

THE TELECOM REVOLUTION -- AN AMERICAN OPPORTUNITY

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Introduction & Summary

America is in the midst of an historic period of dynamic change and opportunity driven by a transformation of technology. In 1995, one half of all capital investment in America, broadly defined, will be in computers and telecommunications equipment. The telecommunications industry already constitutes one seventh of our economy and is growing. By the early 21st century, the global information industry is expected to be a \$3 trillion market. Yet the government statutory and regulatory system now in place was erected in the 1930s during the New Deal and embodies the limits and technological realities of a long-vanished era.

To seize the opportunities of the knowledge age, a new, modern and efficient governmental role with respect to telecommunications is needed. Government can, and indeed should, perform certain tasks. This report is an effort to identify and focus on the essential governmental functions needed for America to enter the new century -- and to cleanse the detritus of the past. Many current governmental institutions and regulations are relics of past practices and seek to perform tasks better performed by competitive markets. The report has a simple goal: to provide for a modern and effective government to complement market forces to speed the development of new products and services for Americans.

The new, smaller government role (hereafter the 'Replacement Model') is based on a functional analysis of what a government should be for a digital era of the 1990s and beyond. A functional analysis reveals certain overarching principles which are applied by the Replacement Model. Conceptually, a functional analysis supports a government

role for ensuring parity of opportunity across media such as wireline, cellular, broadcast, DBS and video dialtone. The success of any one company or even industry should reflect their inherent attributes rather than their relative regulatory handicaps. With respect to mission, the Replacement Model will provide for a new Office of Communications (the "OC") to be located within an existing Executive Branch agency.

The OC will concentrate on the following tasks: (1) overseeing the implementation of a transition from the current practice of universal service based on hidden and elaborate cross-subsidies to a smaller, more efficient and targeted needs -- based system; (2) overseeing the mass privatization of spectrum to the American people through a sequenced, phased-in auction process; (3) coordinating a non-interference standard to govern the private sector's use of spectrum; and (4) coordinating U.S. international commitments and opportunities for telecommunications. Supporting the new, more focused governmental role will be an emphasis on traditional antitrust enforcement utilizing existing expertise and personnel located within the U.S. Department of Justice.

The Replacement Model offers a detailed and specific action plan for the transition to a the new, modern government. Existing statutes, rules and regulations are either eliminated immediately, subject to a three year sunset provision, or retained and re-assigned to the Replacement Model's Office of Communications. At the end of the sunset period, those rules and regulations deemed necessary by the OC to promote economic welfare through competition will be retained only by affirmative action of Congress.

Part One of this report establishes the case for replacing and modernizing the existing regulatory regime. The focus is on the systemic influence of regulations and statutes which authorize the Federal Communications Commission (“FCC”) and have inflicted staggering costs upon American consumers and the economy. The report recognizes that other restrictions arising from federal/state mechanisms such as the Modified Final Judgment (“MFJ”) settlement also have had an impact on competition.

The systemic problem, however, remains that the statutes, rules and regulations underlying the FCC have denied through intrusive regulation the U.S. economy tens of billions of dollars in annual growth. Current public servants may be dedicated and hard working. It is the system itself which in some measure mandates that the FCC engage in certain practices and procedures which block new products and services such as cable TV, microwave, cellular, voice mail, video dialtone and new personal communications services. For decades these technologies have been denied Americans while the FCC struggled to decide what to allow to the consumer. Price competition has been stymied and business costs ultimately borne by the American public have been needlessly inflated by a plethora of entry, ownership and contractual regulations of telephone and media markets. Part One details the history of this structural obstruction of technology and competition.

Resolving the economic imbalances imposed by universal service is a key ingredient to any meaningful reform proposal. Basic dialtone telephone service for those truly in need is an essential element to a sustainable modernization of government’s role. Part Two offers two approaches to providing basic service for those truly in need. The approaches make the actual price of phone service open and clear to the American

people. Currently, a hidden tax is imposed on all through various subsidies. Urban users subsidize rural users. Business and long-distance rates subsidize residential rates. Much of the money is paid to companies, not consumers. Many of the well-to-do get subsidized. The current system imposes burdens on those allegedly it seeks to help -- those financially less well off. An urban, single parent family on government assistance programs today actually subsidizes the phone bills of rural users -- even if the rural user calls from a ski chalet or vacation home straight out of *Lifestyles of the Rich and Famous*.

Moreover, no one knows what the subsidies cost despite the billions of dollars in the system because the lack of accountability destroys incentives to economize. Like a Soviet-era good under Gosplan, no one really pays the true cost of the phone services they use. The replacement model puts a halt to this muddle.

The model supports the claimed purpose of cross-subsidization, promotion of so-called “universal service,” but in ways that are more accountable, explicit and efficient. Both plans recognize a *national* interest in keeping basic phone service affordable to all Americans. The first model has three facets. First, the federal program to keep residential telephone rates affordable in high cost areas would be limited to that amount needed on a going forward basis to provide wireline service to those areas. Second, the model embraces use of a specific, targeted means test to provide assistance to those truly in need. Third, the responsibility for the remainder of the universal service subsidies paid by interstate long distance callers would devolve to the state level subject to broad federal guidelines. Restoration of market prices and efficient pricing will foster real competition and result in substantially lower prices.

The second approach proposes that the responsibility for maintaining universal service be transferred to the states. Those local exchange costs that are now allocated to the interstate jurisdiction are returned to the respective states. Each state could recover those costs as deemed fit, subject to federal guidelines. Under this model, federal law would pre-empt entry restrictions and prohibit discriminatory treatment of interstate users for comparable services.

Both approaches are subject to strict federal guidelines forbidding price discrimination and requiring interconnection for all competitors. Moreover, the Replacement Model continues the federal pre-emption of state regulation of wireless services.

In Part Three, the Replacement Model promotes American competitiveness through a modern approach to use of the spectrum. Spectrum is transferred to private hands in a sequenced, phased-in approach. In Phase One, those with current licenses in spectrum are granted title to the spectrum currently used. These owners of spectrum, the vast majority of whom have already purchased their stations, will be free to use, transfer and develop spectrum as they deem necessary. Property rights in spectrum will be enforced through traditional legal protections afforded all property owners in the courts. Under this approach, industry would also have recourse to the OC for interference issues and use of laboratories for testing and evaluation of new equipment and technologies.

In Phase Two, applications pending before the FCC as of May 1, 1995, would be granted title to the spectrum on an expedited basis. In addition, the OC will on an expedited basis, begin to roll-out non-allocated spectrum for the presumptive

use by private sector entities seeking its use. Competing bids for the spectrum will be subject to expedited auction. This bottom-up, demand-driven process will allow market forces to determine spectrum use and jump start competition and technological innovation.

In Phase Three, the government will begin the process of turning over its spectrum to the private sector by beginning an expedited survey of available spectrum bands, establishing standardized parcels for entrants to claim. The government currently presides over massive amounts of under-utilized spectrum far in excess of its needs for possible use by the Department of Defense, NASA, etc.

In Phase Four, the government will permit claimants to claim title to available spectrum as identified in the spectrum survey. In the event that there are multiple claimants for a particular parcel of spectrum, an auction will be held. Each department making the spectrum available that is subject to an auction will retain a portion of auction proceeds for modernization to more efficient digital equipment, re-location expenses and for current operations. Remaining auction proceeds can be dedicated to deficit reduction.

The premise again is that spectrum use will be dictated by the American people, not the government. The Replacement Model envisions a governmental role for coordinating “spectrum contours,” “overlay rights” and “band management rights” but mandates that these rights be defined quickly and made available for private investors willing to risk capital in developing new wireless services. The key is to sell title in property, not mere licenses. Those who claim unchallenged use of identified parcels or bid and win title to spectrum are free to develop and/or re-sell the spectrum as with any other private property right subject to antitrust review and the geographic and

interference boundaries of property assignments. The primary goal of these spectrum reforms is the rapid and efficient creation of a spectrum market and to provide an economic stimulus in job creation. Recent announcements by the government confirmed that auctioning spectrum can also have a supplemental benefit of raising billions in revenue for deficit reduction.

Finally, Part Four sets out a detailed and specific plan for implementing the Replacement Model's recommendations. It re-assigns and re-organizes the functions now performed by the FCC. The goal is to focus on the critical tasks for today and the future. Government unquestionably should fulfill some functions and services for the benefit of all Americans. Others should be eliminated immediately. A third residual category of FCC rules and regulations would be sunsetted in three years.

The Replacement Model updates government to account for the differences between the analog past and the technologies now emerging through market forces. For sixty years, the government substituted administrative, bureaucratic decision-making for the free market. Two old, major assumptions -- (1) the existence of a "natural monopoly" in telecommunications; and (2) the assumption that technology would remain essentially static or unchanging -- are untenable for the 21st century. The model makes a clear break with the past, embracing competition with antitrust enforcement and by transferring authority to the states in those instances when monopoly regulation remains temporarily necessary. The new role for government is leaner, more cost effective and serves the American people. This, then, is a call to action to meet the challenges of the telecommunications revolution -- an American opportunity.

Part One: The Regulatory Roadblock to the Telecom Revolution

Overview

The failure of telecommunications regulation is systemic to the regulatory structure created by and under the Communications Act of 1934. Regulation has been prone to wasteful delay, costly and unnecessary intrusion on market processes without due regard for regulation's unintended effects, and abuse of process by special interests. These problems are not linked to any particular FCC. Rather they span the decades and continue to this day. Nor are the hard work and many hours spent by public servants in the FCC a factor in improving the situation. It is systemic. In light of the accelerated pace of technological change and heightened global competition, the ill effects of this system are increasingly unacceptable.

The FCC's processes have been prone to delay for three reasons. First, considerable delay results simply from good old fashioned bureaucratic practices. The Commission's processing of licenses and formal complaints take inordinately long. Second, centralized decision making by regulators dealing with complicated issues better left to market forces leads to wasteful regulatory vacillation. As explained below, the agency's back-and-forth handling of basic regulatory questions has been extensive. Third, some of the regulatory functions assigned to or assumed by the FCC functions duplicate responsibilities of federal antitrust and other authorities. This duplication complicates the review of matters such as telecommunications and represents needless expense.

Over time, the regulatory system has expanded its regulatory authority to address problems it did not fully understand in ways fraught with unintended effects. Through the financial interest and syndication and prime time access rules, the FCC attempted to increase

diversity in television programming by attempting to shift profits from the television networks to Hollywood producers. Instead, it simply created a bonanza for game-show producers. Through its so-called fairness doctrine, it justified encroachment on broadcasters' First Amendment rights without due regard for the chilling of speech. In the late 1960s and 1970s, the FCC dramatically increased the tax on interstate long-distance service, lowering residential telephone rates artificially for the rich and poor alike. Perhaps most costly of all, the FCC's top-down management of the electromagnetic spectrum frustrated the development of new broadcast stations, television networks and innumerable "wireless" radio services.

Lastly, the FCC's regulatory process has lent itself to abuse by existing firms and special interests resistant to competition. Using regulatory processes against one's existing or potential competitors is a temptation few businesses and almost no trade association can resist. The perennial loser of this "gaming" of the regulatory system has been the American public. For example, if the Commission had authorized phone companies to begin competing directly against cable in 1984, cable consumers would have saved between \$3 and \$7 billion annually between 1983 and 1992. Likewise, the FCC-imposed delay in licensing cellular telephony cost America \$85 billion in growth and consumption.

The case for reforming and replacing this failed regulatory regime is compelling. Over the last two decades the FCC moved laboriously -- sometimes in the face of political opposition from Congress and sometimes after prodding from the courts -- to open markets to competition and to reform existing regulation. Despite these steps, the systemic problems persist. Delay through regulatory gaming is still the order of the day. For example, in the past it was AT&T who opposed opening the long distance and equipment markets to

competition and broadcasters who stymied competition from cable TV systems. Today, it is MCI and other long distance carriers who oppose AT&T's efforts to compete, it is the cable companies who oppose telephone companies' efforts to compete in video markets, and it is the broadcasters who oppose satellite-delivered radio services.

In numerous cases the FCC continues costly regulation and intrudes on business decision making that could be much better handled by market forces or state government. For example, federal price regulation of the long-distance market is counterproductive. Virtually all of the existing broadcast regulation imposed unnecessary costs ultimately borne by the American viewing public. Most of the spectrum remains hostage to bureaucratic gridlock.

The case for radical transformation is even more compelling now given that the market power rationale for much of this regulatory intervention has largely disappeared. The telephone industry used to be a monopoly; but the main segment of that industry under the FCC's jurisdiction -- long-distance service -- has become highly rivalrous. Although some experts disagree on the current extent of competition in local telephone service, most would agree that full competition in the local loop is both feasible and highly likely. The broadcast industry used to be oligopolistic; now the number of broadcasters has burgeoned and they compete vigorously with cable and direct broadcast satellites. An invigorated "wireless cable" (MMDS) industry supplies additional competition, and telephone companies will enter video markets in the near future.

If America's regulatory and statutory regime for telecommunications dates back to the Communications Act of 1934, it is helpful to recall that in 1934 the telegraph still was the dominant form of communications for Americans. Enacted in the midst of the

Great Depression, the 1934 Act today is defended after the fact by the following assumptions: (i) a natural monopoly existed in the telecommunications industry, warranting price-and-entry federal regulation; (ii) broadcast spectrum , both radio and TV, was scarce and required federal oversight; and (iii) the analog technologies of the day dictated the form and function of communications. At that time only a telephone let people communicate point to point; only a radio broadcast, for example, could reach out to many. None of these assumptions holds true today. We are now in an era of accelerating innovation moving towards digital technologies in the 21st century:

- **Competition, not monopolies.** Introduction of microwave, fiber optics, cellular, digital cellular, co-axial cable, satellite and the new personal communications services/personal communications networks (“PCS/PCN”) mean that competition, rather than natural monopoly, better characterizes the telecommunications industry.

- **Abundance, not scarcity.** The future is and will be characterized by abundance, not scarcity. Over the wireline, the capacity to transmit data (“bandwidth”) is doubling every five years. A fiber in the new fiber optic networks can carry in 1995 simultaneously 37,500 separate conversations. The marginal cost of transmitting a call is literally zero.

Wireless spectrum also is characterized by new abundance. New digital techniques known as Code Division Multiple Access (“CDMA”)¹

¹ CDMA is not new technology. The military used it for decades in military satellite systems. Unlike the present analog system and other digital systems, which divide the available spectrum into narrow channels and assign one or more conversations to each channel, CDMA is a wideband spread spectrum technology. It "spreads" multiple conversations across a wide segment of the cellular broadcast spectrum.

CDMA works simply. Each telephone or data call is assigned a unique code that permits it to be distinguished from the multitude of calls simultaneously transmitted over the same broadcast spectrum. As long as the receiving device (in this case, the other phone) has the right code, it can pick its conversation out of a crowded signal. CDMA offers a 10- to 20- fold capacity increase in spectrum efficiency. Consider the following example: setting aside an initial 15% of its broadcast spectrum, a service provider can realize an immediate increase in overall system capacity of up to 190%. Existing technologies would require converting almost the entire spectrum to attain a comparable capacity gain.

present a massive wideband increase in efficient use of spectrum. In broadcast fields, other compression techniques and advances in spectrum management open up huge segments of spectrum for commercial, educational and public applications. The old approach of the government husbanding scarce spectrum and tightly regulating its use no longer has a valid basis.

• **Flexibility in transmission, not limits.** Digital signals, consisting of 1s and 0s, do not define and are not characterized by the devices through which the signals are transmitted. Telephone calls, faxes, or TV broadcasts can be sent and received by any variety of platforms, processed by on-board microprocessors. Video can be sent into the American home *via* coax cable, wireless, satellite direct digital broadcast, or over the telephone line. Telephone calls can be cellular/ wireless, sent over the telephone line or through a Cable TV coax cable. In all instances, how the digital transmissions are sent and the means they are received do not change the nature of the transmission. The 1s and 0s are the same. The analog technology of the 1934 Act could not offer that flexibility. A telephone had to make a phone call. A radio had to receive a broadcast, etc. The 1934 Act's separate provisions for wireline telephones, radio broadcasts, etc. are obsolete and reflect the limits of analog technologies.

