

# ADVICE TO THE NEW PRESIDENT ON THE FCC AND COMMUNICATIONS POLICY

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## I. INTRODUCTION

The Telecommunications Act of 1996 ("1996 Act")<sup>1</sup> promised the first major revision of communications policy since the passage of the Communications Act of 1934 ("Communications Act").<sup>2</sup> In passing the 1996 Act, Congress intended to "promote competition and reduce regulation."<sup>3</sup> Congress believed that the 1996 Act would "secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."<sup>4</sup> President Clinton characterized the 1996 Act as "revolutionary legislation" aimed at bringing the future to the doorsteps of the American people.<sup>5</sup> Vice President Al Gore claimed to be championing the Clinton Administration's efforts to promote the goals of private investment, competition, and

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1. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.).

2. Ch. 652, 48 Stat. 1064 (1933-34) (codified as amended in 47 U.S.C. §§ 151-613).

3. Pub. L. No. 104-104, 110 Stat. 56, pmb. (1996).

4. *Id.*

5. Remarks by the President in Signing Ceremony for the Telecommunications Act Conference Report (Feb. 8, 1996), [http://clinton4.nara.gov/WH/EOP/OP/telecom release.html](http://clinton4.nara.gov/WH/EOP/OP/telecom%20release.html).

flexible regulation.<sup>6</sup>

One year after the passage of the 1996 Act, former Federal Communications Commission ("FCC" or "Commission") Chairman Reed Hundt asked, "Is it working?"<sup>7</sup> The answer was clearly no. Unfortunately, and largely due to actions of the Clinton FCC, the regulatory framework created by the 1996 Act has failed to produce many of the benefits promised by its supporters.<sup>8</sup> The Act has instead provided an excuse for the FCC to expand its already swollen bureaucracy.<sup>9</sup> Although some in Washington "paradoxically and mischievously" refer to the current state of affairs as "deregulation," the FCC continues to regulate emerging communications technologies and to re-regulate previously deregulated communications industries.<sup>10</sup>

The 1996 Act was supposed to end "outdated, invasive regulation," which should, according to elementary common sense principles, require a smaller budget.<sup>11</sup> Nonetheless, on the third anniversary of the 1996 Act, President Clinton submitted a budget to Congress asking for a 20% hike in the FCC's budget for fiscal year 2000.<sup>12</sup> For fiscal year 2001, the FCC requested and received an additional 11.5% increase, bringing the agency's current allocation to a staggering \$237,188,000.<sup>13</sup> All the while, the FCC has kept on its books

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6. See Statement of the Vice President on Passage of Telecommunications Reform Legislation (Feb. 1, 1996), <http://clinton4.nara.gov/WH/EOP/OP/telecom/signing.html>.

7. Reed Hundt, *The Light at the End of the Tunnel vs. The Fog: Deregulation vs. The Legal Culture*, Remarks Before the American Enterprise Institute (Aug. 14, 1997), <http://www.fcc.gov/Speeches/Hundt/spch741.html>.

8. See Robert W. Crandall, *Are We Deregulating Telephone Services? THINK AGAIN* (Mar. 1997), <http://www.brook.edu/ES/POLICY/POLICYBRF13.html>; Harold Furchtgott-Roth, *A Birthday Present the FCC Doesn't Need*, *INVESTOR'S BUSINESS DAILY*, Feb. 16, 1999, at A26, available at [http://www.fcc.gov/Speeches/Furchtgott\\_Roth/birthday.html](http://www.fcc.gov/Speeches/Furchtgott_Roth/birthday.html).

9. See Crandall, *supra* note 8.

10. Harold Furchtgott-Roth, *Regulation in the 21st Century*, Remarks Before the KMB Video Conference (Apr. 28, 1999), <http://www.fcc.gov/Speeches/Furchtgott-Roth/sphfr905.html>.

11. Furchtgott-Roth, *supra* note 8.

12. See *id.*

13. See Budget of the United States Government, FY 2001, at 1145, available at <http://w3.access.gpo.gov/usbudget/fy2001/pdf/oia.pdf>; see also Press Release, FCC, FCC Budget of \$237,188,000 Proposed for Fiscal Year 2001 (Feb. 7, 2001), [www.fcc.gov/Bureaus/Miscellaneous/News\\_Releases/2000/nrmc007.html](http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2000/nrmc007.html).

hundreds of regulations which have long outlived their usefulness and has refused to heed the command of Congress to deregulate American communications markets.<sup>14</sup>

Given the rapid pace of change in the telecommunications industry, the new Administration should work with Congress and the FCC to make the Commission do less, faster. Only then will the American public obtain the benefits of the competitive, innovative telecommunications industry that the 1996 Act envisioned. To accomplish these goals, the new President should take the following "top ten" steps. He should ensure that:

1. the FCC stops using its merger reviews to extract conditions it could not otherwise impose;
2. the FCC exercises its statutory power to forbear from regulation more often;
3. the FCC adopts a customer service mentality;
4. the growth of the FCC as an administrative agency is halted;
5. the FCC ends its regulation of mass media content;
6. the FCC modifies its ownership restrictions;
7. the FCC keeps its hands off the Internet;
8. the FCC eliminates access charges and reforms its regulatory fee structure;
9. the FCC reforms its spectrum allocation policies to increase the use of auctions and allow for spectrum flexibility; and
10. the FCC gives more respect to states' rights.

## II. DISCUSSION

### *A. Limit FCC Merger Review and Attendant Conditions*

Since the passage of the 1996 Act, the FCC has become far more heavy-handed in its review of mergers between telecommunications companies.<sup>15</sup> Given the FCC's increased

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14. See Furchtgott-Roth, *supra* note 8.

15. See, e.g., CS Docket No. 00-30 (AOL/Time Warner); CS Docket No. 99-251 (AT&T/MediaOne); CC Docket No. 98-184 (Bell Atlantic/GTE); CS Docket No. 98-178 (AT&T/TCI); CC Docket No. 98-141 (SBC/Ameritech); see also Mergers of

focus on communications mergers, many will be surprised to learn that the 1996 Act did not increase the FCC's merger review authority. Indeed, no provision of the Communications Act expressly authorizes most of the Commission's current merger review activities. Moreover, the FCC's current merger review process is often inconsistent with the 1996 Act's deregulatory goals.

