COMPETITIVE ENTERPRISE INSTITUTE

Tech Briefing 2001

A Free-Market Guide to Navigating Tech Issues in the 107th Congress

Reform of the Federal Communications Commission

by
Solveig Singleton

REFORM OF THE FEDERAL COMMUNICATIONS COMMISSION

A number of substantive and procedural reforms to the Federal Communications Commission have been proposed, many of which would absorb time and resources without promising any particular improvement in the degree to which FCC sometimes micromanages the communications industry. This summary recommends those reforms most likely to further the long-term goal of bringing free markets to communications.

What is the Federal Communications Commission? FCC is an independent agency charged with regulating interstate communications, including the use of the radio spectrum by broadcasters, satellites and other wireless services, and wire-line systems such as traditional telephone service and cable television. It had a staff of 1975 people and a budget of $210 million in 2000.[1] Fees charged to the telecommunications industry accounted for 88 percent of this budget.[2] The 1996 Telecommunications Act was intended to put the industry on the road to reduced regulations. However, FCC's budget has grown by almost 10 percent since the act.[3] The agency recently proposed a Five Year Plan describing ways to restructure, but these reforms mostly consist of reshuffling bureaus and creating new ones.[4] The plan is unlikely to reduce FCC's overall size. Indeed, FCC requested a budget increase of just under $30 million for 2001.[5]

The transition to markets: rules and incentives, or more command and control? Defenders of the agency's growth argue that before deregulation can happen, FCC must actively build competition. Their theory is that the agency must grow before it can shrink. In this perspective, the expansion of FCC's budget is an inevitable consequence of the 1996 act. The alternative view is that a larger, richer FCC is not compatible with the 1996 act's premise that the old regulatory model must be phased out. Government "experts" far removed from business realities do not know better than entrepreneurs the best course for communications technology. This is true for questions of what competition "ought" to look

like, what cable-television rates "ought" to be, or what HDTV standard "ought" to be adopted. *No one* knows what "ought" to happen; only market interactions among the millions of players in society can determine this.

Achieving competition is important, but there are ways to create a framework for competition without regulatory micromanagement. It is unreasonable for FCC to expect that markets will work perfectly all of the time, and to intervene in every case where they are deemed to be flawed; the point is that markets as a general rule work better than regulation, and that what regulators perceive as "flaws" are often an important part of the market process.

FCC *should* establish certain general rules to foster incentives to compete. It *should not* craft special rules for each new situation to promote some idealized expectation of what competition "should" be. The view that a transition to markets must entail regulatory micromanagement is a throwback to the failed regulatory philosophy that communications markets are not naturally competitive and must be tightly controlled by government.

Substantive v. structural FCC reforms. Structural reforms to FCC might include folding the Cable Services Bureau into the Mass Media Bureau, or abandoning technology-oriented bureaus such as the common-carrier bureau in favor of more functional divisions (consumer matters, pricing, and enforcement, for example).[6] The latter reform would encourage consistency between rules for different industries that compete with one another, yet are at present regulated differently (such as broadband networks operated by local phone companies (DSL) versus those operated by cable companies). But structural reforms will not greatly further the goal of downsizing or eliminating FCC. The same number of employees would be engaged in the same tasks as before, only under different department labels.

For reforms to have a real impact on FCC, they must be substantive. The agency enjoys broad discretionary powers, the exercising of which is at the root of many agency problems. These include:

- the transformation of *ex parte* proceedings into covert rulemakings. For example, e-mail circulated within FCC shows that agency officials instructed long-distance phone companies not to reveal universal-service charges on customers' bills, an attempt to keep the charges hidden.[7]

- the agency's tendency to "mission creep," a pattern of interpreting the Telecommunications Act so as to enlarge its own authority, sometimes deviating substantially from statutory language or congressional intent. Examples include FCC's decision to turn the Children's Television Act of 1990 into a quota system for children's programming, despite extensive legislative history showing that Congress did not want this result.[8]

- the uncertainty and delay created because no one has held FCC accountable. This combines with mission creep, as FCC embroiders what appear to be straightforward statutory rules into amorphous inquiries in which everything is relevant and nothing is determinative. An example is the 14-point checklist for incumbent local phone companies' entry into long-distance phone markets, which FCC transformed into 850 pages of regulation.[9]

Major reform proposals in a nutshell. In the long run, FCC should be almost entirely eliminated. At most, a vestigial FCC could remain to act as a registry of rights to use spectrum (like a land registry) and to deal with international communications negotiations.

Short of this goal, many productive reforms have been suggested. Some of the most significant structural and substantive reforms now on the table are described below. (Other vital reforms are discussed in other sections of this briefing book, such as universal service to high-cost areas, and spectrum reform.)

- Move the e-rate program to the Department of Education, as suggested by President Bush.[10] FCC has no expertise in assessing the needs of schools and libraries. Moving the e-rate program to DOE would foster comparisons between expenditures on technology versus those on competing needs of schools, and would discourage the waste of funds on jazzy technology that does not actually improve education. It also makes sense to consolidate the e-rate program with other technology grant programs already administered by DOE. To make this change, DOE would need jurisdiction to administer the funds raised through the telephone taxes imposed for the universal-service program. However, a better solution would be to eliminate the universal-service e-rate taxes. Funds for technology should come from general tax revenues as part of the overall DOE budget.[11]

- Expand FCC's forbearance authority. Under the 1996 Telecommunications Act,[12] FCC has authority to refrain from regulating any

telecommunications carrier or service. However, it lacks the authority to refrain from regulating broadcasting and other mass-media services. Expanding FCC forbearance authority to all services could help speed deregulation.