Despite the rapid growth of competition in all sectors of the industry, the FCC continues to expand. At present, the Commission has over 2,200 full-time employees. Its budget for 1995 is \$185 million.² Adjusted for inflation, the Commission's budget fell 6.5 percent during the Reagan Administration.³ It rose over 56 percent during the Bush and Clinton Administrations.⁴ In the two most recent fiscal years, the Commission's

With CDMA, each additional 10% allocation of spectrum further increases the system capacity by up to twice the capacity of the original analog system.

²FCC, FISCAL YEAR 1986 BUDGET ESTIMATES at 6 (Feb. 1995) (hereinafter 1996 Budget Estimates).

³Thierer, *A Policy Maker's Guide to Deregulating Telecommunications Part 5: Is the FCC Worth Its Cost?*, HERITAGE FOUNDATION TALKING POINTS, Mar. 22, 1995, at 3.

⁴*Ibid.*

budget increased a total of 35 percent. The Clinton Administration has proposed a budget for fiscal year 1996 of \$224 million, a 62 percent increase over bloated 1994 levels.⁵

FIGURE 1

The Commission's staff has grown from 1,753 full-time employees in 1993, to a proposed 2,271 for 1996 -- a 30 percent increase in three years. The Common Carrier Bureau employs 270 people, and spends an estimated \$22 million a year.⁶ The Mass

⁵FCC, FISCAL YEAR 1986 BUDGET ESTIMATES at 6 (Feb. 1995).

⁶The FCC's budget for 1995 is about \$185 million. Seventy-five percent of this budget is earmarked for the salaries and benefits of the Commission's 2,271 employees; another 16 percent

Media Bureau employs 335 employees, spending an estimated \$27 million a year. The Cable Services Bureau has 223 employees; its 1995 budget was about \$18 million. About 865 people, or more than 40 percent of FCC staff, provide "executive direction and support."⁷ Nearly 40 percent are engaged in "non-feeable" activities that cannot be linked to any specific regulatory program.⁸

The Challenge. Apart from budgetary savings, transforming telecommunications regulation will create an enormous opportunity for America. The pace of technical change and global competition have accelerated. The faster the potential rate of innovation, the greater care that must be taken to assure that regulations designed to address outmoded monopoly concerns do not have the unintended effect of retarding innovation. Likewise, the globalization of markets and economic liberalization of Soviet bloc and developing countries have heightened the competition facing U.S. companies. At the turn of the century, a country growing at 4 percent per year would have been considered to have a high growth rate. Now something closer to 10 percent would be in order. Starting in 1780, it took Britain 60 years to double its output per person. Beginning in 1880, Japan achieved this feat in 34 years. Starting in 1966, South Korea did it in 11 years.⁹

is non-discretionary expenses such as GSA rent, mail and utilities. FCC, FISCAL YEAR 1996 BUDGET ESTIMATES at p. 6 (Feb. 1995). The Commission does not provide budget figures on a bureau-by-bureau basis. The bureau budget figures given here represent estimates reached by dividing the FCC's 1995 budget of \$185 million by the total number of FCC employees (2,271) to arrive at a per-employee expenditure figure; and multiplying the latter number of employees in each bureau.

⁷ Robinson, *How Much Wood Would a Woodchuck Chuck, If a Woodchuck Could Chuck Wood?: The FCC, the New Congress, and Regulatory Spending*, 11 Telecommunications Policy Review 2 (Feb. 26, 1995).

⁸ See Fee Assessment and Collection at Appendix C, No. 95-3 (F.C.C. Jan. 12, 1995).

⁹ *21st Century Capitalism*, Business Week, January 24, 1994, p. 19.

Our country is poised to take advantage of tremendous opportunities for economic growth and social development through reform of the government's role in regulating the telecommunications industry. At stake is our ability to compete and prosper in an international information market that is projected to exceed \$3 trillion by the close of the decade. Our entrepreneurial culture, openness to innovation and acceptance of robust competition give American concerns a comparative advantage. America's technical resurgence, especially in the digital arena, provides a basis for reforming its telecom regulatory regime to provide a powerful springboard to greater technical advance and levels of prosperity. The chief obstacle in the way is unnecessary, increasingly costly, regulation.

The FCC's Performance. The rest of Part One details some of the regulatory system's "highlights". The FCC 's poor performance here in part is a symptom of the regulatory regime mandated by the 1934 Act. We consider its processes for licensing wires and spectrum and its program content. We end by reviewing wasteful regulatory vacillation, the complaint process and duplicative functions.

Regulatory Highlights

1. Licensing. Section 214 of the 1934 Communications Act gives the FCC broad power to license wireline facilities and services used in interstate common carriage.¹⁰ No facilities may be deployed or operated without the FCC's advance approval. The FCC licenses use of the airwaves too, under section 307 of the Act.¹¹ The Commission allocates frequencies to various uses, and assigns them to specific users. Cable facilities,

¹⁰47 U.S.C.A. §214(a) (1994).

¹¹47 U.S.C.A. §307 (1994).

by contrast, are licensed by local authorities; the Commission exercises only general oversight over the franchising process.

Across the board, the Commission's licensing process is characterized by procrastination, equivocation and seemingly endless delay. Unnecessary delay in issuing licenses ultimately found to be in the public interest imposes enormous costs on the industry and the national economy. It particularly increases the risk and cost of introducing new technologies. While the FCC equivocates about issuing new licenses, the market waits. If a \$20 billion a year industry develops five years later than it might have because of unnecessary FCC delays in issuing the needed licenses, the American public pays -- in lost services and jobs.

a. Licensing wires. The most surprising fact about the licensing of interstate wires is that it is required at all. There is no obvious reason why a federal commission must approve every new deployment of equipment, wires or wireline services that can arguably be characterized as "interstate." As the long-distance telephone industry has demonstrated, entry can be completely deregulated with no adverse effects. Nonetheless, comprehensive licensing by the FCC remains the norm.

1). *Customer Premises Equipment (CPE).* -- Until the 1960s, the FCC backed AT&T's position that telephones and other forms of customer premises equipment were an integral part of "telephone service," to be provided only by the monopoly telephone company. In 1956, for example, the Commission agreed with AT&T that the sale of the

Hush-a-Phone -- a small plastic device that snapped onto the mouthpiece of the phone to provide privacy -- violated AT&T's tariffs and was therefore illegal.¹²

Today, the CPE market is fully competitive. The market for telephone handsets alone generates \$750 million a year. Assuming that competition has driven prices in this market down by 20 percent (a reasonable assumption) if the FCC had simply approved handset competition in 1956, when the Hush-A-Phone sought to enter the market, consumers could have saved several billions between 1956 and the late 1970s when competition was allowed.

These figures reflect what consumers might have saved if the FCC had merely authorized competition in handset markets. The overall market for CPE -- including PBXs, key systems, voice processing equipment, teleconferencing equipment, telephones and fax machines -- generated \$16 billion in 1994.¹³ One can only speculate as to how much more consumers would have saved if the FCC had approved competition in all CPE markets generally a decade or two before it did. What is clear is that in this single market, FCC licensing delays cost consumers billions of dollars.

2). *Long-distance Services.* -- The Commission's forty-year effort to protect AT&T from long-distance competitors tells a similar story. The FCC grudgingly permitted limited private-line competition in 1969, six years after MCI filed its first request to do so.¹⁴

¹²Hush-A-Phone, 20 F.C.C. 391, *rev'd*, 238 F.2d 266 (D.C. Cir. 1956), *on remand*, 22 F.C.C. 112 (1957).

¹³NATA, 1993-1994 TELECOMMUNICATIONS MARKET REVIEW AND FORECAST 151, 161, 171, 180, 190, 191 (1994).

¹⁴MCI, 18 F.C.C.2d 953 (1969).

The Commission rejected subsequent attempts by MCI to expand its offerings in 1975,¹⁵ and to interconnect with AT&T in 1978.¹⁶ On both occasions, MCI had to go to the D.C. Circuit Court of Appeals to win those rights.¹⁷

Today, long-distance is a \$65 billion market, more than double its 1978 size.¹⁸ Both the FCC and Department of Justice maintain that competition in long-distance markets has spurred innovation and pushed prices sharply down. To the extent this is so, the Commission's decades-long policy of *forbidding* competition in long-distance markets once again cost consumers tens of billions of dollars had the FCC fully opened long-distance markets in 1968, rather than in 1978.

The FCC's regulation of the competitive process in the long distance market has also denied consumers the benefits of robust competition. Throughout the 1980s, the FCC stymied efforts by the incumbent carrier to cut prices in the face of competition. When it eventually allowed AT&T to respond by introducing optional calling plans in the residential market and tariff 12 and contract offerings in the business market, prices fell substantially. Amazingly, long-distance carriers continue to operate under difficult notice and tariff requirements. Just this year, MCI intervened to delay reductions in tariffs that would have given consumers discounts up to 50%. MCI contended that the rates were too low. The delay in introducing the plan, which was finally approved, cost consumers an estimated \$30

¹⁵Decision, MCI, 60 F.C.C.2d 25, app. B at 62-64 (1976).

¹⁶Petition of AT&T for a Declaratory Ruling and Expedited Relief, 67 F.C.C.2d 1455 (1978).

¹⁷See MCI v. FCC, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (Execunet I). MCI v. FCC, 580 F.2d 590 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 980 (Execunet II).

¹⁸FCC, 1984 STATISTICS OF COMMUNICATIONS COMMON CARRIERS 14 (1984); FCC, 1993-4 STATISTICS OF COMMUNICATIONS COMMON CARRIERS (1995).

million. Generally, had competition been permitted to reduced interstate rates by 10 percent, consumers would have saved tens of billions of dollars.

3). *Enhanced Services.* -- The Commission's two-decade crusade against the provision of "enhanced services" by telephone companies has imposed yet another layer of costs. From the mid-1960s to the mid-1980s, the Commission enforced a policy of "maximum separation" between "basic" voice services and network-based data processing, electronic services, and computers.¹⁹ The Commission did not back away from this quarantine until 1986,²⁰ and did not allow AT&T or the Bell Companies to provide enhanced services directly until 1992.²¹ Today, enhanced services comprise a \$13.6 billion market.²² Phone companies compete head-to-head with independent providers to deliver enhanced services like voice mail to consumers.

It is impossible to estimate precisely what this unnecessary quarantine has cost consumers. But the single example of voice mail demonstrates that the costs were staggering. Today, phone companies provide voice-mail services at roughly \$5 a month per mailbox, to roughly ten million customers. This single service alone is thus a \$600 million a year industry in the U.S. economy. Yet the market scarcely existed at all until phone companies were finally authorized to serve it. Though the technology was available in the 1970s, if not earlier, FCC permission to deploy it did not come until 1988. The cost to the

¹⁹Final Decision, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980).

²⁰Report and Order, Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958 (1986).

²¹Memorandum Opinion and Order, Bell Atlantic's Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, 7 F.C.C. Rec. 3877 (1992).

²²U.S. DEP'T OF COMMERCE, 1994 U.S. INDUSTRIAL OUTLOOK 25-2 (1994).

economy from the Commission's delay in authorizing these services has been estimated to approximate \$6 billion.²³

4). **Cable TV.** -- In 1958, the Commission declared that it had no jurisdiction over cable television;²⁴ cable was viewed as a strictly local matter. The Commission revisited the issue in 1959 and again disclaimed jurisdiction.²⁵ In 1962, the FCC decided it would regulate cable, but only indirectly, through the microwave systems used to import distant television signals.²⁶ The FCC adopted a more general cable policy in 1965, still relying on its authority over microwave common carriers.²⁷ Finally, the Commission announced it had full jurisdiction over cable after all, because cable competed with television.²⁸

The Commission did not wade into the threshold business of franchising local cable networks; it left that to local authorities. Instead, as described below, the Commission set out general rules for what cable systems could or must carry, simply to limit cable competition against established broadcasters.

²³Jerry A. Hausman and Timothy J. Tardiff, Benefits and Costs of Vertical Integration of Basic and Enhanced Telecommunications Services, *attached to* Comments of Bell Atlantic, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20 (F.C.C. filed Apr. 6, 1995).

²⁴Frontier Broadcasting Co. v. Laramie Community TV Co., 24 F.C.C. 251, 254 (1958).

²⁵Report and Order, Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 403 (1959).

²⁶Carter Mountain Transmission Corp. v. F.C.C., 32 F.C.C. 459 (1962).

²⁷Amendment of Subpart L, Part 11, to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 38 F.C.C. 683 (1965).

²⁸Amendment of Subpart L, Part 91, To Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, Second Report and Order, 2 F.C.C.2d 725, 734.

Cable today is a \$23 billion a year industry. Once again, it is impossible to quantify with precision what consumers lost by Commission policies that aimed to suppress cable for the benefit of broadcasters. But given the high value consumers place on television programming, the Commission-imposed drag on competition certainly cost consumers billions of dollars in the 1960s and 1970s.

5). *Video Dialtone (VDT)*. -- In 1970, the FCC put in place rules to exclude phone companies from the provision of video programming and cable television.²⁹ In 1987 it suggested that the policy might be inhibiting competition and began to reevaluate it.³⁰ The reevaluation occupied the Commission for five years. In 1992 the Commission again declared its general support for telco provision of video dialtone services.³¹ Many phone companies then filed for permission to provide commercial services. The Commission took another two years to approve the first such application.³²

²⁹Final Report and Order, Application of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 F.C.C.2d 307 (1970).

³⁰Notice of Inquiry, Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 2 F.C.C. Rec. 5092 (1987).

³¹Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 F.C.C. Rec. 5781 (1992).

³²The experience with VDT is by no means unique. Since 1990, applications for section 214 certification to build or modify new common carrier lines, excluding video dialtone applications, on average required over seven months to obtain. The creation of a separate bureau in 1994 to handle section 214 requests to build or operate international facilities has not improved the situation at all: section 214 applications before the International Bureau have taken an average ten months to resolve.

In the few markets where a second cable company has challenged the first, cable television rates are 20 to 30 percent lower than in markets served by only a single provider.³³ If the Commission had authorized phone companies to begin competing directly against cable in 1984, and had phone companies actually entered at that time, cable subscribers could have benefited from billions in savings *a year* for the period from 1983 to 1992.³⁴

The Replacement Model recognizes that federal licensing of both common-carrier and cable wires and their uses is now obsolete. State regulators already oversee the physical deployment of facilities along public rights of way. State authorities likewise regulate the prices charged by local phone companies in areas where the phone companies are still deemed to possess monopoly power. The FCC's role in licensing wireline facilities is now simply an expensive anachronism, one that costs the economy enormously in lost competition and yields no concomitant benefits whatsoever. The Replacement Model addresses this by updating the 1934 Act specifically in Part Four, sharply reducing any federal role in licensing and therefore slowing the introduction of the wireline facilities.

b. *Licensing spectrum.* Licensing of spectrum presents somewhat different problems. Two adjacent radio stations cannot broadcast on the same frequencies simultaneously; rules or property rights of some kind are needed to prevent interference.

³³Affidavit of Thomas W. Hazlett, *attached to* Motion of Bell Atlantic Corp., Bell South Corp., NYNEX Corp., and Southwestern Bell Corp. to Vacate the Decree, No. 82-0192 (D.D.C. July 6, 1994).

³⁴This assumes a 20 percent decline in basic rates and a demand elasticity of -2.0. Two sets of calculations -- one based on quantities and prices of basic service and another based on quantities and average revenue per subscriber -- were performed. Estimates were converted to 1994 dollars assuming an interest rate of ten percent. It is also assumed that 98 percent of markets were monopolies, and that 98 percent of subscribers were in these monopoly markets. This tends to provide a downward bias in the estimates, as in reality competition did not exist every year in markets that were competitive in 1992.

The Commission licenses spectrum to private users for fixed periods of time. With few exceptions, the licenses are given away; they are not sold.

Protracted delays in issuing licenses cost both industry and consumers enormously. And the Commission seldom issues licenses cleanly; there are almost always many strings attached. These prescriptions impose additional, large costs on the economy and consumer welfare.

1). *Radio and Television.* -- The introduction of both FM radio and television was delayed by years of FCC equivocation over which bands would be assigned to which uses. FM radio technology, which was invented in 1933, was not in widespread use until the 1960s.³⁵ The modern television was exhibited by RCA in 1939, but the FCC took years to adopt initial standards. The FCC then froze all applications for TV licenses until 1952.³⁶ In the year after the freeze was ended, the number of stations tripled.³⁷ However, a 1952 FCC decision deliberately limited the number of viable stations per market and impeded the creation of additional TV networks at enormous cost to the American viewing public.