To be sure, the FCC has the authority to review proposed station license transfers between parties and to review proposed transfers of interstate operational authorizations for common carriers to ensure that such transfers are in the "public interest, convenience and necessity."<sup>16</sup> The Act also grants the Commission authority to impose conditions on transfers of licenses and section 214 authorizations.<sup>17</sup> In addition, the Clayton Act, which prohibits combinations in restraint of trade, gives the FCC authority to review mergers between common carriers per se.<sup>18</sup> However, the Commission has not relied on this power in any of its recent merger review proceedings, perhaps due to the high evidentiary hurdles it would be forced to clear.<sup>19</sup> Instead, the FCC has used its general "public interest" authority, which, by its very nature, can lead to unpredictable and inconsistent results.

Rather than analyzing the merits of a proposed transaction pursuant to established rulemaking and adjudicatory procedures, the FCC has too often placed behind-the-scenes pressure on companies that often have billions of dollars at

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Common Carriers Requiring FCC Approval, at <http://www.fcc.gov/ccb/Mergers> (last modified Sept. 27, 2000).

16. 47 U.S.C. §§ 214, 310 (2000). Interstate operational authorizations for common carriers are commonly referred to as "section 214 authorizations." Transfers of these authorizations are thus referred to as "section 214 transfers."

17. 47 U.S.C. § 303(r) (2000) (providing that "the Commission . . . shall . . . proscribe such . . . conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Act]."); *id.* at § 214(c) (permitting the Commission to "attach to the issuance of [a section 214 authorization] such terms and conditions as in its judgment the public convenience and necessity may require").

18. 15 U.S.C. § 21 (2000).

19. See, e.g., Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements*, 53 FED. COMM. L.J. 49, 56 n.21 (2000) (discussing close judicial scrutiny that would likely occur if the FCC were to exercise its Clayton Act authority); Harold Furchtgott-Roth, *Testimony Before the House Comm. on Commerce, Subcomm. on Telecomm., Trade, and Consumer on the Telecomm. Merger Review Act of 2000* (Mar. 14, 2000), [http://www.fcc.gov/Speeches/Furchtgott\\_Roth/2000/sphfr004.htm](http://www.fcc.gov/Speeches/Furchtgott_Roth/2000/sphfr004.htm).

stake to accede to “voluntary” conditions. Companies seeking merger approval often succumb to this pressure rather than risk interminable delay or, at worst, disapproval of their transactions. Such activities signal a troubling move away from public participation in the regulatory process. They also fail to provide businesses with a transparent and predictable framework for evaluating the likely level of inquiry into the merits of a proposed transaction.

The SBC/Ameritech merger proceedings, for example, included “‘discussions’ between the companies and Common Carrier Bureau staff unauthorized by the full Commission, with ‘ground rules’ set by the Chairman and thus subject to change at his personal whim . . . and even special ‘fora’ to discuss the transfers.”<sup>20</sup> The use of such closed door conversations finds no support in Commission precedent or procedure.<sup>21</sup> It also can raise serious questions as to the FCC’s impartiality.<sup>22</sup>

In addition, the conditions which the Commission has imposed in recent merger orders tend to suffer from several major defects. Although the FCC has authority to condition license transfers and section 214 authorizations,<sup>23</sup> such conditions obviously may not violate federal communications laws. Also, common sense suggests that conditions must be

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20. In the Matter of Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission’s Rules, FCC 98-141 (Oct. 6, 1999) (separate statement of Commissioner Harold Furchtgott-Roth concurring in part and dissenting in part), [http://www.fcc.gov/Speeches/Furchtgott\\_Roth/Statements/sthfr949.html](http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr949.html) [hereinafter *SBC/Ameritech*].

21. *See id.*; AOL/Time Warner En Banc Hearing (July 27, 2000) (opening statement of Commissioner Harold Furchtgott-Roth), [http://www.fcc.gov/Speeches/Furchtgott\\_Roth/Statement/2000/sthfr040.html](http://www.fcc.gov/Speeches/Furchtgott_Roth/Statement/2000/sthfr040.html) [hereinafter *AOL/Time Warner*] (noting that use of an en banc hearing in the AOL/Time Warner merger review proceeding was an “entirely novel and unprecedented approach” and characterizing it as “a public spectacle”). The FCC’s use of such procedures is not limited to the merger context. *See* Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service (May 31, 2000) (statement of Commissioner Harold Furchtgott-Roth concurring in part and dissenting in part), [http://www.fcc.gov/Speeches/Furchtgott\\_Roth/Statements/2000/sthfr023.html](http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/2000/sthfr023.html) (describing private meetings with a select group of parties with interests in access charge proceedings).

22. *See, e.g., AOL/Time Warner, supra* note 21.

23. *See* 47 U.S.C. §§ 214, 310 (2000).

proportionate to alleged potential harms and reasonably calculated to remedy those harms. Yet in many recent cases, conditions imposed on licensees were both violative of federal communications law and disproportionate to the harms sought to be addressed.<sup>24</sup> Moreover, the FCC's characterization of many of these conditions as "voluntary" is laughable, given that many conditions were the result of intense pressure by the Commission itself.<sup>25</sup>

Instead of limiting its public interest review to matters concerning compliance with the Communications Act and the FCC's rules, the Commission has expanded its limited authority to review license transfers into a sweeping power to engage in searching investigations of the competitive effects of arbitrarily selected communications mergers. Not only does the Commission lack this authority, but its exercise duplicates the efforts of the Department of Justice's Antitrust Division and the Federal Trade Commission.<sup>26</sup> The FCC's efforts waste precious government resources and create a risk of inconsistent results.<sup>27</sup>

The public interest "standard" which the FCC purports to apply to recent communications mergers often fails to constitute any standard at all. Some communications mergers trigger extensive inquiries, while others receive little attention. The Commission has failed to articulate a sound basis for

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24. See *AOL/Time Warner*, *supra* note 21; see also *In the Matter of GTE Corporation and Bell Atlantic Corporation, Applications for Transfer of Control of Domestic and International Section 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, FCC 00-221 (June 16, 2001) (statement of Commissioner Harold Furchtgott-Roth concurring in part and dissenting in part), <http://www.fcc.gov/Speeches/Furchtgott-Roth/Statements/2000/sthfr028.html> (stating that "the legality of the conditions imposed in this order is dubious" and pointing out that "some of the conditions are directly at odds with specific sections of the statute."); *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Media One Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251 (June 6, 2000) (statement of Commissioner Harold Furchtgott-Roth concurring in part and dissenting in part), <http://www.fcc.gov/Bureaus/Cable/Orders/2000/fcc00202.txt> [hereinafter *AT&T/Media One*] (stating that the "objectives" sought to be addressed by a condition must be found in the Communications Act and the FCC's rules, and that if they are not, the Commission is without power to impose a condition to serve such objectives).