- Eliminate FCC's merger-review process. FCC merger reviews are based on the Communications Act's dictate that the transfer of a communications license may proceed only "upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."[13] This is like setting up a government agency to review every conveyance of real property that occurs when two companies merge, to see if the change "serves the public interest." The government has no business trying to allocate spectrum to some "optimum" use in the first place, and its efforts to do so are certain to be futile (see chapter 4, "Market-Driven Spectrum Reform"). But the exercise of this authority has become worse than futile; it is downright pernicious. Fear of FCC merger disfavor forces companies to toe the FCC line in other rulemakings, which chills public debate. And FCC's practice of imposing special regulatory conditions on each merger—mergers already approved by the Department of Justice—is creating a patchwork of different rules for different companies that should be competing with each other on equal terms. This patchwork was precisely what Congress intended to eliminate in the 1996 act when it terminated the antitrust consent decrees binding the former Bell Operating Companies, AT&T, and other competitors. (For further discussion of FCC's merger-review process, see chapter 7, "Telecommunications and Media Mergers.")

Other reforms would include:

- imposing a time limit on FCC reviews. Under the Hart-Scott-Rodino Act, Department of Justice must complete its review of most mergers within 30 to 60 days. FCC has no time limits.

- revising 47 U.S.C. section 310(d) to place the burden of proof that the merger is *not* in the public interest on opponents of the merger. At present, the burden is on the merging parties to prove the consolidation is beneficial to the public.

- removing 47 U.S.C. section 310(d)'s reference to section 308; clarify that the FCC should not subject license transfers in a merger proceeding to more stringent reviews than in a simple license transfer, and that it should not create new rules for merging companies.

- removing FCC's content controls. FCC's rules for regulating content are vague and unevenly enforced. They and the Supreme Court's now rather aged opinions upholding them have been condemned by First Amendment scholars.[14] The following FCC rules should be eliminated:
  - the remaining editorial-fairness and right-of-reply rules, which are subject to political abuse (President Nixon ordered a crackdown on radio stations critical of his policies under the now defunct "Fairness Doctrine") and "chill" debate of controversial issues;[15]
  - quotas for children's educational content, which were passed contrary to congressional intent under the Children's Television Act of 1990;
  - "indecency" rules for broadcasters.

~ Solveig Singleton

For further reading:

Berresford, John W. *The Future of the FCC: Promote Competition, Then Turn Out the Lights*. Washington, DC: The Economic Strategy Institute, 1997.

Corn-Revere, Robert. *Mass Media Regulation and the FCC: An Agenda for Reform*. Washington, DC: Citizens for a Sound Economy, 1997.

Gordon, Kenneth, and Paul Vasington. *The FCC's Common Carrier Bureau: An Agenda for Reform*. Washington, DC: Citizens for a Sound Economy, 1997.

Keyworth, George A., II, Jeffrey Eisenach, Thomas Lenard, and David E. Colton, Esq. *The Telecom Revolution—An American Opportunity*. Washington, DC: The Progress and Freedom Foundation, 1995 (summary available at www.pff.org/telecom_revolution.html).

[1] William Kennard, Federal Communications Commission, "Prepared Testimony Before the House Committee on Government Reform Subcommittee on Government Management, Information & Technology," *Federal News Service*, 6 October 2000.
[2] Heather Forgren Weaver, "$6M Shortfall Means Fewer FCC Staffers at CTIA Show," *Radio Commission Report*, 28 February 2000, p. 2.
[3] Ted M. Coopman, "FCC Enforcement Difficulties With Unlicensed Micro Radio," *Journal of Broadcasting & Electronic Media*, 22 September 1999, p. 582 (FCC went from a 1995 budget of $182 million to a 1996 budget of $185.7 million, plus $10 million for the move to their new offices in the Portals building).
[4] "A New Federal Communications Commission for the 21st Century," Report to Congress, 17 March 1999; available at www.fcc.gov/Reports/fcc21.html. See also Kennard, "Prepared Testimony Before the House Committee on Government

Reform." In late 1999, the agency completed a major reorganization, consolidating its previously dispersed public-information functions into a new Consumer Information Bureau, and its formerly dispersed enforcement functions into a new Enforcement Bureau.

[5] Kennard, "Prepared Testimony Before the House Committee on Government Reform."

[6] Solveig Singleton, "FCC Reform: What's On The Table," *Telecommunications & Electronic Media News* (Summer 1999), pp. 9-11.

[7] "Bliley says FCC Told Long Distance Companies Not to Use Line-Item," *Washington Telcom Newswire*, 2 July 1998.

[8] Robert Corn-Revere, "Regulation in Newspeak: The FCC's Children's Television Rules," *Cato Institute Policy Analysis*, no. 268, 19 February 1997.

[9] W.J. "Billy" Tauzin, "Testimony Before the House Committee on Judiciary," *Federal News Service*, 18 July 2000.

[10] "E-Commerce: Bridging the Digital Gap," *National Journal's Technology Daily*, AM Edition, 30 October 2000.

[11] See the discussion in chapter 5 describing in greater detail the desirability of funding universal service from general tax revenues.

[12] 47 U.S.C. § 160(a).

[13] 47 U.S.C. § 310(d).

[14] See, *e.g.*, Jonathan Weinberg, "Vagueness and Indecency," 3 *Vill. Sports & Ent. L. J.* 221 (1996).

[15] Thomas W. Hazlett and David W. Sosa, "'Chilling' the Internet? Lessons from FCC Regulation of Radio Broadcasting," 4 *Mich. Telecomm. Tech. L. Rev.* 35 (1997); available at www.mttlr.org/volfour/Hazlettfr.html. Daniel Schorr, *Clearing the Air* (Boston: Houghton Mifflin, 1977), p. 48.