Licensing radio transmitters of every kind remains one the Commission's largest and most time-consuming activities. Between 1984 and 1994, the Commission designated 6,834

³⁵Lack of FCC support contributed to FM's lack of popularity. One glaring example occurred in 1945. By 1945, 500,000 FM receivers had been built, but were all rendered useless when the FCC decided to move FM channels to a different spectrum band. FM languished for so long that the inventor of FM eventually committed suicide in despair.

³⁶Sixth Report and Order, 17 Fed. Reg. 3905 (1952), *aff'd*, Peoples Broadcasting Co. v. U.S., 209 F.2d 286 (D.C. Cir. 1953).

³⁷Similar delays are likely to occur with the introduction of high-definition television (HDTV). The Commission began its inquiry in 1987. Notice of Inquiry, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, 2 F.C.C. Rec. 5125 (1987). It took five more years to settle on a rough spectrum allocation plan and implementation schedule. Memorandum Opinion and Order, Third Report and Order, and Third Further Notice of Proposed Rulemaking, 7 F.C.C. Rec. 6924 (1992). The transition to all-HDTV broadcasting is now scheduled for 2013. *Ibid.*

broadcast license applications for hearing. The administrative costs of those proceedings approached \$50 million over ten years.³⁸ Licensing broadcast applicants by lottery would have cost the FCC just over \$12 million; licensing via auction would have cost just \$2.4 million, in addition to generating substantial revenue.³⁹

But those numbers pale beside the costs society bears while it waits for the FCC to get licenses out the door. Judging from the secondary market, broadcast licenses for AM radio, FM radio and broadcast television are worth, in the aggregate, about \$13 billion.⁴⁰ Direct broadcast satellite (DBS) spectrum is worth an estimated \$3 billion; MMDS spectrum is worth roughly \$1 billion; IVDS spectrum is worth over \$200 million. Spectrum, in short, is an enormously valuable commodity -- when it finally gets into private hands. In the aggregate, broadcast spectrum licenses in use today are worth an estimated \$17 billion.

With a commodity this valuable, every year, every month, of delay in putting it to productive use costs the economy enormously. If it just sits idle for a year, the economy suffers an irretrievable loss. If FCC licensing procedures were responsible for delaying the movement of spectrum into productive, private uses, the delays would be responsible for

³⁸Evan Kwerel and Alex Felker, Office of Plans and Policy, FCC, OPP Working Paper No. 16, Using Auctions to Select FCC Licenses 17 (May 1985) (1985 hearing costs adjusted to 1994 dollars). This estimates assumes an average of four applications per hearing (hereinafter 1985 OPP Working Paper).

³⁹The Office of Plans and Policy (OPP) estimates the cost of lotteries at \$5,000 each, and the cost of auctions at \$1,000 each (adjusted to 1994 dollars). Lotteries and auctions are also subject to considerably shorter delays than comparative hearings. The OPP estimated the average delay at one year and three months, respectively, compared to 18 months for a comparative hearing. Shorter delays lead to less of a decrease in the value of the license.

⁴⁰See NTIA, U.S. Spectrum Management Policy: Agenda for the Future 91 (Feb. 1991) (estimating total at \$11.5 billion in 1990 dollars).

reducing the broadcast industry's total revenues by about \$38 billion,⁴¹ and total economic output by a substantial fraction of this \$38 billion.⁴²

2. Cellular. -- Cellular technology was first conceived in 1947 by Bell Laboratories. AT&T was operating its first experimental cellular telephone system in 1962, but the FCC did not even get around to allocating spectrum for cellular until 1974.⁴³ The first cellular licenses were not handed out until 1983. Today, the cellular industry generates some \$14.2 billion in revenues a year.⁴⁴

But the delays were much longer than a year. Cellular service could have been introduced a decade earlier;⁴⁵ the technology was in hand, and the only obstacle was FCC licensing. Economists estimate that the decade of delay cost America roughly \$85 billion.⁴⁶

⁴¹Michael Wilke, *Y&R's New Buying Plan Jolts Radio*, ADVERTISING AGE, May 1, 1995, at 28; *Broadcast Ad Revenues Climb; Television Advertising*, INSIDE MEDIA, Mar. 15, 1995 at 29.

⁴²The gain in the value of output would be equal to \$38 billion less the value of the resources required to produce it (productions and transmission costs, etc.) less the value of output displaced around the spectrum.

⁴³Second Report and Order, In the Matter of An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, 46 F.C.C.2d 752 (1974). Some of this delay was due to the unavailability of technology. Application of Illinois Bell Tel. Co., 63 F.C.C.2d 655 (1977), *aff'd sub nom.* Rogers Radio Communications Services, Inc. v. FCC, 593 F.2d 1225 (D.C. Cir. 1978).

⁴⁴CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION, WIRELESS SOURCE BOOK (Spring 1995) (forthcoming).

⁴⁵Jeffrey H. Rohlfs, Charles L. Jackson, and Tracey E. Kelly, National Economic Research Associates, Estimate of Loss to the United States Caused by the FCC's Delay in Licensing Cellular Telecommunications 4 (Nov. 8, 1991). "[H]ad the FCC proceeded directly to licensing from its 1970 allocation decision, cellular licenses could have been granted as early as 1972 and systems could have become operational in 1973, a decade earlier than they were in reality." *Id.* See also THE WEFA GROUP, ECONOMIC IMPACT OF DEREGULATING U.S. COMMUNICATIONS INDUSTRIES 97 (Feb. 1995).

⁴⁶Jeffrey H. Rohlfs, Charles L. Jackson, and Tracey E. Kelly, National Economic Research Associates, Estimate of Loss to the United States Caused by the FCC's Delay in Licensing Cellular Telecommunications 4 (Nov. 8, 1991). *But see* WEFA study, *supra* note 46 (estimating loss at \$25 billion between 1973 and 1983 in constant 1994 dollars).

At a finer level of detail, the economy lost millions simply because cellular licenses were issued through lengthy comparative hearings rather than through quick auctions. Comparative hearings typically took 18 months. In 1985, it was estimated that delays of that order eroded the value of each cellular license by \$90,000 and cost the government \$20,000 per hearing in administrative costs. Extrapolated over the 60 licenses for which comparative hearings were used, this method of license assignment cost the economy roughly \$9 million.⁴⁷ The remaining 1,400 cellular licenses were assigned through a lottery process, which was estimated to have delay and administrative costs of \$67,000 per license; overall, these lotteries thus cost the economy another \$130 million in 1994 dollars.⁴⁸ Auctions, if used instead, could have saved the economy more than \$100 million.⁴⁹

3). PCS. -- The FCC's handling of Personal Communication Services ("PCS") licenses marked a significant improvement over past practices. But even here, unnecessary delays have been very costly. PCS services were introduced in the United Kingdom in 1989.⁵⁰ That same year, the FCC received two petitions for a PCS

⁴⁷1985 OPP Working Paper 17. Comparative hearings were used to assign licenses in the top 30 markets; markets below the top 30 were to be distributed through lotteries. *See* Report and Order, In the Matter of Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 F.C.C.2d 175 (1984). Nine million dollar figure is 1994 dollars.

⁴⁸1985 OPP Working Paper 17. One hundred-thirty million dollar figure is 1994 dollars.

⁴⁹In 1985, the costs associated with auctions were estimated to be roughly \$17,000 per license. *Ibid.* 1994 dollars.

⁵⁰Jennifer Quinn Williams, *PCS and Cellular: Is the Industry Poised to Capitalize on the PCS Opportunity?*, CELLULAR MARKETING, June 1991, at 24.

rulemaking.⁵¹ In the more than five years since, fewer than 150 of the nearly 3,500 broadband and narrowband PCS licenses have actually been assigned.⁵²

Assuming that PCS competition can push the price of wireless phone service down by 20 percent,⁵³ existing cellular consumers would have realized more than \$9 billion in savings if PCS licenses had been assigned five years ago. If PCS had added five million new wireless customers during that period, an additional gain to the economy of more than \$1.5 billion from subscriber revenue would have been realized.⁵⁴

4). Subcarrier Channels. -- Radio and TV stations can readily use interstitial bits of their spectrum to transmit paging signals, electronic TV guides, and other kinds of data. The transmission of radio programming via subchannel frequencies was developed as

⁵¹The first petition, filed by Cellular 21, Inc., was received in September of 1989 (RM-7140). PCN America, Inc. followed suit that November (RM-7175).

⁵²It is not yet clear what effect these delays will have on the ultimate success of PCS. At the time it divested itself of its interest in broadband pioneer American Personal Communications, the Washington Post remarked that "significant governmental delays and policy reversals have changed the outlook for us, particularly since we are 'pure' PCS investors." *Washington Post Sells APC Interest; Sprint Buys It, Forms Venture*, ADVANCED WIRELESS COMMUNICATIONS, Jan. 18, 1995.

⁵³Industry analysts have been predicting, fairly consistently, that PCS service charges will be around \$25 per month, a rate less than half that of the current average monthly cellular bill. See, e.g., Aaron Zinter, *Sprint, AT&T Win in Boston; FCC License Sale Ends; Bills For Wireless Phones May Fall*, BOSTON GLOBE, Mar. 14, 1995, at 35 (citing estimates of \$30 per month); *Auction of Airwaves Brings \$7 Billion in Bids*, PLAIN DEALER, Mar. 14, 1995, at 7C (\$25 to \$30 per month); Catherine Arnst, *The New Wireless Looks a Bit Pricey*, BUSINESS WEEK, Dec. 5, 1994, at 104 (\$20 to \$30 per month); Mary E. Thyfault and Barbara DePompa, *Wire-Less*, INFORMATIONWEEK, Nov. 7, 1994, at 12 (\$30 per month). As of June 1994, the average monthly cellular bill was \$58.65. CTIA, THE WIRELESS SOURCEBOOK 9 (Fall 1994 Update).

⁵⁴This assumes an average price of \$25 per subscriber per month and a subscriber penetration rate comparable to cellular between 1984 and 1988. This estimate is extremely conservative for a number of reasons. The pace of cellular subscriber growth has increased rapidly since the service's inception, with demand for wireless services rising precipitously in recent years. Additionally, digital PCS systems will likely offer additional value-added services such as electronic mail and paging. The \$25 cost per month is also one of the lower often-cited sums; higher service charges would inflate the \$1.5 billion estimate.

early as 1948.⁵⁵ The Commission did not permit use of these frequencies for anything but broadcast services until 1983.⁵⁶ In 1994, the subcarrier market was worth \$40 million.⁵⁷ Had the FCC decided in 1948 to permit unlimited use of subcarrier frequencies, the economy would have gained hundreds of millions of dollars.

5). Vertical Blanking Intervals (VBI). -- Restrictions on another usable part of the broadcast video signal -- the vertical blanking interval (VBI) -- have entailed significant losses as well. The VBI was first used in 1967.⁵⁸ But for the next 16 years the FCC did not permit the VBI to be used for anything but closed-captioning. In 1983, the Commission finally authorized television stations to begin offering teletext services on the VBI;⁵⁹ additional VBI communications services such as data transmission, computer software delivery, and paging were authorized in 1985.⁶⁰ Total dollar values for this market are unavailable, but like FM subcarriers, the delay in permitting full use of VBI technology imposed an unnecessary cost on the economy.

⁵⁵McMartin Industries v. Vinal, 301 F. Supp. 749 (D. Neb. 1969).

⁵⁶Report and Order, BC Dkt No. 82-536, Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of the Subsidiary Communications Authorizations (F.C.C. Apr. 7, 1983). In 1982, the Commission admitted that its rules had "artificially limited" the uses of SCA; "vast numbers of potential SCA's are unused and probably wasted;" this available resource had "remain[ed] essentially idle." Notice of Proposed Rulemaking, BC Dkt No. 82-536, Amendment of the Commission's Rules Concerning the Use of Subsidiary Communications Authorizations, at ¶2 (1982).

⁵⁷COMMUNICATIONS DAILY, Jan. 18, 1994, at 4.

⁵⁸The Commission had authorized on an experimental basis the addition of a facsimile signal using the VBI. Experimental Facsimile Television Signal, 8 F.C.C.2d 986 (June 28, 1967).

⁵⁹Report and Order, Amendment to the Commission's Rules to Authorize the Transmission of Teletext by TV Stations, 48 Fed. Reg. 27054 (F.C.C. June 13, 1983).

⁶⁰Report and Order, Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations, 101 F.C.C.2d 973 (1984).

6). *Spectrum Zoning*. -- Sub-carrier channels and the VBI illustrate a more general point: the FCC routinely "zones" spectrum licenses. Licensees may use the spectrum only in the specific, designated ways approved by the Commission at the outset. A licensee that discovers a new way of squeezing more transport out of its spectrum (as sub-carrier and VBI technologies allow), or discovers an entirely new, more valuable way of using the spectrum must go back to the Commission for a new license -- and risk standing in line for years or even decades while the Commission considers the matter.

The gains from dezoning can be substantial. A government study concluded that if a single UHF television station in Los Angeles were to shut down and transfer its spectrum to a third cellular provider, the overall public gain would be about \$1 billion over eight years. This study predates the PCS decision and assumes that the introduction of the third provider would cause a 25 percent reduction in prices.⁶¹ What the PCS auctions indicate are that markets will move spectrum to higher valued uses. Another example is Nextel (formerly "Fleet Call"). In 1991, Nextel purchased approximately 9 MHz of spectrum for roughly \$45 million in the Los Angeles market to provide digital wireless telephone service.⁶²

The Replacement Model, in Part Three, identifies a procedure to permit the American economy to capture gains by dezoning spectrum licenses across the board. The simple *deletion* of a few lines of legal boilerplate from FCC spectrum licenses -- and a

⁶¹Evan Kwerel and John R. Williams, Office of Plans and Policy (OPP) Working Paper No. 27, *Changing Channels: Voluntary Reallocation of UHF Television Spectrum*, 1991. The FCC model estimated a 25 percent reduction in prices based on oligopoly pricing and empirical evidence. With a 25 percent price reduction, the present discounted value of the change in consumer and producer surplus is \$1.2 billion for the years 1992 to 2000 using the maximum amount of spectrum available. Subtracting lost consumer welfare from the deactivation of the UHF station leaves a net consumer welfare gain of just over \$1 billion.

⁶²Memorandum Opinion and Order, Request of Fleet Call Inc. for a Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio System in Six Markets, 6 F.C.C. Rec. 1533 (1991).

streamlined “rollout” of spectrum for creative use by the private sector -- could create a very substantial increase in social welfare nationwide.⁶³

2. Content and Program Regulation.

a. **Broadcast Program Formats.** Neither the Radio Act of 1927 nor the Communications Act of 1934 expressly requires broadcasters to provide specific kinds of programming or to serve any particular constituency. The Commission, however, spent decades trying to prescribe program formats.

In 1946, the FCC published its "Public Service Responsibility of Broadcast Licensees" -- the "Blue Book."⁶⁴ In applying for license renewals, broadcasters were to show they had provided "balanced program structure."⁶⁵ In 1960, the Commission replaced the Blue Book with even more specific guidelines as to what constituted a well balanced programming structure.⁶⁶ From 1970 to 1981, the FCC tried unsuccessfully to curtail its program review.⁶⁷ The D.C. Circuit disagreed a third time.⁶⁸ In 1981 the Supreme Court at

⁶³As Janice Obuchowski, former Assistant Secretary for Communications and Information at the Department of Commerce and former NTIA Administrator, has said, "Efficient use of the spectrum will be maximized only if licensees are given the widest possible latitude in determining which services to offer within their assigned frequencies. In principle, the flexibility granted to licensees should be limited only to the extent necessary to prevent radio frequency signal interference with other users." Janice Obuchowski, *The Unfinished Task of Spectrum Policy Reform*, 39 Fed. Com. L. J. 325, 328-329 (Dec. 1994).

⁶⁴FCC, *Public Service Responsibility of Broadcast Licensees*, Report by Federal Communications Commission (Mar. 7, 1946).

⁶⁵*Id.* at 13.

⁶⁶Report and Statement of Policy Commission *en banc* Programming Inquiry, 44 F.C.C. 2303 (1960).