25. See Harold Furchtgott-Roth, Remarks Before the Media Institute (Nov. 17, 1998), [http://www.fcc.gov/Speeches/Furchtgott\\_Roth/sphfr817.html](http://www.fcc.gov/Speeches/Furchtgott_Roth/sphfr817.html).

26. See *id.*

27. See *id.*

distinguishing between mergers that deserve intense analysis and those that should receive limited review.<sup>28</sup> The general proposition that a merger violates the public interest if it will have anti-competitive effects fails to provide much useful guidance, and the FCC seems not to have recognized any limits to this “merger review” authority.<sup>29</sup> Moreover, if and when the Commission begins an extensive investigation, companies generally have no means by which to determine the substantive standard which will govern approval.<sup>30</sup>

The FCC would do better to confine itself to determining whether a merger or license transfer would violate existing federal laws or regulations.<sup>31</sup> Under this approach, a transaction would not violate the “public interest” unless it violated specifically applicable rules.

In short, the use of “voluntary” conditions should be prohibited unless they are directly related to violations of law that the merger would create. The FCC should apply a uniform, transparent standard to determine whether a proposed transfer is in the public interest. Failing that, the FCC should be stopped from reviewing the competitive effects of communications mergers under the guise of its limited power to review and condition license transfers and transfers of section 214 authorizations.

#### *B. Increase the FCC's Use of Regulatory Forbearance*

Consistent with its deregulatory aims, the 1996 Act authorized the FCC to:

forbear from applying any regulation or provision of [the Communications] Act[, in whole or in part,] to a telecommunications service . . . if the Commission determines that:

(1) enforcement of such regulation . . . is not necessary to ensure that the charges, practices, classifications, or regulations . . . in connection with that telecommunications

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28. See *id.*; *SBC/Ameritech*, *supra* note 20.

29. See *SBC/Ameritech*, *supra* note 20 (noting that there may not be “anything that the Commission couldn’t do . . . when considering applications [to transfer licenses] under sections 310 and 214”); Furchtgott-Roth, *supra* note 19.

30. See *SBC/Ameritech*, *supra* note 20.

31. See, e.g., *AT&T/Media One*, *supra* note 24.

service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.<sup>32</sup>

In determining whether forbearance is in the public interest, the FCC is directed to “determine whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which . . . forbearance will enhance competition.”<sup>33</sup> Congress’s adoption of this provision requires the Commission to change its focus and ask, in all cases, “why regulate?” rather than “why forbear?”<sup>34</sup>

The Commission, however, does not exercise its forbearance authority often enough, and when it does, its exercise has been incomplete and contrary to the mandate of the 1996 Act. Moreover, the FCC’s decisions in this area too often improperly impose the burden of justifying forbearance on the petitioning party.<sup>35</sup> Yet the statute, when read in context, places the burden of justifying continued regulation on the Commission.<sup>36</sup> This burden is particularly appropriate when forbearance would plainly result in increased competition or enhance the timely deployment of advanced telecommunications services.<sup>37</sup>

In spite of Congress’s command, the FCC has denied forbearance to the extent that a petition seeks relief beyond that which is granted in a contemporaneous regulatory proceeding.<sup>38</sup> This type of action turns on its head the statutory

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32. 47 U.S.C. §§ 160(a), (c) (2000).

33. *Id.*; see also 47 U.S.C. § 157(a) note (2000) (directing the FCC to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . regulatory forbearance”).

34. See Dissenting Statement of Commissioner Michael K. Powell, Policy and Rules Concerning the Interstate Interexchange Market, <http://www.fcc.gov/Speeches/Powell/Statements/stmkp908.html>.

35. See 47 U.S.C. § 160 (2000); *id.* § 157(a) note (2000).

36. See 47 U.S.C. § 160 (2000); *id.* § 157(a) note (2000).

37. See 47 U.S.C. § 160 (2000); *id.* § 157(a) note (2000).

38. See, e.g., In the Matter of Petition for Forbearance of the Independent

power to forbear, which is aimed at allowing the Commission to make exceptions for certain parties or classes.<sup>39</sup> By definition, rulemaking proceedings involve, at a minimum, a general class of carriers, and such proceedings yield generally applicable standards. When the FCC defers the decision of whether forbearance is appropriate for an individual carrier, or even a sub-class of carriers, to a general rulemaking, it fails to carry out the purpose of the statute.<sup>40</sup> In particular, this practice allows the FCC to adopt new regulations or impose separate conditions, actions which it cannot take in the context of a forbearance petition, and which are inconsistent with the Act's emphasis on deregulation.<sup>41</sup> Moreover, the Commission's actions effectively transfer targeted and complex questions regarding competition in telecommunications markets to generalized rulemaking proceedings, where the FCC has more discretion and the issues are likely to become clouded.<sup>42</sup>

Ironically, the FCC itself proposed the creation of its forbearance authority.<sup>43</sup> The Commission told Congress that authorizing the FCC to forbear from regulating carriers or services would "save resources, reduce paperwork, increase efficiency, and promote competition."<sup>44</sup> The FCC's actual exercise, or lack thereof, of its forbearance authority has failed to produce these benefits. It's time for a new approach.

### *C. Make Customer Service a Priority*

In 1993, Vice President Al Gore announced the National Performance Review ("NPR"), now the National Partnership

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Telephone & Telecommunications Alliance; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, FCC 99-108 (June 30, 1999) (consolidated separate statement of Commissioner Harold Furchtgott-Roth), [http://www.fcc.gov/Bureaus/Common\\_Carrier/Orders/1999/fcc99108.txt](http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1999/fcc99108.txt). The Commission issued a series of decisions regarding the above-referenced petition. Commissioner Furchtgott-Roth issued a consolidated separate statement which addresses all of the Commission's decisions.

