision on remand to the court that issued the remand — in this case, the D.C. Circuit — here, the majority took the unprecedented step of *opposing* transfer of the case out of the Eighth Circuit. In the procedural realm, just as with the substantive decisions, we must be guided more by law and precedent than by our own policy and political preferences. That is the only way the Commission will be accorded the respect and deference that is normally accorded to an expert independent agency.

Media Ownership

Turning to media ownership, that proceeding presented a similar dynamic, but there we did the right thing by following the mandates in the Communications Act and in relevant court decisions. Unfortunately, adhering to the statute in this case exacted a heavy cost. Many members of the public and of Congress are disappointed — to say the least — that the FCC relaxed some media ownership restrictions. But those who say that the Commission should have heeded the public opposition to these rule changes, in response a grass-roots postcard-writing campaign and scores of letters from members of Congress, in my view misunderstand our role as an independent agency. We may not ignore statutory and judicial directives based on the number of emails we receive.

There is no real question where the law pointed in this case. As in the UNE context, the Commission's past efforts to preserve existing ownership rules had a consistently poor record: In fact, we lost every time. We were 0 for 5 in defending our media ownership restrictions. The reason we lost consistently is that the biennial review provision of the Communications Act requires the FCC to affirmatively demonstrate that rules remain *necessary* in the public interest. The court of appeals characterized the

congressional mandate as telling the FCC: "Damn the torpedoes, full speed ahead" on its deregulatory voyage.

When the FCC finally made a serious effort to conduct a rigorous review of the media landscape, it became clear that many of the rules could not be justified without modification. This should not come as any surprise, given that many of the rules at issue were adopted decades ago. Since that time, we have moved from a three-channel world into one with cable, DBS, and the Internet. Most consumers have literally hundreds of media outlets to choose from.

Of course I also recognize that a relatively small number of companies produce programming that a majority of Americans choose to watch on television. Specifically, four companies create the programming that is chosen by approximately 75 percent of viewers during prime time. But to me, the critical fact is that these providers control no more than 25 percent of the broadcast and cable channels in the average home, even apart from the Internet and other information pipelines. Given these other viewing options, I can only presume that this means that Americans are watching programming from these four providers because they prefer their content, not because they lack alternatives. And it would be anathema to the First Amendment to regulate media ownership in an effort to steer consumers toward other programming.

The facts persuade me that the modest changes that the Commission made to our media ownership rules represented the only responsible course that was available to us. Of course, I would have preferred that everyone agree, and that Congress laud our action rather than seek to rescind parts of it. But I am confident that, given the statutory framework and judicial precedent, if the reviewing court finds fault with our decision, it will be because we did not deregulate enough, not because we went too far. I also

sincerely believe that if Congress wants to chart a more regulatory course, that is the prerogative of our elected officials, and I will faithfully implement whatever framework they adopt. But unless and until there is a change in the statute, I am duty bound to follow the current deregulatory mandate.

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In closing, I believe that the FCC must redouble its efforts to stay true to its mission as an independent agency. Even when it makes us unpopular, we must follow the law. Even apart from the inevitable court reversals that otherwise occur, and the ensuing disruption, it is easy to recognize the danger of political decisionmaking. Simply imagine an agency implementing political preferences that differ from your own. When agencies and courts engage in such behavior, it undermines our system of representative democracy. Appointed officials are not accountable to the public, and we must not give ourselves authority that Congress has denied us. I have tried to make this my guiding principle at the FCC, and I will do my best to adhere to it throughout the remainder of my tenure at the Commission.

Thank you very much. I would be happy to take some questions on whatever is on your mind.