⁶⁷ When it first sought to set aside programming guidelines, however, the D.C. Circuit overruled. In
a follow-up case in 1973, the Commission again tried to dispense with program format rules. The D.C. Circuit overruled again. The Commission then initiated a proceeding to redefine its role in resolving program format disputes and concluded it shouldn't have any at all .

⁶⁸*WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979).

last agreed that the Commission could reasonably leave program formats to the marketplace.⁶⁹ The Commission eliminated certain programming guidelines for radio in 1981,⁷⁰ and for broadcast television in 1984.⁷¹

The Commission continues to insist, however, that programming respond to "community needs."⁷² FCC regulation superflously requires every radio and television broadcaster to provide "significant programming" to five or more community issues each quarter.⁷³ The Prime Time Access Rule, promulgated in 1970,⁷⁴ and modified in 1974 and 1975,⁷⁵ still requires network affiliates to devote at least one of the four daily "prime time" hours to non-network programming.

The decades of Commission meddling with program formats have served no demonstrably useful purpose at all. Between 1934 and 1978, the Commission found only eighteen occasions not to renew a license because of inadequate program service.⁷⁶ Its programming-related license revocation rate was less than one station every two years.⁷⁷

⁶⁹FCC v. WNCN Listener's Guild, 450 U.S. 582 (1981).

⁷⁰Report and Order, Deregulation of Radio, 84 F.C.C.2d 968 (1981), *aff'd in part and remanded in part sub nom.*, Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983).

⁷¹Report and Order, Revision of Programming and Commercialization Practices, 98 F.C.C.2d 1076 (1984).

⁷²*Id.* at 1098-1101.

⁷³Memorandum Opinion and Order, Deregulation of Radio, 104 F.C.C.2d 505, 507 n.8 (1986).

⁷⁴Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition & Responsibility in Network Television Broadcasting, 23 F.C.C.2d 382 (1970).

⁷⁵Report and Order, Consideration of the Operation of, and Possible Changes in the "Prime Time Access Rule," Section 73.658(k) of the Commission's Rules, 44 F.C.C.2d 1081 (1974); Second Report and Order, 50 F.C.C.2d 829 (1975).

⁷⁶Dwight L. Teeter, Jr. and Don R. Le Duc, *Law of Mass Communications* 375 (7th ed. 1992).

⁷⁷*Id.*

Indeed, it has only refused to renew 142 licenses in all, for any reason. The vast majority of license renewals are approved.

b. The Fairness Doctrine. In an effort to make the airwaves accessible to the largest variety of voices, the Commission instituted the so-called "Fairness Doctrine" in 1949.⁷⁸ Broadcasters were to offer access to their facilities for the airing of opposing viewpoints.⁷⁹ In 1959, these rules were partly codified by Congress in its "equal time" amendments to section 315 of the Communications Act.⁸⁰ In 1967, the FCC extended the doctrine to advertising, or at least to cigarette advertising.⁸¹ In 1974 the Commission retreated from this position and exempted all commercial advertising except for "editorial advertisements."⁸² In 1981, the FCC determined the Fairness Doctrine was no longer in the public interest⁸³ and in 1987, repealed it.⁸⁴ During the course of nearly 40 years, the Commission issued more than 20 orders in pursuit of this policy.

The FCC on the Fairness Doctrine:
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⁷⁸Report, *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949).

⁷⁹*Id.* at 1257-58.

⁸⁰47 U.S.C.A. §315 (1994).

⁸¹Complaint Directed to Station WCBS-TV, New York, N.Y., Concerning Fairness Doctrine, 8 F.C.C.2d 381 (1967).

⁸²Fairness Report, *Handling of Public Issues Under the Fairness Doctrine*, 48 F.C.C.2d 1, 26 (1974).

⁸³Report, *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145 (1985).

⁸⁴Memorandum Opinion and Order, *Complaint of Syracuse Peace Council*, 2 F.C.C. Rec. 5043 (1987). Congress then passed legislation reinstating it. *Fairness in Broadcasting Act of 1987*, H.R. 1934, S. 742, 100th Cong., 1st Sess. (1987). The measure was vetoed by President Reagan. *Veto of the Fairness in Broadcasting Act of 1987*, Message to the Senate Returning S. 742 Without Approval, 23 Weekly Comp. Pres. Doc. 715 (June 19, 1987).

1974: *[T]he First Amendment impels, rather than prohibits, governmental promotion of a system which will ensure that the public will be informed of the important issues which confront it. . . The purpose and foundation of the fairness doctrine is therefore that of the First Amendment itself.* (48 F.C.C.2d at 5-6)

1985: *[W]e no longer believe that the fairness doctrine, as a matter of policy, serves the public interest. . . Furthermore, we find that the fairness doctrine, in operation, actually inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogatives of broadcast journalists.* (102 F.C.C.2d at 147)

1987: *[W]e are persuaded that the fairness doctrine is unconstitutional on its face.* (2 F.C.C. Rec. at 5047).

c. Cable Programming. -- The Commission has also spent three decades trying to dictate what kind of programming should or should not be carried on cable. In 1966, the FCC tried to persuade Congress to prohibit cable from originating its own programming.⁸⁵ Three years later the Commission embraced the opposite position: larger cable systems were *required* to originate their own local programming on at least one channel.⁸⁶ The rule survived two months; the Eighth Circuit found that the Commission lacked the authority to regulate cable this way.⁸⁷ The Supreme Court eventually upheld the Commission's power to require cable program origination, but expressed no view on the validity of the content rules.⁸⁸ In 1974, however, the Commission deleted the origination requirement entirely.⁸⁹

⁸⁵Second Report and Order, Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Antenna Signals to Community Antenna Systems, 2 F.C.C.2d 725 (1966).

⁸⁶First Report and Order, Amendment of Part 74, Subpart K of the Commission's Rules and Regulations Relative to Community Antenna Systems, 20 F.C.C.2d 201 (1969).

⁸⁷Midwest Video Corp. v. FCC, 441 F.2d 1322 (8th Cir. 1971).

⁸⁸United States v. Midwest Video Corp., 406 U.S. 649, 652 n. 4 (1972).

The 1984 Cable Act expressly forbids the FCC from imposing any new requirements concerning the content of cable television services.⁹⁰

⁸⁹Report and Order, Amendment of Part 76, Subpart G of the Commission's Rules and Regulations Relative to Program Origination By Cable Television Systems, 49 F.C.C.2d 1090 (1974).

⁹⁰47 U.S.C.A. §544(f)(1).

The FCC on Cable Program Origination:

1966: *[W]e shall urge that Congress prohibit the origination of program or other material by a [cable] system. (2 F.C.C.2d at 787)*

1969: *[W]e have accordingly concluded that, at least for the present, [cable] operators should be eligible to engage in program origination, and encouraged or even required to do so. (20 F.C.C.2d at 206)*

1974: *[T]he Commission has concluded that the mandatory origination scheme is not likely to be the most effective means of fostering local expression in programming. . . .Accordingly, we have decided to eliminate the mandatory origination requirement. (49 F.C.C.2d at 1104)*

A second FCC rulemaking crusade has addressed the carriage of broadcast stations on cable. In 1965, the FCC issued its first set of "must carry" rules, directing cable providers to carry local broadcast signals.⁹¹ It revised the rules in 1972.⁹² In 1985, the D.C. Circuit struck down the Commission's rules.⁹³ The Commission immediately responded with a new set of rules.⁹⁴ These were struck down again a year later.⁹⁵ In 1992, Congress passed its own version of must-carry rules. A three-judge district court upheld the rules; the Supreme Court has remanded the case for further factual findings.⁹⁶ Since 1965, the Commission has issued 57 orders promulgating or affirming must-carry rules, acted on hundreds of petitions

⁹¹First Report and Order, Rules re Microwave-Served CATV, 38 F.C.C. 683 (1965).

⁹²Cable Television Report and Order, 36 F.C.C.2d 143 (1972).

⁹³Quincy Cable v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).

⁹⁴Report and Order, Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C. Rec. 864 (1986).

⁹⁵Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987).

⁹⁶Turner Broadcasting System v. FCC, 819 F. Supp. 32 (D.D.C. 1993), *vacated and remanded*, Turner Broadcasting System v. FCC, 114 S. Ct. 2445 (1994).

for carriage by broadcasters and waiver requests by cable operators, and been reversed on appeal twice.

While it has tried to require cable to carry some broadcast stations, the FCC has labored equally hard to forbid carriage of others. Rules were designed to outlaw "leapfrogging" -- the importation of a distant network affiliate rather than a nearby one.⁹⁷ In 1970, the Commission proposed a new version of "distant signal" rules, somewhat less restrictive than the old.⁹⁸ In 1972 the Commission changed its regime yet again.⁹⁹ Almost before the ink had dried, the FCC began to amend and backtrack.¹⁰⁰ In 1976, the FCC eliminated the "leapfrogging rules."¹⁰¹

d. *Financial Syndication Rules (Fin-Syn).* -- For many years, the Commission labored to control the relationships between television networks and suppliers of TV programming in order to encourage more diverse programming. The Commission initiated its first rulemaking on the subject in 1965.¹⁰² Five years later it issued its financial interest and syndication ("fin-syn") rules, which barred the networks from selling network-produced

⁹⁷Notice of Proposed Rulemaking and Notice of Inquiry, Amendment of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 15 F.C.C.2d 417 (1968).

⁹⁸Second Further Notice of Proposed Rulemaking, Amendment of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 24 F.C.C.2d 580 (1970).

⁹⁹Cable Television Report and Order, Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 36 F.C.C.2d 143 (1972).

¹⁰⁰Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, 36 F.C.C.2d 326 (1972).

¹⁰¹Report and Order, Amendment of Subpart D of Part 76 of the Commission's Rules and Regulations with Respect to Selection of Television Signals, 57 F.C.C.2d 625 (1976).

¹⁰²Notice of Proposed Rulemaking, Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, No. 65-227 (F.C.C. Mar. 22, 1965).

programming directly to independent stations and from acquiring a financial interest in syndicated programming.¹⁰³

The Department of Justice followed in 1974 with an antitrust suit against the three networks, which resulted in a consent decree that largely incorporated the FCC's rules.¹⁰⁴ After those decrees expired in 1991, the FCC tried to reinstitute a modified set of rules;¹⁰⁵ these were struck down by the Seventh Circuit.¹⁰⁶ In thirty years, the Commission has come roughly full circle. The networks have as much leeway to purchase and sell programming in 1995 as they had in 1965. In the three decades in between, however, the Commission significantly intruded on this process. Along the way it issued 15 major opinions and a comprehensive staff report, and defended its action before federal appellate courts three times. During much of this period a comprehensive antitrust consent decree addressed precisely the same concerns and both were based on misguided notions of network power over program supply.

The Replacement Model, in Part Four, *infra*, proposes immediate elimination or in a few instances sunseting all program content regulations. Media markets are competitive

¹⁰³Report and Order, Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, 23 F.C.C.2d 382 (1970).

¹⁰⁴United States v. National Broadcasting Co., 449 F. Supp. 1127 (C.D. Cal. 1978); United States v. CBS Inc., 1980-1981 Trade Cas. (CCH) ¶63,594 (C.D. Cal. 1980); United States v. American Broadcasting Cos., 1980-1981 Trade Cas. (CCH) ¶64,150 (C.D. Cal. 1980).

¹⁰⁵Report and Order, Evaluation of the Syndication and Financial Interest Rules, 5 F.C.C Rec. 1815 (1991).

¹⁰⁶*See* Schurz Communications v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1991). The court noted that in the FCC's order, "Key concepts are left unexplained, key evidence is overlooked, arguments that formerly persuaded the Commission and that time has only strengthened are ignored, contradictions within and among Commission decision are passed over in silence. . . .The Commission must do better in articulating their justification." *Ibid.*

today and will be still more rivalrous tomorrow. Content regulation is unnecessary, counterproductive, and runs afoul of the First Amendment rights of speakers.

3. Wasteful vacillation. Centralized decision-making by the FCC deals with complicated issues better left to market forces. Consequently, with rare exceptions, Commission rulemaking is a quagmire of false starts, delay, backtracking, and endless fine-tuning. The Commission announces a major new regulatory scheme: time and again, after substantial delay, it then abandons it, drastically revises it, steps back to an earlier plan previously discarded, or starts all over again after a rebuff from the courts. Both industry incumbents and firms considering entry spend years guessing at what the final regulatory regime will be. Endless uncertainty in the regulatory process entails huge losses for both consumers and providers alike.

a. Enhanced Services Supplied by Phone Companies. -- The Commission has been equivocating for three decades over the rules to govern phone company provision of "enhanced services," like voice mail. During that period, the Commission has issued over 150 orders, and has made five trips to appellate courts to defend its rules.

The process began in 1966, when the FCC began investigating the convergence of computers and communications. Seven years later, this *Computer I* proceeding culminated in rules mandating that telephone companies offer enhanced services only through separate subsidiaries.¹⁰⁷ Just three years into this scheme, the Commission proposed another. Its *Computer II* inquiry lasted almost eight years. *Computer II* resulted in a new definition of

¹⁰⁷Order, Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, 40 F.C.C. Rec. 293 (1973).

what kinds of services properly belonged in the separate subsidiaries.¹⁰⁸ Two years after this scheme was fully developed, the FCC reconsidered the rules again: *Computer III* had been launched.¹⁰⁹ *Computer III* would eliminate the separate subsidiary requirement; network interconnection requirements and accounting rules, the Commission now concluded, would suffice.¹¹⁰ A fourth rulemaking proposal was issued in February 1995.¹¹¹ Astonishingly, the Commission is proposing separate subsidiaries once again, the position first adopted in 1966.

¹⁰⁸Final Decision, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980).

¹⁰⁹Notice of Proposed Rulemaking, Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), CC Dkt No. 85-229 (F.C.C. Aug. 16, 1985).

¹¹⁰Report and Order, Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958 (1986).

¹¹¹Notice of Proposed Rulemaking, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Dkt No. 95-20 (F.C.C. Feb. 21, 1995).

The FCC on Telephone Company Provision of Enhanced Services:

1970: *[T]hese objectives will be achieved best by a maximum separation of activities which are subject to regulation from nonregulated activities. (28 F.C.C.2d at 302)*

1971: *[W]e consider the concept of 'maximum separation' central to our regulatory scheme, and shall require such separation to insure that the public is offered efficient and economical communication services. (28 F.C.C.2d at 270)*

We are making an investment today [by imposing a separations requirement] in the vitality of a competitive industry that may be important in serving the needs of the public well into the future. (77 F.C.C.2d at 463)

1986: *We find that for the provision of enhanced services, the costs from the structural separation requirements in lost innovation and inefficiency render these requirements far less desirable. (104 F.C.C.2d at 1012)*

1995: *We also solicit comments, broadly, on whether structural separation should be reimposed for some or all BOC enhanced services. (FCC Dkt. No. 95-20, Feb. 21, 1995 at 2)*

b. Cable Television Supplied by Phone Companies. -- In 1968, the Commission declared that telephone companies required certification before they could offer cable television service.¹¹² The Commission formally barred telephone companies from the cable market in 1970.¹¹³ With hardly any consideration of the matter, Congress codified the ban in the 1984 Cable Act. In August 1986, the FCC began reexamining the ban; by 1988 it had tentatively concluded that it didn't serve the public interest.¹¹⁴ In 1991, the Commission

¹¹²Decision, General Telephone Company of California, Applicability of Section 214 of the Communications Act with Regard to Tariffs for Channel Service for Use by Community Access Television Systems, 13 F.C.C.2d 448, 463 (1968).

¹¹³Final Report and Order, Application of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 F.C.C.2d 307 (1970).

¹¹⁴Further Notice of Inquiry and Notice of Proposed Rulemaking, Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 3 F.C.C. Rec. 5849, 5860 (1988).

invited further comment on the ban.¹¹⁵ A year later, the Commission formally recommended that Congress repeal it.¹¹⁶

In 1993, phone companies finally brought First Amendment challenges against their blanket exclusion from the arena of "video speech." Since then, fifteen federal judges have examined the ban. Without a single dissenting vote so far, all have concluded that the ban is unconstitutional.¹¹⁷

The FCC has responded with open defiance: it has simply reaffirmed its power to license all phone company operations under the common carrier (not the cable television) provisions of the Communications Act. Phone companies have filed a new round of First Amendment challenges.