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. *See* Press Release, FCC, Telecommunications Act of 1996 Enacts 21 Proposals to "Reinvent" Agency, (Feb. 8, 1996), [http://www.fcc.gov/Bureaus/Miscellaneous/News\\_Releases/1996/nrmc6008.txt](http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1996/nrmc6008.txt).

44. *Id.*

for Reinventing Government. The NPR was supposed to “create a government that works better, costs less, and gets results.”<sup>45</sup> The NPR set forth a number of objectives, such as putting customers first,<sup>46</sup> phasing out unnecessary regulation,<sup>47</sup> and making regulation understandable.<sup>48</sup> In April of 2000, Gore’s NPR reported “important changes” and stated that “the idea of ‘service’—once foreign to the regulated community—is now alive and well.”<sup>49</sup> At the same time, the NPR called itself “the longest and most successful national government reform effort in American history.”<sup>50</sup>

Although the FCC website includes a list of customer service standards, the Commission often fails to perform even the most fundamental activities, such as returning phone calls.<sup>51</sup> In

45. Nat’l Performance Review, Frequently Asked Questions About the National Partnership for Reinventing Government (May 2000), <http://www.npr.gov/library/papers/bkgrd/q-n-a.html>.

46. See Setting Customer Service Standards, Executive Order No. 12,862, 58 Fed. Reg. 48,257 (Sept. 11, 1993), available at <http://www.npr.gov/library/direct/orders/2222.html>. The President “requested” that independent agencies, such as the FCC, adhere to the Order.

47. See Regulatory Planning and Review, Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), available at <http://www.npr.gov/library/direct/orders/2646.html>. The President recognized that Americans deserve “regulatory policies that recognize that the private sector and private markets are the best regime for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable.” *Id.* President Clinton also recognized that such a regulatory system did not exist in 1993, *id.*, or even in 1995. See Memorandum from the White House to Heads of Departments and Agencies Regarding Regulatory Reinvention Initiative (Mar. 4, 1995), <http://www.npr.gov/library/direct/memos/reinvent.html>. At least as far as the FCC is concerned, we do not have one in 2000 either.

48. See Memorandum for the Heads of Executive Departments and Agencies, 63 Fed. Reg. 31,885 (June 1, 1998), available at <http://www.plainlanguage.gov>; see also Vice Presidential Guidance—How to Comply with the President’s Memo on Plain Language (July 29, 1998), <http://www.plainlanguage.gov> (providing agency heads with guidance on how to comply with the President’s Memo on Plain Language); Furchtgott-Roth, *supra* note 10 (criticizing the FCC’s approach to regulation).

49. Nat’l Performance Review, Reinventing Government (Apr. 2000), <http://www.npr.gov/initiati/common/index.html>; see also Nat’l Performance Review, NPR’s Greatest Hits: Reinvention@workforyou: Creating a Culture of Change and Reconnecting Americans to Their Government (Apr. 2000), <http://www.npr.gov/library/announc/040700.html> [hereinafter National Performance Review, NPR’s Greatest Hits] (summarizing the NPR’s goals).

50. See National Performance Review, NPR’s Greatest Hits, *supra* note 49.

51. See FCC, FCC Customer Service Standards, at <http://www.fcc.gov/css.html> (last modified Sept. 5, 2000). The FCC’s website promises return telephone calls promptly. Practitioners uniformly report a different experience.

addition, a casual perusal of the FCC's website reveals that the information contained therein is often far from accessible or easily understood.<sup>52</sup> Moreover, in its more candid moments, the agency admits that it has failed to appropriately implement a sufficient customer service mentality.<sup>53</sup> If "success" means including a list of customer service standards on an agency's website that are routinely flouted,<sup>54</sup> taking years to conduct a biennial review while deciding that its antiquated rules are still "in the public interest,"<sup>55</sup> and continuing to draft incomprehensible regulations, then the FCC has been successful. If, however, "success" entails actual progress towards achieving the goals of increased customer service, decreased regulation, and comprehensibility, then the FCC still has a long way to go.

#### D. Halt the Growth of the FCC

NPR's report of "success" is even more inaccurate with respect to deregulating telecommunications and the electronic media than it is with respect to the lack of customer service at

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52. See FCC, FCC Homepage, at <http://www.fcc.gov> (last modified Mar. 19, 2001).

53. See FCC, A New Federal Communications Plan for the 21st Century, at [http://www.fcc.gov/21st\\_century/](http://www.fcc.gov/21st_century/) (last visited Mar. 20, 2001). Former Chairman Kennard's plan acknowledges that customer inquiries are handled by several different offices and bureaus, and that the various departments have had different levels of success with regard to satisfying customer demand for information. Although the former Chairman's Report Card on Implementation reports that the establishment of a Consumer Information Bureau has alleviated this problem, see *infra* note 65, practical experience of some attorneys at my law firm often indicates otherwise. On one occasion, for example, one attorney was directed to no fewer than ten different individuals in several offices and bureaus in response to an inquiry regarding a particular Commission document. Notably, that document had been cited in the Code of Federal Regulations, and had been recently relied upon by the Commission to begin an investigation into the activities of a firm client.

54. Although non-compliance with its customer service standards may seem to be merely an annoyance, it signals a lack of respect and humility. As David Osborne and Ted Gaebler note in *Reinventing Government*, "[t]he greatest irritant most people experience in their dealings with government is the arrogance of the bureaucracy." DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 167 (1992).