The FCC on Telephone Company -Cable Cross-Ownership:

1970: *The entry by a telephone company, directly or through an affiliate, into the retailing aspects of [cable] services in the community within which it furnishes communication services can lead to undesirable consequences.* (21 F.C.C.2d at 324)

¹¹⁵Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Proposed Rulemaking, Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 F.C.C. Rec. 300 (1991).

¹¹⁶Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, Telephone Company-Cable Television Cross-Ownership Rules, 7 F.C.C. Rec. 5781 (1992).

¹¹⁷*See* U S West, Inc. v. United States, 1994 U.S. App. LEXIS 39121 (9th Cir. 1994), *aff'g* U S West, Inc. v. United States, 855 F. Supp. 1184 (W.D. Wash. 1994); Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994), *aff'g* Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909, (E.D. Va. 1994); Southern New England Telephone Company v. United States, No. 3:94-CV-80 (D.Conn. Apr. 28, 1995); Southwestern Bell Corp. v. United States, No. 3:94-CV- 0193-D (N.D. Tex. Mar. 27, 1995); USTA v. United States, No. 1:94CV01961 (D.D.C. Jan. 27, 1995); GTE South, Inc. v. United States, No. 94- 1588-A (E.D. Va. Jan. 13, 1995); NYNEX Corp. v. United States, No. 92-323-P-C (D. Me. Dec. 8, 1994); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994).

- 1981:** *This report [OPP Report, FCC Policy on Cable Ownership] found that there could be important advantages from provision of cable television services by telephone companies. (3 F.C.C. Rec. at 5850)*
- 1988:** *The ban directly deprives consumers of video programming services telephone companies could provide, prevents operation of market incentives and achievement of efficiencies that could bring additional services to the public. . . (3 F.C.C. Rec. at 5866)*
- 1992:** *We conclude that allowing telephone companies to respond to these technological and market incentives for greater participation can further our public interest objectives. (7 F.C.C. Rec. at 5795)*
- 1995:** *A telephone company must, however, continue to obtain from the Commission a certificate of public convenience and necessity under Section 214 of the Communications Act before constructing or acquiring a cable television system within its local service area. (FCC Public Notice 3/17/95)*

c. **CPE.** -- Customer premises equipment (“CPE”) is another example of FCC obstruction of market forces. After a decade of skirmishing and with prodding from an appellate court, the FCC struck down all tariffs barring foreign attachments in 1968.¹¹⁸ This ruling did not, however, cover handsets; they would still be provided exclusively by the monopoly carrier.¹¹⁹ It was 1975 before the FCC allowed full competition in the provision of CPE,¹²⁰ nearly 25 years after the issue arose. In the process, the Commission issued nearly 60 major notices and orders, including 13 in the Computer II proceedings dealing with structural separation and tariffing issues.

The FCC on CPE:

¹¹⁸Use of the Carterfone Device in Message Toll Telephone Services, 14 F.C.C.2d 571 (1968).

¹¹⁹*Ibid.*

¹²⁰AT&T Co.'s Proposed Tariff Revisions in Tariff FCC No. 263 Exempting Mebane Home Telephone Co. of North Carolina from the Obligation to Afford Customers the Option of Interconnecting Customer-Provided Equipment to Mebane's Facilities, 53 F.C.C.2d 473 (1975).

1947: *Recording devices cause no "perceptible effect on the functioning of the telephone apparatus or the quality of the telephone service."* (11 F.C.C. at 1036)

1956: *Unlike ordinary "recording devices," the Jordaphone "opens and closes the telephone circuit," justifying different treatment.* (18 F.C.C. at 669)

1957: *Hush-A-Phone might "result in impairment to the quality and efficiency of telephone service, damage to telephone plant and facilities, or injury to telephone company personnel."* (20 F.C.C. at 391)

1975: *Our experience indicates that not only have customers obtained substantial private benefit from [customer-provided equipment] interconnection, but there has been no technical harm to telephone company operations.* (53 F.C.C.2d at 477)

4. Processing Complaints. -- Some significant share of the FCC's budget and energy is spent on processing complaints. The Commission does keep track of how many complaints are filed, and tallies how many it takes off of the books. But the Commission makes no attempt to determine whether complaints are resolved to anyone's ultimate satisfaction. Most complaints of any significance simply put the Commission in the position of adjudicating disputes between large corporations, disputes that often require ultimate resolution in court.

a. Common Carriage. -- The Commission is required by statute to investigate and dispose of all complaints against interstate common carriers.¹²¹ Charges against carriers for violations of the Act generally begin as informal complaints. During fiscal year 1993, the most recent year for which figures have been made publicly available, the Enforcement

¹²¹47 U.S.C.A. §208(a).

Division of the Common Carrier Bureau received more than 10,000 informal complaints.¹²²

There is no way of knowing how long the Commission takes on average to dispose of an informal complaint.¹²³

A complainant may follow up the initial round with a formal complaint.¹²⁴ Formal complaint proceedings must conform to strict standards prescribed by the Commission.¹²⁵ Judging from reports in the F.C.C. Record, the Commission has adjudicated some 154 formal carrier¹²⁶ complaints from 1990 to March of 1995. Nearly 90 percent (134) involved disputes between two or more carriers.¹²⁷ Most end user complaints were brought by large entities such as Bank of America or local utility companies. Only four of the complaints were brought by individual customers; of these, three were dismissed by the Commission.¹²⁸

¹²²FEDERAL COMMUNICATIONS COMMISSION, 59TH ANNUAL REPORT/FISCAL YEAR 1993, at 52 (1994).

¹²³Observers of the FCC's complaint process have noted the lack of self-examination in its management of informal complaints. *See, e.g.*, Sidney White Rhyne, Reinventing FCC Adjudication, 39 Fed. Com. L.J. 357 (Dec. 1994); Warren G. Lavey, Inconsistencies in Applications of Economics at the Federal Communications Commission, 45 Fed. Com. L.J. 437 (Aug. 1993).

¹²⁴47 C.F.R. §§1.717-1.718.

¹²⁵*See* 47 C.F.R. §§1.720-1.735 for general rules governing the entire filing process and disposition of formal complaints against common carriers.

¹²⁶"Carriers" here refers to local exchange carriers, interexchange carriers, providers of pay phone services, specialized common carriers, resellers, and carrier consortia.

¹²⁷These accounted for 33 (or nearly 70 percent) of the 49 total proceedings. Pole attachment complaints between cable companies and utilities accounted for four formal complaints in four separate proceedings, and there was one complaint of a cable company against a common carrier. There was also one complaint against a common carrier brought by the District of Columbia's Public Service Commission. Business customers of common carriers brought ten complaints in seven different proceedings. Individual customers were only responsible for four complaints against common carriers, representing less than three percent of all formal complaints over these years.

¹²⁸The only one granted was a complaint filed against AT&T, alleging that the carrier had unlawfully collected a gross tax receipts surcharge prior to the effective date of the tariff. *See* 6 F.C.C. Rec. 1618.

During the past five years, the Commission required an average of almost three years to adjudicate a formal complaint against a carrier.

b. *Cable.* -- The procedures for cable rate complaints are similar to those used for common carriage. Complaints are simply forwarded to the cable operator, which is then expected to respond.¹²⁹ Broadcasters may also petition for must-carry rights. After considering the initial petition and comments, the bureau may issue a ruling or specify additional procedures such as oral argument, an evidentiary hearing or further written submissions.¹³⁰ The 38 complaints of unreasonable rates resolved by the full Commission since the 1992 Act took effect required an average of almost fourteen months to resolve. Must-carry complaints resolved between 1990 and 1994 took an average of six months.

c. *Broadcast.* -- Between 1990 and 1995, the Commission issued more than 4,500 orders and notices concerning disputes over the regulation, licensing, construction, and spectrum allocation for radio and television broadcasters. Most complaints are filed around the time licenses come up for renewal,¹³¹ when complaints may help tip the scale against an incumbent and in favor of a challenger. During the first five of the six months before its license is due to expire, a station must post its renewal application for public view and announce over the air its intention to renew and the schedule for filing public comments.¹³² The Commission takes the station's complaint record into account when deciding whether to renew a license. There is apparently no "resolution" of complaints of this sort beyond that.

¹²⁹47 C.F.R. §§76.951, 76.954-76.957.

¹³⁰47 C.F.R. §76.7. The bureau's decision may be appealed to the full Commission.

¹³¹Office of Public Affairs, FCC Fact Sheet: How to File a Complaint Against a Broadcaster, Apr. 1990.

¹³²Mass Media Bureau, The FCC and Broadcasting, Jan. 1994.

The FCC also processes a large number of complaints concerning spectrum interference. Most of these complaints are processed by regional and local FCC district offices. Market forces, controlled by property rights, contracts and privately-enforced limits on trespassing, could do the job at least equally well.

5. Duplicating functions. Present law permits the Commission to replicate precisely the same antitrust reviews conducted by the Department of Justice.¹³³ The Commission is also entitled to weigh antitrust matters in licensing the manufacture and sale of radio equipment,¹³⁴ in licensing radio stations and in granting station construction permits,¹³⁵ and in performing character evaluations of broadcasters.¹³⁶ The Department of Justice enforces these provisions independently.

¹³³The Clayton Act vests authority to enforce compliance with sections 2 (price discrimination), 3 (tying and other conditioning), 7 (stock and asset acquisitions), and 8 (interlocking directorates and officers) of the Act in the FCC where applicable to communications common carriers. Clayton Act, 15 U.S.C. §§12-27 (1988).

¹³⁴See 47 U.S.C.A. §313(a).

¹³⁵See 47 U.S.C.A. §313(b).

¹³⁶Report, Order and Policy Statement, Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1200-1201 (1986).

Duplication of Antitrust Authority	
Federal Communications Commission	Department of Justice
Section 2 Clayton Act Authority To Enforce Antitrust Law Against Common Carriers Re: Price Discrimination	Section 2 Clayton Act Authority To Enforce Antitrust Law Re: Price Discrimination
Section 3 Clayton Act Authority To Enforce Antitrust Law Against Common Carriers Re: Tying	Section 3 Clayton Act Authority To Enforce Antitrust Law Re: Tying
Section 7 Clayton Act Authority To Enforce Antitrust Law Against Common Carriers Re: Stock And Asset Acquisitions	Section 7 Clayton Act Authority To Enforce Antitrust Law Re: Stock And Asset Acquisitions
Section 8 Clayton Act Authority To Enforce Antitrust Law Against Common Carriers Re: Interlocking Directorates and Officers	Section 8 Clayton Act Authority To Enforce Antitrust Law Re: Interlocking Directorates and Officers
May Perform Antitrust Analysis In Reviewing License Transfers (e.g. AT&T/McCaw)	May Review Mergers Under Clayton Act
Must Revoke Or Refuse License And/Or Construction Permit For Antitrust Violations Relating To Manufacture, Sale, And Trade In Radio Apparatus	Broad Authority To Prosecute Sherman And Clayton Act Violations
May Consider Antitrust Violations In Character Review In Broadcast Licensing Proceedings	Broad Authority To Prosecute Sherman And Clayton Act Violations
Enforces Variety Of Structural Regulations To Limit Cross-Ownership And Vertical Integration	Enforces Various Consent Decrees To Limit Cross-Ownership And Vertical Integration

When AT&T sought to acquire McCaw Cellular, for example, the Department of Justice reviewed the proposed merger. The Commission mercifully decided not to invoke its Clayton Act jurisdiction, but rather to consider antitrust issues in connection with the application to transfer the radio licenses.¹³⁷ Had it chosen to conduct the Department's

¹³⁷Memorandum Opinion and Order, Applications of Craig O. McCaw and AT&T For Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, at ¶6 n.25, No. ENF-93-44 (F.C.C. Sept. 19, 1994).

whole antitrust review again, it could have. Though it would have been expected to consider the Department's conclusions,¹³⁸ the Commission would not have been bound by them.¹³⁹

In addition to enforcing the antitrust laws, the FCC has put in place a huge labyrinth of structural rules aimed at preventing antitrust violations before they even occur. These rules generally forbid more than is necessary, particularly when markets are changing fast, and thus suppress more competition than they promote. For example, the Commission's rules ban affiliations between newspapers and broadcasters;¹⁴⁰ prohibit common ownership of two or more television stations, two or more AM stations, or two or more FM stations with overlapping service contours;¹⁴¹ prohibit common ownership of a television station and an AM or FM radio station in the same market;¹⁴² ban telephone companies from acquiring Enhanced Specialized Mobile Radio (ESMR) licenses -- in or out of their telephone service areas;¹⁴³ bar cross-ownership of broadcast television and cable systems in the same

¹³⁸See *National Ass'n of Indep. Tel. Producers & Distrib. v. FCC*, 502 F.2d 249, 253-254 (2d Cir. 1974).

¹³⁹See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978); *Northern Natural Gas Co. v. Federal Power Commission*, 399 F.2d 953, 961 (D.C. Cir. 1968).

¹⁴⁰47 C.F.R. §§73.3555(d).

¹⁴¹See 47 C.F.R. §73.3555(a)-(b).

¹⁴²See 47 C.F.R. §73.3555(c); First Report and Order, Amendment of Section 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 22 F.C.C.2d 306 (1970).

¹⁴³See Order, Amendment of Part 90 of the Commission's Rules Governing Eligibility for the Specialized Mobile Radio Services in the 800 MHz Land Mobile Band, 7 F.C.C. Rec. 4398 (1992). Non-wireline common carriers are not barred from being licensed as SMR service providers.

market;¹⁴⁴ and preclude local exchange carriers from providing video programming in their service areas.¹⁴⁵

The FCC has duplicated most of the mandates of the AT&T divestiture decree. The FCC regulates equal access, cross-subsidization and vertical integration. The Department of Justice and the consent decree purport to do so as well. The decree forbids the Bell Operating Companies from discriminating in the dissemination of network information; under the Commission's "All Carrier Rule," carriers must make any information necessary for carrier interconnection available in a timely manner and on a reasonable basis.¹⁴⁶

FCC regulation duplicates Department of Justice antitrust enforcement in other areas, as well. In 1974, for example, the Department of Justice filed an antitrust suit that sought to limit the power of ABC, CBS and NBC to monopolize prime-time entertainment by combining with their affiliates and controlling all access to network air time. All three networks signed consent decrees that incorporated the FCC's weaker rules on the subject and added stricter conditions.¹⁴⁷ Unlike the FCC rules, however, most elements of the consent agreements were to sunset in 1991. The remaining provisions were vacated on November 8, 1993, by which time the networks were clearly in decline.¹⁴⁸

¹⁴⁴47 U.S.C.A. §533(a).

¹⁴⁵47 U.S.C. §533(b).

¹⁴⁶Computer and Business Equipment Mfrs. Ass'n, 93 F.C.C.2d 1226, 1228 (1983).

¹⁴⁷United States v. National Broadcasting Co., 449 F. Supp. 1127 (C.D. Cal. 1978); United States v. CBS Inc., 1980-1981 Trade Cas. (CCH) ¶63,594 (C.D. Cal. 1980); United States v. American Broadcasting Cos., 1980-1981 Trade Cas. (CCH) ¶64,150 (C.D. Cal. 1980).

¹⁴⁸See United States v. National Broadcasting Co., 842 F. Supp. 402 (C.D. Cal. 1993).

The 1992 Cable Act and FCC rules implementing it likewise address relations between cable operators and their video programming affiliates.¹⁴⁹ But actions brought separately by the Department of Justice and a group of state Attorneys General against various major cablecasters culminated in two 1993 consent decrees addressing precisely the same issues. The decrees require the video programming affiliates of several major cable operators -- including the largest, TCI -- to provide their programming to other video distributors (like operators of direct broadcast satellites) on reasonable, non-discriminatory terms.¹⁵⁰ Unlike the Commission's regulations, these decrees address specific circumstances that present serious anticompetitive concerns; they are targeted at particular defendants and a specific record of abuse.

The Commission duplicates itself internally as well. It recently announced, for example, plans to regulate cable television services provided by phone companies under both Title II and Title VI.¹⁵¹ Thus, non-common-carrier cable television service, ordinarily licensed under section 541 of Title VI, must *in addition* be licensed under the more restrictive provisions of section 214 of Title II. The two Titles, however, create sharply different and inconsistent rights and duties.

¹⁴⁹47 U.S.C. §548(c)(2)(C); 47 C.F.R. §76.1002(c).