55. In the Matter of 1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, FCC 00-191 (June 20, 2000), [http://www.fcc.gov/Bureaus/Mass\\_Media/Orders/2000/fcc00191.pdf](http://www.fcc.gov/Bureaus/Mass_Media/Orders/2000/fcc00191.pdf); see also *infra* Part II.F (discussing the need to modify the FCC's ownership restrictions).

the FCC. In September of 1993, the NPR published a report entitled "Improving Regulatory Systems."<sup>56</sup> This report recommended innovative approaches to regulation, streamlining of agency procedures, and enhanced public participation.<sup>57</sup>

As noted above, the 1996 Act demanded deregulation. Yet, despite this congressional mandate and that of the NPR, the FCC has kept on the books hundreds of regulations that have outlived their usefulness.<sup>58</sup> Too often, the agency has failed to exercise self-restraint in regulating developing technologies.<sup>59</sup> Contrary to the pro-competitive and deregulatory purposes of both Gore's "Reinventing Regulation" initiative and the 1996 Act, the FCC continues to expand its discretion inappropriately and to adopt regulations that harm competitive markets.<sup>60</sup> The FCC commonly uses "market failure" as a justification for regulation. Although "market failure" certainly can exist, as Commissioner Furchtgott-Roth wryly put it, markets do not fail "as often or as systematically as one might believe in Washington."<sup>61</sup> Indeed, the FCC's recent regulatory approach does more to impair competition, and ultimately innovation, than it does to promote either of these goals.<sup>62</sup>

Former FCC Chairman William Kennard missed a dramatic

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56. Nat'l Performance Review, *Improving Regulatory Systems* (Sept. 1993), <http://www.npr.gov/library/reports/reg.html>.

57. *See id.*

58. *See Furchtgott-Roth, supra note 8.*

59. *See id.*

60. *See Harold Furchtgott-Roth, The Realpolitik of Regulation: Offensive and Defensive Strategies, Remarks Before the American Enterprise Institute, Amgem Forum* (Apr. 28, 2000), [http://www.fcc.gov/Speeches/Furchtgott\\_Roth/2000/sphfr0005.html](http://www.fcc.gov/Speeches/Furchtgott_Roth/2000/sphfr0005.html).

61. Harold Furchtgott-Roth, *Regulation and the FCC, Remarks Before the Federalist Society of Pittsburgh* (Apr. 20, 2000), [http://www.fcc.gov/Speeches/Furchtgott\\_Roth/2000/sphfr009.html](http://www.fcc.gov/Speeches/Furchtgott_Roth/2000/sphfr009.html).

62. *See Furchtgott-Roth, supra note 10; see also Randolph May, A Leaner FCC, LEGAL TIMES*, Nov. 15, 1999, at 78, available at [http://www.pff.org/a\\_leaner\\_fcc.html](http://www.pff.org/a_leaner_fcc.html) (stating that "the FCC never seems to realize that in the increasingly competitive marketplace there should be less, rather than more, need for the government to play an activist role as consumer protector."); Solweig Singleton, *Growing, Growing, Gone? The Future of Telecommunications Regulation* (Sept. 26-27, 1998), <http://www.cato.org/dailys/9-26-98.html> (pointing out that "regulating, deregulating, reregulating, rederegulating and reregulating cable rates hardly invites the investment in cable networks necessary for them to grow into next-generation two-way data networks.").

opportunity to carry out the deregulatory aims of the 1996 Act when he developed his plan, "A New Federal Communications Commission for the 21st Century," in August of 1999.<sup>63</sup> The plan recognized that there will be "vigorous competition that will greatly reduce the need for direct regulation" within the next five years, but it did not articulate what the FCC's precise reaction would be.<sup>64</sup> Former Chairman Kennard delivered a "Report Card" on implementation of his plan to Congress on March 21, 2000, and again recognized the increase of competition in telecommunications markets.<sup>65</sup> Although the former Chairman reported deregulation in several areas, the Report Card failed to recognize that, at the same time, the Commission has resisted elimination of numerous other regulations that are not necessary in the current telecommunications marketplace.

The outcome of the FCC's 1998 Biennial Review proceedings contradicts the former Chairman's report of deregulation. Even when directed to do so by Congress and the President, the Commission has been unwilling to "cut obsolete regulations" and unable to recognize its own failure. Moreover, although the Report Card stated that the FCC's work is far from done, it failed to articulate a meaningful process for true deregulation and signaled that the FCC had no plan to implement the goals of the 1996 Act faithfully.

Former Chairman Kennard had also publicly stated his commitment to ensure that the FCC continues to regulate, despite the 1996 Act's command to do otherwise. In a speech given before the National Association of Regulatory Utility Commissioners ("NARUC") in 1999, Kennard spoke of the abolition of the Interstate Commerce Commission ("ICC") with apparent disdain, and frankly stated his desire to make sure that the FCC is not "abolished . . . with a simple stroke of the

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63. FCC, *supra* note 53.

64. *Id.* at 1.

65. See WILLIAM KENNARD, REPORT CARD ON IMPLEMENTATION - DRAFT STRATEGIC PLAN, A NEW FCC FOR THE 21ST CENTURY (2000), [http://www.fcc.gov/21st\\_century/report\\_card\\_march2000.pdf](http://www.fcc.gov/21st_century/report_card_march2000.pdf); Press Release, FCC, FCC Chairman Delivers Report Card on the New FCC to Congress: Kennard Outlines 'Faster, Flatter and More Functional' Agency for the Broadband Internet Age (Mar. 21, 2000), [http://www.fcc.gov/Bureaus/Miscellaneous/News\\_Releases/2000/nrmc0014.html](http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2000/nrmc0014.html).

pen."<sup>66</sup> Although couched in terms of responding to the deregulatory demands of the future, Kennard's address made clear his desire—often shared by regulators—to “remain relevant” in an era when excessive regulation is often *not* relevant.<sup>67</sup> And, the FCC's regulatory actions under Kennard's leadership dispel any reasonable belief that he was genuinely focused on anything but promoting the growth of the FCC, or, at a minimum, maintaining its already excessive size.

Given the Commission's regulatory actions since the 1996 Act and its willingness to take advantage of its broad authority to regulate in the “public interest,” the American people may well have to wait until the *end* of the twenty-first century to see any real reform in communications policy. As Commissioner Furchtgott-Roth has stated, “Deregulation is in the law. All the FCC has to do is read it. But if it doesn't now, there is little reason to believe the FCC will observe any future deregulatory mandates, either.”<sup>68</sup> Although deregulation was mandated by the 1996 Act and was also the Clinton Administration's stated “policy,” the FCC has continued to insist that broadcasters and telecommunications providers should be subject to additional regulations in areas that are already governed by federal law.<sup>69</sup> This approach decreases the incentive for investment in communications companies<sup>70</sup> and fails to recognize that the current communications marketplace requires less regulation rather than more. To avoid harm to consumers and the competitive markets for communications services, the new Presidential Administration should ensure that the FCC actually carries out the deregulatory policies that have been

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66. William Kennard, Remarks of William E. Kennard, Chairman, Federal Communications Commission to the National Association of Regulatory Utility Commissioners (Nov. 10, 1999), <http://www.fcc.gov/Speeches/Kennard/spwek939.html>.