¹⁵⁰United States v. Primestar Partners, L.P., 1994-1 Trade Cas (CCH) ¶70,562 (S.D.N.Y. 1994); State of New York v. Primestar Partners, L.P., et al., 1993-2 Trade Cas. (CCH) ¶70,403 (S.D.N.Y. 1993) (hereinafter State Decree).

¹⁵¹Public Notice, Commission Announces Enforcement Policy Regarding Telephone Company Ownership of Cable Television Systems, DA 95-520 (F.C.C. Mar. 17, 1995). On April 3, 1995, the agency issued a "corrected" version of the notice substituting the staff in place of the Commission as the issuing authority. Public Notice, Commission Announces Enforcement Policy Regarding Telephone Company Ownership of Cable Television Systems, DA 95-722 (F.C.C. Apr. 3, 1995).

Finally, there is extensive overlap between FCC and state authority. Every major line and switch operated by local phone companies for the joint provision of in-state and interstate services is allocated roughly three parts to state regulators and one part to the FCC; the regulation of all matters of depreciation, pricing and so on are double regulated accordingly.¹⁵²

PART TWO:

A NEW MODEL FOR COMPETITION, UNIVERSAL SERVICE, AND DEVOLUTION

The 1934 Communications Act required the FCC to “make available, so far as possible, to all people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.” This language has been used to justify so-called universal service policies designed to encourage penetration of telephone service to as many households as possible. The means of doing so was through massive cross-subsidies administered through the FCC. As of this writing, over 96 percent of American households have access to a telephone. While it is not clear that these subsidies have any material impact on maintaining this access rate, they do suppress toll calling and greatly complicate the introduction of local competition.

Competition poses a direct challenge to existing universal service subsidies designed to keep local residential rates lower than they otherwise would be. The local telephone companies and their state regulators transfer among themselves, out of the public eye, literally billions and billions of dollars. Residential telephone services have been priced below cost since at least the 1940s. At present, there are five explicit support

¹⁵²Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986).

funds administered by the FCC-mandated National Exchange Carriers Association (“NECA”). Most of the \$1.4 billion disbursed by NECA yearly goes to support low-cost telephone service to high-cost rural areas.

There are disagreements regarding the magnitude of current implicit rate support payments. The current transfer payments are estimated to be about \$20 billion a year. The going-forward cost of subsidizing wireline service to high-cost areas is estimated to be less than \$7 billion. No responsible party seriously challenges the existence of a substantial subsidy.

Below-cost residential service constitutes one of the largest off-budget entitlements programs. Generations of economists have criticized the program. Its inefficiencies, faulty signals and fundamental unfairness have been amply documented. Moreover, competition makes this subsidy program increasingly unsustainable. It is grounded on gross, government-sanctioned price distortions. The same product is sold to different customers at inordinately different prices. Such discrimination can be sustained only when customers can be denied access to alternatives. Competition and technological advance are exactly that -- alternatives.

The replacement model: two approaches. While one need not be convinced of the need to continue to provide subsidized access to high-cost areas, two alternative approaches are identified below to maintain (perhaps increase) telephone penetration rates at less cost and in fairer, more efficient ways..

1. *The Federal Universal Service Plan Approach.* Under the Federal Universal Service Plan, every residential and business telephone customer would pay a universal service line charge for each access line it purchases. The plan is similar in concept to the

existing federal charge levied against all long distance subscribers of 52 cents per subscriber but under this plan, the customer would make the direct payment. The U.S. line charge addresses two goals: (i) keep affordable service in high cost areas; and (ii) fund policies targeted at the needy. The charges would be made explicit to endusers and be explained in billing.

a. *High-cost areas.* The high-cost subsidy would be limited to companies serving high-cost areas. Within 180 days of enacting legislation, the new Office of Communications would determine a “high-cost schedule” which would set out the cost of serving high-cost areas. The national average cost of local basic dialtone service now is estimated to be about \$18.00. The replacement model envisions using census block data currently available and the going-forward costs of serving those lines.¹⁵³

Under the federal U.S. plan, the total high-cost subsidy would initially be the product of the number of high-cost lines times each line’s respective “line subsidy.” The line subsidy is the cost of serving that line as indicated in the high-cost schedule minus the \$18.00 national average cost of service. Each year the high-cost subsidy is recovered by a monthly universal service subscriber line charge levied equally on all residential and business access lines.

Companies serving high-cost areas, the so-called carriers of last resort, receive a subsidy payment for each high-cost line equal to its line subsidy, that is, the cost of serving that line as indicated on the high-cost schedule minus \$18.00. Over a fifteen year period, the line subsidy payments would be reduced by one dollar a year. The total high-

¹⁵³ For example, the wireline cost of serving areas with 10 to 100 lines per square kilometer is estimated to be \$37.00 a month and in areas with 10 or fewer lines per square kilometer the monthly cost is estimated to be \$65.00. All other areas are at or below the \$18 a month national average. The above-average cost of

cost subsidy amount and the universal service subscriber line charge would be reduced accordingly.

After three years, all carrier of last resort payments would be put up for competitive bid. The individual states would define the relevant carrier of last resort areas within which bidding would take place, but the areas should be defined as narrowly as possible to preclude distortion to competition. The high-cost line subsidy and the carrier of last resort payment would be reduced to reflect the competitive bidding process.

Alternatively, the subsidies could be paid directly to subscribers in high-cost areas. In that case, the phase down of the subsidy should be increased to replace the cost reducing effect of the auction process. In either case, the plan would reduce interstate long-distance prices substantially and generate billions in consumer welfare and promote the development of new technology.

b. Targeted aid to the needy. The second component of the Federal Universal Service Plan is to target aid to low-income users to assure that telephone service remains affordable for all. The OC will advise Congress within 180 days after enactment on how best to perform this function. Possibilities include funding means tested waivers for installation charges, deposits and the federal universal service subscriber line charge. Each year the low-income subsidy would be recovered as an explicit component of the monthly universal service subscriber charge. As the high-cost fund is ramped down, only a small portion of the savings would be needed to fund this second component of the federal subscriber line charge.

serving customers from areas with a 100 or fewer access lines per square kilometer is estimated to be

By targeting assistance to low income households, the Federal Universal Service Plan would be more fair and less expensive. It would also be more effective in raising telephone penetration rates among the poor, because installation charges and deposits are widely believed to represent larger obstacles to telephone subscribership than does the monthly cost of telephone access.

It should also be noted that the lower long-distance rates under the Federal Universal Service Plan would be beneficial to many rural households. Rural callers make more long distance calls on average than do urban customers. Also, one study found that low-income (life-line) customers in one state paid more than 60 percent of their monthly bill for long-distance services.¹⁵⁴

The administration of the universal service subscriber line is envisioned as being administered by a private organization such as the National Exchange Carriers Association. All other existing subsidy programs either would be funded by the Federal Universal Service Plan or eliminated. All local exchange carriers would provide itemized billing of the universal service subscriber line charges with brief accompanying explanations.

c. *Devolution of the Remaining Subsidies Back to the States.* Within 180 days after enactment, the OC will determine best how to return those interstate costs not covered by the plan to the individual states. States will have broad flexibility to recover these costs as they deem fit, subject to general federal guidelines. The essential federal guideline in this regard is the “most favored nation” approach, which would prohibit State regulators from discriminating against interstate users when pricing access to local

roughly \$7.3 billion. *The Cost of Basic Universal Service*, Hatfield Associates, Inc. at p. 4 (July 1994).

exchange facilities. A strict MFN approach is designed to promote interstate commerce. Moreover, the Replacement Model assumes elimination of all legal barriers to entry in local telephony markets and pre-emption of all state public utility regulation of wireless carriers. Additionally, the OC could be required to calculate an appropriate national access cap below which all states would have to price interstate access. This one time cap would be set to reflect that portion of interstate costs that are recovered by the universal service subscriber line charge.

States will nevertheless retain the flexibility to adopt additional universal service policies. Nothing here will limit the ability of the states to formulate universal service policies beyond those expressly provided for in the federal universal service subscriber line charge. For example, the states may maintain residential rates at or below the national average or expand the definition of services covered under universal service.

2. *The Replacement Model's Option Two: Full Devolution.* This alternative model also emphasizes transition, not maintenance, and explicit, not implicit subsidies. In contrast to the Federal Universal Service Plan, however, it transfers the full responsibility for universal service back to the states.

a. *Transition, not maintenance.* Due regard for transitional inequities is appropriate. Where changes are contemplated in regulation for the purpose of benefiting society as a whole, the full cost of such change should not be visited on one single group. Due regard for transitional inequities should not be converted into creating long-term maintenance programs.

¹⁵⁴Pitsch and Teolis, *Updating Universal Telephone Service*, Hudson Briefing Paper, August 1994, p. 7.

In 1977, Senator Ernest Hollings, then-Chairman of the Senate Communications Subcommittee, proposed a program which would have essentially frozen both the total amount of subsidy dollars and those eligible to receive them. Support payments would have been made in aid of ensuring a single party, Touch-tone service with access to 911 emergency services, but not the full range of options available. Such services could be purchased, of course, but not at subsidized prices.

A comparable approach today would entail freezing the size of the five NECA-administered support funds (an initiative that the FCC has, in part, already undertaken). Alternatively, a freeze coupled with an automatic reduction over the next decade -- say, 10 percent a year -- could be put in place. Again, the objective would be to safeguard legitimate transactional inequities while at the same time encouraging efficiencies and to take into account the lower cost options and technologies.

b. *Implicit to Explicit.* Most support payments are buried in telephone company FCC and state-filed tariffs, with the result that the magnitude and direction of subsidies is at best disputable, and there is scant accountability. Congress, under this full devolution plan, would direct the OC promptly to discern and make public the magnitude and direction of telephone industry price support programs. In effect, a “subsidy budget” would be established, much as a “burden hours budget” is required in conjunction with Federal paperwork reduction measures. To quote Justice Brandeis, “Sunshine is the best disinfectant.”

c. *Devolution.* Then, the full responsibility to devise and administer residential telephone price support programs for today’s implicit subsidies should be transferred from Washington to the states. States would have the responsibility to regulate the price

charged for access to and from that state. Several mechanisms exist for generating funds necessary to meet a pre-determined State “universal service” budget. Assume, for example, Tennessee were to determine that, next year, \$250 million is needed to cover its local exchange carrier’s costs and maintain the status quo -- \$200 million to subsidize residential rates and \$50 million to provide nearly free “lifeline” services to the truly needy. Tennessee would have the flexibility to determine the charges levied by local phone companies in conjunction with the origin and termination of intra- as well as interstate calls. State authorities might choose to raise access charges in order to meet a clearly defined societal purpose. Alternatively, those authorities might choose sharply to reduce access charges to make the state more competitive with peers for attracting and retaining investment and jobs.

This approach would give states new responsibilities subject to a federal interest in promoting interstate commerce. The states would still be required to meet MFN non-discrimination requirements noted above. Elements of this approach exist in certain FCC-administered programs today. The outlines of state-sanctioned “lifeline” programs are nominally subject to local option and legislative endorsement. State authorities traditionally have been left with the option of defining what constitutes “universal service.” Instead of being bit-players in a system largely administered through Washington, here states would have the primary responsibility.

This approach would also give states broader latitude for experimentation, subject to the limitations imposed by their competing for commerce and industry. The communications component of business enterprise has nearly doubled over the past 10 years. States know this and are aware of the impact on their competitiveness should they

hike phone charges significantly. The top 10 largest states in the country today account for more than two-thirds of the total “telephone economy” and for the preponderance of long distance calling.

States also could be required to meet the MFN non-discrimination requirement noted above. This would give states new responsibilities and opportunities to experiment and control their destiny subject to a federal interest in promoting interstate commerce.

PART THREE:

VOLUNTARY RE-ALLOCATION OF RADIO

The Replacement Model implements a pro-competition, anti-monopoly regime which will not protect incumbent companies by placing the onus on new entrants to the market to justify themselves. New wireless service providers will have a presumptive right to compete. The Replacement Model envisions that government's role will be dedicated to providing an orderly entry-way for the robust forces of competitive rivalry, as well as safeguards to ensure the continued vitality of market competition.

1. *Spectrum defined.* The radio spectrum -- generally defined as the range of electromagnetic frequencies between three kilohertz and 300 gigahertz -- is one of the Nation's most valuable economic resources. Television and radio broadcasting, cellular telephone communications, paging and messaging, satellite services, point-to-point microwave and taxi dispatching -- all use spectrum.

The use of spectrum as a resource is largely determined through administrative allocation and licensing procedures first developed in the 1920s. Under this system, the federal government determines the general uses for the radio spectrum, allocates bands of frequencies to each of those uses, and then assigns licenses to specific users. This system involves a large degree of central planning by federal regulators. The FCC today determines which services are to be provided, the frequencies on which they will be provided, the conditions under which they will be provided, and the technology to be used.

2. *The Replacement Alternative: A Property Rights Approach to Spectrum.* As far back as 1959, Nobel-laureate economist Ronald Coase proposed that property rights be accorded to radio licenses, that license owners pay for the right to use spectrum, and that bidding for that right was the most efficient way to allocate spectrum.¹⁵⁵ Privatizing spectrum would eliminate the years current applicants must wait to provide new services, permit market forces to move spectrum to its highest valued use, and greatly reduce spectrum scarcity, unleashing a raft of new wireless technologies.

In 1991, NTIA studied the idea, reviewed the considerable literature and past proposals on the subject, and concluded that a "market-based system for spectrum management would improve considerably the efficiency and fairness of the current U.S. system, and, if properly designed and implemented, can fully address concerns about such issues as competitive equity, spectrum 'warehousing,' and the preservation of socially-desirable services."¹⁵⁶ As part of its recommendation, NTIA supported private transfers and subleasing of spectrum rights directly from one user to another.¹⁵⁷

All of this is administratively feasible. Spectrum is already bought and sold, although only in the secondary market.¹⁵⁸ New Zealand has already liberalized

¹⁵⁵R. H. Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1, 14, 25 (1959). This was not true for the pre-1927 period, as Thomas Hazlett has written in Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & Econ. 133.

¹⁵⁶NTIA, U.S. SPECTRUM MANAGEMENT POLICY: AGENDA FOR THE FUTURE, Feb. 1991, at 7. Henry Geller, former NTIA Administrator and former General Counsel for the FCC, co-authored a report which explained that "[c]harging for the spectrum is particularly appropriate now in light of the weakness of traditional broadcast public trustee regulation and the growing demands on the spectrum overall." Henry Geller and Donna Lampert, *Benton Foundation Project on Communications and Information Policy Options, Charging for Spectrum Use*, 1989, at ii.

¹⁵⁷NTIA, U.S. SPECTRUM MANAGEMENT POLICY: AGENDA FOR THE FUTURE, Feb. 1991, at 8.

¹⁵⁸*See, e.g., de Sola Pool, Technologies of Freedom* (Harvard U. Press 1983)

significant bands of spectrum already.¹⁵⁹ In 1927, Congress -- persuaded by incumbent broadcasters -- to establish a “public interest” licensing scheme. That system served the interests of incumbents well, short-circuiting competitive forces from almost the very beginning. America can now correct this mistake.

The Replacement Model presumes that new companies, new services and new ideas have a presumptive right to access spectrum with non-interfering use. New entrants are encouraged to invade existing markets and compete. New and existing users have the right to compete freely without “public interest” restrictions, thereby lowering prices, increasing consumer choices, and expanding services.

Spectrum Allocation By Bands			
<u>Band</u>	<u>Government</u>	<u>Non-Government</u>	<u>Shared</u>
0.009- 0.30	0.05	0	0.24
0.30 - 3.0	0.14	1.17	1.45
3.0 - 30.0	3.36	4.54	18.85
30.0 - 300	103.42	123.94	42.65
300 - 3,000	916.00	1,022.00	761.85
3,000 -30,000	10,055.00	8,350.00	8,395.00
30,000 - 300,000	246,400.00	4,700.00	18,900.00
A breakdown of the entire spectral region is contained in Part 2 of the FCC Rules.			
(Frequencies above 300 gigahertz are infra-red rather than radio)			

As this chart indicates, the U.S. government is the prime holder of spectrum in the 30,000 megaHertz to 300 gigaHertz range. Spectrum is used for a wide variety of critical law enforcement, national defense, and other important needs. Nevertheless,

¹⁵⁹New Zealand has made extensive use of competitive bidding to award spectrum management rights as well as to auction off broadcast (and other) licenses. *See* Notice of Proposed Rule Making and Tentative Decision Making, Amendment of the Commission's Rules to Establish New Personal Communications Services. 7 F.C.C. Rec. 5676, 5710-5711 (1992).

large portions of the spectrum go unutilized or vastly under utilized, and many of the wasted bands are under the control of the federal government. The Replacement Model, as discussed below, encourages through incentives the government to privatize this spectrum. In addition, Congress may well wish more direct and explicit means of ensuring this resource is used more efficiently, as it has in the past -- as when it recently re-assigned 220 Mhz. in the emerging technologies band from the federal government to the private sector.

Auctions are an efficient way to assign rights. The objective is not to generate funds for the U.S. government. Indeed, the objective of the auction approach stressed below is to reduce scarcity values which are currently associated with spectrum licensing and use. Nonetheless, it is currently estimated by all, including the FCC itself, that auctions will generate billions in direct proceeds over five years. This sum, while substantial, will pale compared to the economic growth, new jobs, new companies, new products and consumer saving that will accompany the more efficient, market-oriented use of spectrum.

3. *The current standard is hostile to consumers.* The centerpiece of the 1934 Act is a “Public Interest Standard” which came into being first with the 1927 Radio Act. The Public Interest Standard was requested by David Sarnoff and incumbent radio broadcasters so government would have a legal basis to deny licenses to newcomers. Senator C.C. Dill, the author of the both the 1927 Radio Act and the 1934 Act, liked the standard because it permitted policymakers (such as himself) political discretion to shape the marketplace. Dill subsequently wrote that political control was important because common law was rapidly shaping spectrum access rights as private property. The public

interest standard, in practice, allows regulators to stop decentralized development and to engage in both industrial policy and political handicapping.

4. “Public interest” cannot be defined. Today there is still no effective definition of the “public interest” standard. In 1993, Commissioner Duggan attacked critics of the FCC and the public interest standard -- claiming the FCC indeed, could define it. That this debate was still occurring almost sixty years after the concept was promulgated makes the point cogently. In effect, the public interest standard is exactly whatever three of the five FCC members say it is. Nothing is ruled out.

5. The Replacement Plan. The Replacement Model sequences reforms to give markets and competitors time to make rational decisions based upon market information. Phase One can be completed soon after enactment. All current license-holders of spectrum are granted a complete fee simple in their spectrum -- the title to use, sell, lease or transfer as they deem fit, subject only to interference and antitrust concerns. A one time registration fee can be assessed to help fund the replacement model’s title registry service of the spectrum.

Phase Two contemplates expediting all exclusive applications pending before the FCC for spectrum licenses as of May 1, 1995 (as a representative date). These applications, upon completion of geographic, power and location contour analysis, will be promptly converted to property rights of the applicant to the spectrum. Competing applications will be subject to auction.

Phase Three would open up all unallocated (non-government) spectrum for application. This process would facilitate entry by surveying available spectrum bands (all those where entry is currently feasible) and establish standardized parcels for new

entrants to claim. Such a survey function is designed solely to promote consumer welfare by encouraging competition and is not to block off spectrum “for reserves.” For spectrum frequencies in which there are more than one claim asserted, the model mandates that the government auction the new bands within 180 days. As much as efficient, the new Office of Communications should permit market forces, subject to antitrust review, to determine the geographic and interference boundaries of the initial property assignments. The FCC’s current experience in creating “overlay rights” for PCS licensees should be a valuable guide in this process.

The premise is that spectrum use will be dictated by the American people, not the government. The model allows for “spectrum contours,” “overlay rights” and “band management rights” to be defined quickly by the government and made available to investors willing to risk capital in developing new wireless services. Auctions will be mandatory when more than one entity registers for use of spectrum under a defined and short timeframe. The process encourages competition amongst potential users to establish new wireless services, triggering a discovery process which will usher in dynamic application of cutting-edge technology. These auctions will sell property, not licenses. Those who bid and win title are free to develop and/or re-sell the spectrum as with any other private property right subject to antitrust review and geographic and interference boundaries.

Under Phase Four, unallocated spectrum held in reserve by the government would be opened for use by the private sector as applicants see fit. Spectrum bands currently reserved for government use would be made available for private users through direction the of Congress. The federal government owns the vast majority of “clean” spectrum --

spectrum which is not in use. Phase Four envisions that those government agencies with a claim to spectrum will disgorge their unused spectrum within a determined timeframe. New companies and new services are encouraged to establish new wireless services -- triggering a process of discovery as new technologies are tried and used.

When more than one private party registers for use of the same parcel of spectrum, an auction will be held. Current entities such as the Department of Defense and NASA will be permitted to retain a portion of the proceeds from spectrum roll-out for modernizing, re-location expenses and operational uses. Although it can be expected that certain departments will resort to “national security” arguments to not only maintain but possibly expand their claim to spectrum use, Congress is encouraged to view such assertions skeptically. Much of government’s use of spectrum is inefficient, with competing elements within a single bureaucracy refusing to share spectrum for narrow, internal rivalries or other reasons. Any claim to “national security” should be justified with full inquiry by Congress into the validity of the claim and whether more efficient means can be found to accomplish the asserted mission.

Auctions will be held within a specified deadline time of 180 days. This approach would account for transaction costs to the extent they are a significant obstacle to the aggregation of spectrum where that might be efficient.

6. *The property rights model is supported by courts and common law.* The model encourages both new competitors and existing licensees to push the process forward from below. This reform is not a descendant from the edict of a civil servant from above. Not even interference rights should be set forth in detail in new legislation. The model instead broadly defines what new competitors are entitled to do, and offers spectrum

users the opportunity to fulfill their market-driven aspirations. The government remains involved to protect the marketplace *via* antitrust and property law.

Conclusion. The Replacement Model is predicated upon a fundamental re-appraisal of the rationale and validity of the current “public interest” approach to spectrum management. The model is premised on a new standard to gain economic benefits from the efficiency of a competitive market: “consumer welfare.” Government action will be explicitly designed to promote the economic choices for the American consumer, with lower prices, improved selection, and better, more innovative services.

The legal content for this standard draws from the spirit of competition embedded in over 120 years of antitrust law. More importantly, it is a clean break with the industrial policy of the central planners, representing a series of almost unbroken failures over the past seven decades.

PART FOUR:

THE REPLACEMENT MODEL

A clean sheet approach. The Replacement Model adopts a clean sheet approach to the government's role in the knowledge age. The model addresses the four critical functions that should be performed regardless of era or technology. First, government should establish, protect and enforce a system of property rights, tangible and intangible. The central task of government is to protect individual rights and formulate the laws by which the rights are adjudicated. Government should also define the application of individual rights to a particular sphere of activity. Clarity is essential. Ambiguous property rights are an invitation to litigation, diverting energy and creativity into lawsuits that serve no customers nor generate no new wealth.

Second, the government should promote market efficiency and competition by policing market break down. Since the 1934 Act, technological progress is turning the telecommunications marketplace from one characterized as "economies of scale" and "natural monopolies" into a competitive market. While government can assist industry when possible through cooperative efforts to promote standards and technical guidelines, in general, competition has made whole areas of FCC central planning, such as broadcast, cable and long distance regulation unnecessary and costly. These regulations should be eliminated immediately.

Third, where government supervision is called for it will frequently be best done through antitrust enforcement. Antitrust law is designed to prevent acts and practices that can lead to the creation of new monopolies, or harm consumers by forcing up prices, limiting access to competing products or reducing service quality. For more than 120

years, America has relied upon antitrust law to foster competition and ensure that all compete fairly and by the same rules. Telecommunications is such a market -- telephone, cable, satellite, wireless -- all are seeking to compete. The implication is that the price-and-entry regulation of the 1934 Act should therefore be replaced by antitrust law as quickly as possible.

Fourth, many of the remaining necessary governmental functions in telecommunications should be transferred to the states with appropriate federal guidelines, as well as to other federal agencies with expertise. For example, most regulation of local exchange facilities could be returned to the states which already regulate 75 percent of these costs. Where appropriate, federal interests regarding local telephony could be transferred to the proposed new Office of Communications in an existing agency in the Executive Branch.

A. The New Office Of Communications.

The edifice government created sixty years ago drastically needs an update and facelift to match the realities of contemporary technologies. The replacement for the FCC is the Office of Communications (“OC”). The OC will oversee a telecommunications industry based on the proposition that a digital transmission can not be characterized by differentiating regulations based on function. A digital transmission of 1s and 0s can be transmitted by and received through any variety of means -- twisted pair, cable, wireless, video dialtone or satellite.

The OC will consist of far fewer than the approximately 2,200 current federal bureaucrats. It will reside largely in an Executive Branch agency. Placing the OC within a consolidated niche within the Executive Branch should have **no** impact whatsoever on

the integrity or independence of decision-making. At present, the National Transportation Safety Board and the Federal Energy Regulatory Commission are both parts of Executive departments. There has not been any indication that these arrangements impaired independence or generated undue political influence.

The OC would assume the following functions: oversee for a transition period the remaining federal responsibilities to regulate interstate access to local exchange facilities, coordinate the privatization of the spectrum, and prepare for Congress a phase out plan for all FCC rules and regulations which will be sunsetted in three years (except as noted below).

First, the OC will: (a) monitor interconnection requirements under Section 201 of the 1934 Act consistent with the federal guidelines against discriminatory pricing, with enforcement under the jurisdiction of the Justice Department¹⁶⁰; (b) monitor compliance with hearing-impaired and speech-impaired requirements under Section 225 of the 1934 Act with enforcement under the Department of Justice civil division; (c) monitor uses of telephone communication for harassing calls or prohibited commercial purposes; and (d) implement the universal service plan and federal responsibilities to monitor and facilitate the development of local competition created by legislation terminating the MFJ.

Second, the OC will also coordinate the transfer and privatization of spectrum. It will consist of the frequency coordinator role of the current FCC and the NTIA, which currently chairs the “Interdepartmental Radio Advisory Committee,” established in 1922

¹⁶⁰ Reliance on the Department of Justice for enforcement simply reflects current realities. Section 402(a) of the 1934 Act provides that all appeals taken from FCC actions in other than broadcast station licensing are subject to the Hobbs Civil Appeals Act. This Act, in turn, provides that appeals are to be taken against *both* the agency and the United States, *i.e.* the Justice Department. In the case of the FCC, the Attorney General has delegated Hobbs Act responsibilities to the Antitrust Division, anyway.

by then-Commerce Secretary Herbert Hoover. The OC will establish and run the Spectrum Registry File (“SRF”). The SRF will be the resource to keep track of centralized registration of spectrum.

Under the plan to privatize spectrum, all current licensees of spectrum will be granted title in the spectrum. A deed to the spectrum will be filed with the SRF. All new spectrum to be auctioned will be registered with the SRF as well.

Currently, all engineering, screening and approval of applications of “private radio” -- commercial mobile radio service -- is handled by “frequency coordinators.” These are private entities such as the National Association of Business and Educational Radio (“NABER”), the Associated Public Safety Communications Officers (“APCO”), etc. These user groups perform most of the functions that the government staffs at one time undertook. The frequency coordination process has worked well, and paid important dividends in terms of speed, flexibility and reduced tax payer costs.

The OC will harness this system and work with the private sector and industry associations to perform for broadcast and other forms of spectrum use what NABER and APCO do currently for private radio. An important result would be to speed up title issues with respect to spectrum. The OC, as the FCC does today, will retain ultimate authority. But a large volume of the engineering “sweat work” will be delegated.

The OC will prepare within one year a phase out plan for all FCC rules and regulations which will be sunsetted except in the event that Congress affirmatively acts to preserve the regulation in the interest of competition. The OC will also make recommendations for the efficient phasing-out of other FCC regulations should the three-year sunset create transitional problems. A critical component of the OC’s work will be

to document instances where safety or substantial market failure would make continuation of any sunsetted regulation beneficial to consumers. Unless Congress acts before the sunset date, all designated FCC rules and regulations will be rescinded on that date.

The OC will reverse the massive grant of power given to the FCC under Title II of the 1934 Act. Previously, pursuant to the 1934 Act, the FCC controlled rates for common carriers, investigated existing ones and determined new ones. The FCC controlled which companies compete, where and under what corporate structures. The OC will supervise the transition back to the market. It will develop and implement the universal service plan on a transitional basis with a finite sunset provision for non-needs-based subsidies. The OC will also supervise on a temporary basis the availability of interstate access on a non-discriminatory basis to local exchange facilities.

The OC will also roll back government impositions under Title III of the Act. All existing broadcast stations are presumed to face effective competition. The OC model returns cable TV to the 1984 Cable Act.¹⁶¹

The OC model makes a break with the Cable Act of 1984, however, by repealing the grant to the FCC to regulate cross-ownership of cable and exclude telephone companies from cable programming.¹⁶² The FCC authorized state and local authorities to regulate cable rates as well as set technical standards. Federal law pre-empted local attempts to require cable systems to operate as common carriers or utilities. The legislation, however, expressly barred new FCC regulation of content on cable

¹⁶¹ Originally, cable TV was not regulated at all. The broadcast TV industry repeatedly demanded that the FCC regulate cable beginning in 1958. Broadcast TV viewed cable TV as an explicit threat. The FCC declined the invitation several times, correctly noting that it lacked a statutory basis to do so.

programming. The new standard for effective competition will be the original 3 over-the-air signal standard promulgated by the FCC. Local cable regulation is pre-empted.

The goal, as indicated at the outset of the Report, is to fashion a new, modern governmental approach to telecommunications supportive of and in harmony with the realities of the technological changes over the past 60 years. Government has a role to play in the information age. But that new, modern role has no basis in the 1930s and the values and technological limits of that era.

B. A Functional Re-Assignment of FCC Responsibilities Under The 1934 Act.

The following is a suggested roadmap for analyzing the salient provisions in Title 47 by function in accordance with a modern approach to telecommunications. In general, the analysis corresponds to the five operational bureaus of the Commission: common carriage, mass media, wireless, cable and international/satellite (a functional organization not coincidentally mirroring the limits and functions of analog technology).

Many statutory provisions and FCC rules and regulations can be eliminated immediately upon enactment of the replacement law. Some provisions can be phased out over time. Others, however, need to be retained and their enforcement transferred elsewhere. Unless indicated otherwise, all FCC statutory authority and FCC rules and regulations will be sunsetted within three years of the FCC replacement law.

1. The 1934 Act And Common Carriage Under Title II.

The Common Carrier Bureau oversees the operations of all long distance carriers, the interstate business of the local exchange carriers, wireline carriers, satellite carriers,

¹⁶² 47 U.S.C. Sec. 533(b).

commercial mobile services carriers, microwave carriers and resale carriers, as well as the provision of customer premises equipment.

a. Basic Responsibilities:

1.) Entry/Licensing (§214)

- Certification of public convenience and necessity required for construction, alteration or discontinuation of any line (§214(a))
- Authority to approve, disapprove or attach conditions to any application (§214(c))
- Authority to order the extension of lines or the provision of facilities that it deems to be in the public interest (§214(d))

Action: **Repeal.** Immediate elimination of all barriers to entry for all carriers. Permit companies to make their own determinations about business decisions subject only to antitrust and other law. States enforce right of way and safety and health requirements. Pre-emption and forbearance of all other state regulatory limitations on entry.

2.) Tariffing (§§202-205)

- Authority to enforce nondiscrimination requirements (§202)
- Authority to require filing of tariffs (§203); limited authority to modify these requirements (§203(b))(e.g., streamlined rules for nondominant carriers)
- Authority to suspend a tariff, or part of a tariff, while holding a hearing (§204(a),(b))
- Authority to prescribe "just and reasonable" rates (§205(a))
- Authority to exact fines for violations of tariffing rules (§205(b))

Action:

Interexchange carriers: Immediate elimination of all FCC tariffing requirements and regulations for such carriers and return to common law on common carriage. Eliminate non-discrimination requirements and for non-uniform contracts subject to existing antitrust and other applicable law, including common law of carriage.

allow

Access charges: OC develops universal service plan and transfers pricing authority for access charges to states consistent with federal guidelines subject to non-discrimination requirements and MFN treatment.