67. *Id.* After all, as President Clinton said, “the era of big government is over.”

68. Furchtgott-Roth, *supra* note 8, at A6.

69. See Harold Furchtgott-Roth, Remarks Before the West Virginia Association (Feb. 4, 2000), [http://www.fcc.gov/Speeches/Furchtgott\\_Roth/2000/sphfr002.html](http://www.fcc.gov/Speeches/Furchtgott_Roth/2000/sphfr002.html). Commissioner Furchtgott-Roth pointed out that the FCC apparently believes that “[f]ederal EEOC rules, that apply to every business in America and that are enforced vigorously, are not enough . . . [broadcasters] need special ones.” *Id.*

70. See *id.* In addition, as discussed above, the FCC's merger review process subjects telecommunications providers to obligations above and beyond the requirements of federal antitrust law. See *id.*; *supra* Part II.A.

expressed by Congress.

### E. End Content Regulation

Courts have typically subjected broadcast content to a lesser degree of constitutional scrutiny based on the outdated idea that the scarcity of broadcast frequencies permits greater government regulation.<sup>71</sup> This idea was developed in a long-gone era when broadcasting was the only form of electronic mass media. More recently, the Supreme Court has noted that the scarcity doctrine "has come under increasing criticism" and has suggested that the advent of new technologies "may . . . render the scarcity doctrine obsolete."<sup>72</sup> The Court, however, has declined to reconsider the scarcity rationale "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."<sup>73</sup>

Congress,<sup>74</sup> individual FCC Commissioners,<sup>75</sup> and the FCC itself<sup>76</sup> have long recognized that the current communications marketplace does not allow for the continuance of the "scarcity doctrine," because scarcity has ceased to exist. Accordingly, fundamental First Amendment principles suggest that the Commission should cease its regulation of broadcast content.

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71. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-89 (1969).

72. *FCC v. League of Women Voters*, 468 U.S. 364, 376-77 n.11, *appeal dismissed*, 468 U.S. 1205 (1984).

73. *Id.*

74. See H.R. REP. 104-204, pt. 1, at 54-55 (1995) ("The audio and video marketplace . . . has undergone significant changes over the past fifty years and the scarcity rationale for government regulation no longer applies . . . There is also competition from cable systems as suppliers of video programming . . . [and] other technologies, such as wireless cable, low power television, backyard dishes, satellite master antenna television service (SMATV) and video cassette recorders (VCRs) provide consumers with additional program distribution outlets. . .").

75. See, e.g., Michael K. Powell, Remarks Before the 42d Annual MSTV Membership Meeting (Apr. 6, 1998) ("The growing convergence of technology will not allow us to continue to maintain two First Amendment standards, one for broadcasting and one for every other communications medium . . . [T]he exponential increase in capacity . . . is making it impossible to maintain that broadcasting is uniquely undeserving of full First Amendment protection."), <http://www.fcc.gov/Speeches/Powell/spmcp807.html>.

76. See *Syracuse Peace Council Against Television Station WTVH Syracuse, New York*, 2 F.C.C.R. 5043, 5045 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989). The FCC stated that "we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press." *Id.* at 5053.

Fifteen years ago, in its 1985 re-examination of the fairness doctrine, the Commission actually "sought to respond to the Supreme Court's invitation" and expressly concluded that the scarcity rationale was no longer valid as a justification for content regulation.<sup>77</sup> The D.C. Circuit also recognized long ago that "[t]he FCC has issued a formal report that eviscerates the rationale for its existing regulations."<sup>78</sup> Notwithstanding its own actions, the FCC had to be forced to repudiate the fairness doctrine's two closest corollaries, the political editorial rule<sup>79</sup> and the personal attack rule.<sup>80</sup>

Commission deadlock plagued attempts to resolve the conflict over the political editorial and personal attack rules since August of 1997, due to the recusal of Chairman William Kennard.<sup>81</sup> Kennard withdrew his recusal in mid-September of 2000, citing the public interest in finality, but no change in circumstances.<sup>82</sup> Despite the issuance of one D.C. Circuit order requiring resolution of this controversy "expeditiously,"<sup>83</sup> and another specifying a September 29, 2000 deadline,<sup>84</sup> the FCC on October 4 attempted to suspend the rules for sixty days "to create a better record upon which to review the rules."<sup>85</sup> Notwithstanding the D.C. Circuit's finding of insufficiency of each of six conclusory justifications advanced by the Commission in favor of the rules,<sup>86</sup> the FCC failed to

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77. *Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987).

78. *Id.* at 873.

79. 47 C.F.R. § 73.1930 (1999).

80. 47 C.F.R. § 73.1920 (1999).

81. Kennard's recusal was based on his participation in the matter on behalf of the National Association of Broadcasters in the early 1980s. The remaining Commissioners split along party lines, resulting in a 2-2 split.

82. See William E. Kennard, Statement of FCC Chairman William E. Kennard Concerning His Participation in the Personal Attack and Political Editorial Rule Proceeding (Sept. 18, 2000), <http://www.fcc.gov/Speeches/Kennard/Statements/2000/stwek075.html>.

83. *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872 (D.C. Cir. 1999). It should be noted that Wiley, Rein & Fielding currently represents the National Association of Broadcasters ("NAB") and the Radio-Television News Directors Association ("RTNDA") in this matter.

84. See *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000).

85. In the Matter of Repeal or Modification of the Personal Attack and Political Editorial Rules, Order and Request to Update Record, FCC 00-360, 2000 FCC LEXIS 5190, at \*9 (Oct. 3, 2000).