3.) Interconnection (§201)

- Authority to enforce duty of every carrier to furnish service upon reasonable request therefore (§201(a))
- Authority to order physical interconnection, after opportunity for a "public interest" hearing (§201(a))
- Authority to set aside private interconnection contracts between carriers if "contrary to the public interest." (§201(b))
- Authority to regulate the "rates, terms, and conditions" for pole attachments "where such attachments are not regulated by a state and not provided by railroads or governmentally -- or cooperatively owned utilities." (§224)(1978 Pole Attachments Act)

Action: ***Retain for OC.*** The general obligation to interconnect should be maintained. Technical interfaces should be left to private sector to develop subject to federal oversight.

4.) Monitoring of Carrier Behavior

- Authority to force carriers to respond to charges of negligence or other unlawful actions (§208(a))
- Authority to "examine" all transactions entered into by carriers (§215)
- Authority to inquire into the management of carriers, and obtain any information from carriers (§218)

should Action: ***Immediate repeal.*** Common law of common carriage govern.

5.) Enforcement

- Authority to enforce rules against uses of telephone communication for harassing calls or prohibited commercial purposes (§223)
- Authority to require telecommunications services for hearing-impaired and speech-impaired individuals (§225)
- Authority to enforce rules regarding operator services, and respond to complaints associated with the provision of such services (§226)
- Authority to enforce restrictions on the use of automated telephone equipment (§227)
- Authority to regulate carrier offerings of pay-per-call services (§228)

Action: ***Retain for OC.***

6). Accounting/Reporting Requirements

- Authority to require filing of all inter-carrier contracts (§211)
- Authority to value any property owned or used by any carrier (§213)
- Authority to require carriers to file annual reports (§219)
- Authority to require the submission of any records, accounts or memoranda relating to the movement of traffic, accounting or other charges and issue penalty charges for failure to comply (§220)

Action: ***Immediate repeal.*** Repeal of Sections 202-205 make these unnecessary.

7). Antitrust Authority

- Authority to prohibit interlocking directorates between carriers (§212)
- Authority to regulate mergers and acquisitions (§221)

Action: ***Immediate transfer to Department of Justice/Federal Trade Commission.***

8). Equipment

- Acts jointly with the Office of Engineering and Technology on applications for registration of equipment to be connected directly to the telephone network, and acts on complaints brought by any party concerning the registration or operation of such equipment.

Action: ***Immediate transfer to OC.***

9). Other statutory provisions relevant to common carriers

- Liability for damages (§§206,207)
- Franks and Passes (§210)
- Receivers and trustees (§216)
- Agents' Acts and Omissions (§217)
- Competition among record carriers (§222)

Action: ***Repeal Section 210, 222 as obsolete. Retain remainder with OC.***

2. The 1934 Act and the Mass Media Bureau.

The Mass Media Bureau develops, recommends and administers policies and programs for the regulation of all radio and television broadcast industry services. The Mass Media Bureau oversees the following technologies: television, Low Power Television (LTV), Instructional Television Fixed Service (FITS), Direct Broadcast Satellite (DBMS), and audio broadcast services (AM, FM, and FM Translators).

a. **Basic Responsibilities:**

1.) Frequency Allocation/Licensing (§§301,303,307-309, 311)

- Authority to grant licenses only if "public interest, convenience or necessity will be served" (§307(a))
- Authority to renew licenses (§307(d))
- Authority to classify radio stations (§303(a))
- Authority to prescribe the service to be rendered by each station (§303(b))
- Authority to assign bands of frequencies to various stations (§303(c))
- Authority to prescribe qualifications of station operators (§303(l))
- Authority to suspend the license of any operator (§303(m))
- Authority to require waiver of right to use spectrum contrary to regulatory power of the United States (§304)
- Authority to restrict license ownership by foreign governments, aliens; authority to establish financial ownership requirements for licensees (§310)
- Authority to revoke/refuse licenses (§312, 313)
- Authority to permit operation of radio stations without licenses (§307(e))
- Authority to modify licenses where in the public interest (§316)
- Authority to allocate very high frequency television stations (§331)

Action: ***Immediate repeal of all licensing authority.*** Create property rights in spectrum enforced by trespass laws. OC will have coordination role to supplement intra-industry coordination. Existing licensees retain spectrum. Pending applications expedited. Additional spectrum
auctioned by Department owning spectrum and/or private auctioneer.

Repeal foreign ownership restrictions.

Repeal all restrictions on spectrum use once obtained. Any lawful use permitted.

2). Operation of Facilities/Equipment

- Authority to regulate devices that interfere with radio reception (§302(a))
- Authority to regulate station apparatus used (§303(e))
- Authority to require painting or illumination of radio towers (§303(q))
- Authority to require television apparatus be capable of receiving all allocated frequencies and closed captioned television (§303(s),(u))
- Authority to require actual operation of transmitting apparatus to be done by licensed operator (§318)
- Authority to require construction permits for the operation of any station (§319)
- Authority to regulate interference between government and commercial stations (§323)

Action: ***Immediate repeal.***

3). Content Regulation

- Authority to regulate children's programming/advertising during same (§303a(a), 303b)
- Authority to require improved content (§303c)
- Authority to regulate equal opportunity and rates for political candidates (§315)
- Authority to require announcement of payment for broadcast (§317)
- Authority to regulate false, fraudulent, or unauthorized transmissions (§325)
- Prohibition on FCC censorship (§326)
- Authority to impose programming obligations on DBS (§335)
- Authority to establish times of day during which indecent programming may not be broadcast on radio and television stations (PL 102-356)
- Authority to require disclosure of payments to individuals connected with broadcasts (§508)
- Authority to enforce restrictions on certain practices in contests of knowledge, skill, or chance (§509)

Action: ***Sections 303a(a)(b), 325, 508 and 509 retained for OC***

subject to 3 year sunset and/or reevaluation. Immediate repeal of remainder.

4). Antitrust

- Authority to preserve competition in commerce (§314)

Action: ***Immediate transfer to Department of Justice.***

5). Public Welfare

- Authority to designate stations likely to interfere with distress signals (§320)
- Assist in planning and constructing public telecommunications facilities (§§390-393)
- Promote development of nonbroadcast facilities for distribution of public service information (§395)
- Authority to regulate distress signals (§321), false distress signals (§325(a))
- Authority to regulate maritime radio equipment and radio operators (§§351-362)
- Authority to regulate radio installations on vessels carrying passengers for hire (§§381-386)
- Authority to require exchange of radio communication required between land and ship stations/aircraft and from ship to ship or aircraft to aircraft (§322)
- Investigate complaints and answer general inquiries from the public (47 C.F.R. § 0.61(g)).

Action: ***Transfer Sections 321, 325, 351-62, 381-86, and 322 to OC. Repeal immediately remainder.***

6). Equipment

- Authority to prescribe requirements for television receivers (§330)
- Authority to order forfeiture of communications devices used in violation of §§301 or 302a or any Commission rules

Action: ***Immediate transfer to Department of Justice/Federal Trade Commission.***

7). National Endowment for Children's Educational Television (§394)

Action: ***Privatize.***

- 8). Corporation for Public Broadcasting (§§396-399)

Action: ***Repeal.***

- 9). Other Statutory Provisions

- Ship-to-ship and ship-to-shore communications (§322)
- Navy stations (§327)
- Title III does not apply in Canal Zone (§328)
- Title III does apply in Territories and Possessions (§329)
- Prohibition on willful or malicious interference with radio communications (§333)

Action: ***Retain for OC subject to 3 year sunset and/or reevaluation.***

3. The 1934 Act and Wireless Telecommunications.

The Wireless Telecommunications Bureau is charged with handling all FCC domestic wireless telecommunications programs and policies, except those involving satellite communications; overseeing all activities of wireless telecommunications providers and licensees; serving as the Commission's principal policy and administrative resource with regard to spectrum auctions.

a. Basic Responsibilities:

- 1.) Licensing
 - General filing requirements (47 C.F.R. §22.3-22.50, §22.400)
 - Public land mobile service (47 C.F.R. §22.500)
 - Private land mobile services (§332)
 - Rural radio service (47 C.F.R. §22.600)
 - Cellular (47 C.F.R. §22.900-22.901, §22.913-22.945)
 - Offshore radio telecommunications service (47 C.F.R. §22.1000)
 - 800 Mhz air-ground radiotelephone service (47 C.F.R. §22.1101-22.1102)
 - General PCS (47 C.F.R. §24.10-24.16)
 - Narrowband PCS (47 C.F.R. §24.100-24.103; 47 C.F.R. §24.403-24.444)
 - Broadband PCS (47 C.F.R. §24.200-24.204; 47 C.F.R. §24.801-24.844)

Action: ***Repeal of all licensing authority and maintain***

federal pre-emption. Create property rights in spectrum, enforced by laws against "trespass." Existing licensees may retain spectrum. Additional spectrum to be auctioned by Department or private entity. Eliminate all foreign ownership restrictions. Eliminate all restrictions on use of spectrum once obtained. Any lawful use is permitted. Existing regulations subject to 3 year sunset.

2). Spectrum Auctions (§309):

- Narrowband PCS bidding (47 C.F.R. §24.301-24.320)
- Broadband PCS bidding (47 C.F.R. §24.701-24.720)
- Transfer of auctionable frequencies (§§921-927)

Action: Auction by relevant Department or private entity. Existing regulations subject to 3 year sunset.

3). Technical Standards for Equipment:

- General requirements (47 C.F.R. §22.100-22.121)
- Public land mobile service (47 C.F.R. §22.501-22.527)
- Rural radio service (47 C.F.R. §22.601.-22.610)
- Cellular (47 C.F.R. §22.902-22.912)
- Offshore radio telecommunications service (47 C.F.R. §22.1001-22.1008)
- 800 Mhz air-ground radiotelephone service (47 C.F.R. §22.1105-22.1121)
- General PCS (47 C.F.R. §24.50-24.53)
- Narrowband PCS (47 C.F.R. §24.129-24.135)
- Broadband PCS (47 C.F.R. §24.229-24.239)

Action: ***Repeal after 3 year sunset.*** Let private sector decide.

4). Industry Operations:

- Technical operation requirements (47 C.F.R. §22.200-22.213)
- Service requirements and employment practices (47 C.F.R. §22.302-22.308)
- Research and development (47 C.F.R. §22.400-22.407)

Action: ***Repeal after 3 year sunset.***

4. **The Cable Bureau.**

The Cable Services Bureau develops, recommends and administers policies and programs with respect to the regulation of services, facilities, rates and practices of cable television systems, and with respect to the creation of competition to cable systems.

a. Basic Responsibilities:

1). Entry Restrictions

- Cross-ownership restrictions: cable/TV broadcast; cable/SMATV (§533(a))
- Prohibition on telco provision of video programming (§533(b))
- Preemption of state cross-ownership rules (§533(d))
- Commission directed to fashion rules re. size of MSOs; affiliation of cable operators with video programmers, and other issues re. competition (§533(f))
- Restrictions on sale of cable systems (§537)
- No cable service without franchise (§541(b))
- Prohibition on exclusive franchises (§541(a))
- Franchise fees (§542)
- Renewal (§546)
- Conditions of sale (§547)

Action: ***Immediate repeal*** all cross-ownership restrictions and the prohibition on telco provision of video programming.

Retain preemption of state cross-ownership rules.

Repeal authority to fashion rules re size of MSOs; affiliation of cable operators with video programmers, and other issues re. competition.

Repeal restrictions on sale of cable systems.

2). Regulation of Rates (§543)

- Rate regulation required if cable system not subject to "effective competition" (§543(a))
- Franchising authority must be certified by FCC (§543(a)(1),(3))
- FCC regulates basic service tier rates if certification denied (§543(b))
- Regulation of "cable programming services" (§543(c))
- Regulation of equipment (§543(b)(3))

Action: ***Immediate repeal*** of all rate regulation. Return to 1984 Cable Act.

3). Regulation of services, facilities and equipment

- Technical standards (§544(e))
- Compatibility between cable systems and consumer equipment (§544a)
- Disposition of inside wiring (§544(i))
- Modifications of franchise authority (§545)

Action: ***Repeal subject to 3 year sunset.***

4). Consumer Welfare

- Protection of subscriber privacy (§551)
- Customer Service Standards (§552)

Action: ***Retain Section 551 for OC. Enforcement a State issue.
Repeal Section 552 subject to 3 year sunset.***

5). Signal Carriage Requirements

- Must Carry (§534)
- Leased Access (§532)
- Noncommercial educational television (§535)
- Low Power Television Stations (§534)
- PEG (§531)

Action: ***Immediate repeal.***

6). Program Content Regulations

- Political Cablecasting (§§312(a)(7),315)
- Obscenity/Indecency (§§532,559)

Retain for OC subject to 3 year sunset and/or reevaluation.

7). Antitrust

- Promote competition and diversity in multichannel video programming market, especially with respect to satellite distribution (§§548, 533(f)(2))
- Govern program carriage agreements between multichannel video programming distributors and video programming vendors (§536)

Action: ***Repeal and transfer to Department of Justice..***

8). Miscellaneous

- Unauthorized reception of cable service (§553)
- Equal employment opportunity (§554)
- Judicial proceedings (§555)
- Preemption of inconsistent state and local regulation (§556)
- Existing franchises to remain in effect (§557)
- Criminal and civil liability (§558)

Action: ***Retain for OC.***

5. Satellite/International

The International Bureau oversees communications between the U.S. and other points outside the U.S., including satellites and cable landings, and international rulemaking and conferences.

a. Basic Responsibilities:

1). Licensing

- Submarine cable landing cables (§§34-39)
- Satellites (§§721(c))
- Broadcast (§301(c))
- International carriers (§214)

Action: ***Retain in OC subject to 3 year sunset and/or re-evaluation.***

2). Spectrum Allocation and orbital assignments for domestic satellites (§721(c))

Action: ***Repeal subject to 3 year sunset.*** Auction.

3). Equipment

- Satellites (§721(c))
- Earth terminal stations (§752)

Action: ***Retain in OC subject to 3 year sunset and/or re-evaluation.***

4). Communications Satellite Corporation (COMSAT) (§§ 731-745)

Action: Already privatized.

5). International Organizations

- International Maritime Satellite Telecommunications (INMARSAT) (§§751-757)
- International Telecommunications Satellite Organization (INTELSAT) (§701)

Action: ***Retain in OC subject to 3 year sunset and/or re-evaluation.***

6). International Relations (§701)

- International coordination of spectrum allocations and frequency and orbital assignments.
- Directing and coordinating negotiations of international agreements for coordination of radio frequency assignments
- Overseeing international consultation, coordination, and notification of U.S. frequency and orbital assignments.
- Initiating and directing the development and articulation of international telecommunications policies
- Developing, recommending and administering policies, rules, standards, and procedures for the authorization and regulation of international telecommunications facilities and services, domestic and international satellites systems, and international broadcast systems.
- Representing the Commission on international telecommunications matters at both domestic and international conferences and meetings.

Action: ***Retain in OC subject to 3 year sunset and/or re-evaluation.***

7). Enforcement

- Statutory protections for submarine cables (§§ 21-33)

Action: ***Retain in OC subject to 3 year sunset and/or re-evaluation.***

6. Other Statutory Provisions

- a). Telegraphs (§§9-17).

Immediate repeal as obsolete and unnecessary.

- b). Subchapter I: General FCC administrative provisions (§§151-158).

Immediate repeal.

c). Subchapter IV: Procedural and Administrative Provisions (§§401-416)

Immediate repeal.

d). Subchapter V: Penal Provisions; Forfeitures (§§501-510)

Immediate repeal §502 (Violations of Rules, Regulations), §503 (Forfeitures).

Retain for OC §501 (General penalty); §504 (Forfeitures); §505 (Venue of trials).

Rewrite (to eliminate FCC role) §507 (Violation of Great Lakes Agreement)

e). Subchapter VI: Miscellaneous

Immediate repeal §§ 601 (transfer of powers from ICC and Postmaster General), 603 (transfer of powers from Federal Radio Commission), 604 (effect of transfer), 607 (effective date), 609 (short title), 612 (syndicated exclusivity), 613 (discrimination).

Rewrite (to eliminate FCC role) §§ 605 (unauthorized publication or use of communications), 606 (war powers of President), 610 (telephone service for the disabled), 611 (close-captioning of public service announcements).

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