86. *RTNDA*, 184 F.3d at 881-87.

acknowledge that established First Amendment principles preclude retention of the personal attack and political editorializing rules and failed to heed the command of the Court of Appeals. In another alarming development, the Commission suggested that it might actually expand the scope of the rules to reach subjects that were previously covered by the since-repealed fairness doctrine.<sup>87</sup>

In dissenting statements, FCC Commissioners Powell and Furchtgott-Roth cogently observed that this request to “refresh” the record was nothing more than a tactic designed to afford the FCC yet another opportunity to attempt to justify its rules.<sup>88</sup> In light of the timing of this action, which came within a month of the 2000 presidential election, even the temporary “solution” suffered from insurmountable constitutional defects. As Commissioner (now-Chairman) Powell put it:

[T]he [Commission]’s conception will impermissibly coerce a government-favored form of speech by broadcasters. The [Commission] seems to believe that an ideal time to experiment with broadcast editorial judgment is in midst of a presidential election. . . . I believe this clever device presents the danger of government coercing political speech in the final innings of a major national election.<sup>89</sup>

On October 11, 2000, in a brief opinion that accurately accused the FCC of ignoring previous court orders, the D.C. Circuit recalled its mandate and ordered the Commission to repeal the personal attack and political editorial rules.<sup>90</sup> The D.C. Circuit left open the possibility that the Commission

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87. See 2000 FCC LEXIS 5190 at \*1-2. It might be difficult to understand this move, were it not for the Democratic platform’s proposal to reinstate the Fairness Doctrine. See THE DEMOCRATIC NATIONAL CONVENTION COMMITTEE, THE 2000 DEMOCRATIC NATIONAL PLATFORM: PROSPERITY, PROGRESS AND PEACE 28 (2000), available at <http://www.democrats.org/pdf/hq/2000platform.pdf>.

88. See 2000 FCC LEXIS 5190 at \*29 (statement of Commissioner Harold Furchtgott-Roth, dissenting) (stating that “[t]here is no reason to think that this call to update the record will be any more effective in remediating agency deadlock and producing resolution of the proceeding than the last such call.”); *id.* at \*49 (statement of Commissioner Michael Powell, dissenting) (stating that although it “might” have been appropriate to refresh “the record at a point in time and in a manner that afforded a real opportunity to address expeditiously the specifics of the court’s remand,” such time had long since passed).

89. *Id.* (statement of Commissioner Michael Powell, dissenting).

90. See *Radio-Television News Directors Ass’n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000).

might institute a new rulemaking proceeding to "determine whether, consistent with constitutional constraints, the public interest requires the personal attack and political editorial rules."<sup>91</sup> Given its insistence that content regulation of broadcasting is still warranted, the FCC signaled that it may well consider undertaking such a proceeding.<sup>92</sup> In light of the D.C. Circuit's decision, however, the FCC would bear a heavy burden to justify the validity of the rules under the First Amendment. The FCC should generally abandon this enterprise.

In addition to the recent actions concerning broadcasters' political speech, the FCC has requested comments on how the children's television obligations of broadcasters should apply to digital television<sup>93</sup> and on how to enhance public interest disclosure requirements for television broadcasters.<sup>94</sup> Given that spectrum capacity will increase dramatically with the transition to digital television, this new technology should not warrant an *increase* in government regulation. Moreover, the interminable delays that often accompany a final decision on the merits make it impossible for the FCC to keep up with rapid developments in technology. Given the speed at which innovation occurs in today's day and age, the new Presidential Administration should take steps to ensure that decisions are not stale by the time they are released. In this connection, the new President should require a decision on a petition for rulemaking within one year, and resolution of any request for reconsideration within six months. Upon expiration of these deadlines, interested parties should have a right to seek judicial

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91. *Id.* at 272.

92. See Statement of FCC Chairman William E. Kennard, Court of Appeals Order on Political Editorial and Personal Attack Rules (Oct. 11, 2000), <http://www.fcc.gov/Speeches/Kennard/Statements/2000/stwek085.html> (favoring the initiation of such a proceeding); Statement of Commissioner Gloria Tristani, Court of Appeals Order on Political Editorial and Personal Attack Rules (Oct. 11, 2000), <http://www.fcc.gov/Speeches/Tristani/Statements/2000/stgt055.html> (favoring same).

93. Press Release, FCC, FCC Seeks Comments on Digital TV Broadcasters' Obligations to Serve Children (Sept. 14, 2000), [http://www.fcc.gov/Bureaus/Mass\\_Media/News\\_Releases/2000/nrmm0037.html](http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2000/nrmm0037.html).

94. Press Release, FCC, FCC Proposes Standardized Disclosure Requirements To Better Inform Communities About How Broadcasters Serve the Public Interest (Sept. 14, 2000), [http://www.fcc.gov/Bureaus/Mass\\_Media/News\\_Releases/2000/nrmm0038.html](http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2000/nrmm0038.html).

relief.

The FCC's willingness to continue to regulate content presents clear evidence of its willingness to violate the First Amendment—which the President swears to uphold—as well as long established FCC precedent. The Commission's refusal to expeditiously resolve matters of great public importance also makes it virtually impossible for new rules to be appropriate for new technology. The new Presidential Administration has a duty to ensure that the Commission stops regulating broadcast content and that it resolves matters within a reasonable time period.

#### F. *Modify Ownership Restrictions*

The FCC has also resisted reforming all of its outdated restrictions on ownership of media outlets. Recognizing the economies of scale that flow from common ownership of media outlets in the same market, the 1996 Act directed the FCC to repeal its cable-television cross-ownership rule<sup>95</sup> and to modify several other of its ownership restrictions.<sup>96</sup> The 1996 Act also directed the FCC to conduct a biennial review of all of its regulations, including its ownership restrictions, to "determine whether any such rules are necessary in the public interest as the result of competition."<sup>97</sup> After two years of proceedings,<sup>98</sup> the Commission issued its 1998 *Biennial Review Report* on June 20, 2000.<sup>99</sup> Although the *Biennial Review Report* details the remarkable increase in the number of media outlets, the FCC's

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95. See Telecommunications Act of 1996, Pub. L. No. 104-104 § 202(f), 110 Stat. 56, 111 (1996).

96. See *id.* §§ 202(a)-(e). Congress directed the FCC to repeal the national cap on the number of radio and television stations a single entity can own or control, revise the local radio ownership limits, increase the national audience reach cap, relax the one-to-a market rule, and relax the dual network rule. See *id.*

97. *Id.* § 202(h).

98. The delay was such that Congress took action in November of 1999 to require the Commission to complete the 1998 biennial review of ownership regulations. Pub. L. No. 106-113 § 5003, 113 Stat. 1501, 1501A-593 (1999) (requiring completion of review within 180 days). The Conference Report for this 1999 law makes clear Congress's deregulatory purpose, as it required the FCC to issue a report fully justifying any decision to retain any of its ownership rules. See CONFERENCE REPORT, INTELLECTUAL PROPERTY AND COMMUNICATIONS OMNIBUS REFORM ACT OF 1999, H.R. REP. NO. 106-464, at 148 (1999).

99. FCC, Biennial Review Report, FCC 00-191 (June 20, 2000), [http://www.fcc.gov/Bureaus/Mass\\_Media/Orders/2000/fcc00191.pdf](http://www.fcc.gov/Bureaus/Mass_Media/Orders/2000/fcc00191.pdf).

decision fails to recognize that the communications marketplace has reached a level of competition at which outdated ownership restrictions are no longer required to ensure diversity of source or viewpoint. Rather than modifying all of its ownership rules, the FCC determined that the vast majority remained "in the public interest." Its analysis does not comport with the requirements or purpose of the 1996 Act or the First Amendment.

The FCC's refusal to modify several rules based on an expressed need to study the effects of interim relaxation of local ownership rules does not explain why, in light of increased competition, the rules are still required to serve the public interest.<sup>100</sup> The Commission simply failed to analyze the impact of *competition* on the rules.<sup>101</sup> Instead, it focused on the effect of *its own rulemaking* on the need for the rules.<sup>102</sup> Such an analysis fails to answer the question posed by the statute and suggests that underneath it all, the Commission knows that its current ownership rules cannot be justified.

The scarcity rationale, discussed in more detail above,<sup>103</sup> has traditionally been used as a justification for the FCC's ownership restrictions as well as its content-based regulations. The scarcity doctrine is no more persuasive in the ownership context, and fails to justify the FCC's restrictions on common ownership of various media outlets. Although the Supreme Court has affirmed some of the ownership rules,<sup>104</sup> the Court observed as early as 1973 that "the industry is . . . dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."<sup>105</sup> The vast increase in the

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100. See *id.* at 74-82.

101. See *id.*; see also *Time Warner Entm't Co. v. FCC*, No. 94-1035, 2001 WL 201978 (D.C. Cir. Mar. 2, 2001) (invalidating as violative of the First Amendment FCC cable rules imposing subscriber limits and vertical integration restrictions based on the FCC's failure to provide evidence of anticompetitive behavior in support of the rules).

102. See Biennial Review Report, *supra* note 99.

103. See *supra* notes 71-94 and accompanying text.

104. See, e.g., *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (holding newspaper/broadcast cross-ownership rule constitutional).

105. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973).

number and type of media outlets since the adoption of the ownership rules requires their modification or repeal. By relying on outmoded concerns regarding communications diversity, the Commission has failed to reconsider the empirical underpinnings of its rules, in direct contravention of the 1996 Act.

In September 2000, the FCC released its *Biennial Regulatory Review 2000 Staff Report*, which contains staff recommendations regarding certain FCC rules, including the mass media ownership rules.<sup>106</sup> Notably, the Staff Report fails to recommend repeal or modification of any of the FCC's ownership rules.<sup>107</sup> Rather, the Staff Report strongly suggested that the 2000 Biennial Review process would yield no progress towards freedom from the FCC's antiquated ownership restrictions.<sup>108</sup> Predictably, when the Commission released its Biennial Review Report in January of this year, it accepted in full all of the staff's recommendations concerning the retention of the FCC's long-outdated mass media ownership rules.<sup>109</sup> The new Presidential Administration should take steps to ensure that the FCC reforms this outdated regime.

### G. Dispel the Possibility of FCC Internet Regulation

The FCC, like every other agency in Washington, says that it does not regulate the Internet. However, there are important reasons why the American public should worry about the FCC.<sup>110</sup> The headlines on the FCC's website often contain more stories about the Internet than about the FCC.<sup>111</sup> Moreover, the FCC's searching inquiry into issues associated with AOL's Instant Messenger service during the AOL/Time Warner

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106. FCC, *Biennial Regulatory Review Staff Report* (Sept. 2000), <http://www.fcc.gov/Reports/biennial2000report.pdf>.

107. *See id.* at 37-42.

108. *See id.* The March 2000 Report Card spoke of "launching an aggressive 200 biennial review to eliminate, consolidate, and/or revise rules that are obsolete or outdated." Thus, the staff report not only fails to comport with the 1996 Act and the Clinton Administration's explicit policy, but also represents yet another unfulfilled promise made by the agency itself. *See* KENNARD, *supra* note 65.

109. *See* In the Matter of the 2000 Biennial Regulatory Review, FCC 00-456, CC Docket No. 00-175 (Jan. 17, 2001).

110. *See* Furchtgott-Roth, *supra* note 61.

111. *See id.*

merger review evidences the Commission's intense interest in the Internet.<sup>112</sup> This is particularly worrisome, because the FCC has the authority to decide whether the Internet is a "telecommunications service" and thus subject to all of the FCC's regulatory burdens.<sup>113</sup>

For now, it seems that the FCC has no intention of regulating the Internet as a telecommunications service. The FCC has already determined that the provision of Internet access does not involve a telecommunications service.<sup>114</sup> Moreover, the FCC has recognized the "negative policy consequences" of the opposite conclusion,<sup>115</sup> including the harm that Internet regulation would have on innovation. As recently as last September, then-Chairman Kennard, normally in favor of regulation, pledged that the FCC would not regulate the Internet.<sup>116</sup> It will be up to the new Presidential Administration to ensure that the FCC honors this pledge.

#### H. Reform the FCC's Charges and Fees Structure

Providers of communications services are subject to numerous access charges, as well as the FCC's mandatory regulatory fee requirement. Since the Spanish-American War, the government has imposed a three-percent excise tax on all common carrier telecommunications services.<sup>117</sup> When added

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112. See *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc., and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, FCC 01-12, CS Docket No. 00-30, at ¶¶ 126, 190 (Jan. 22, 2001) (imposing conditions on the merged entity's offering of high-speed Internet access services and instant messaging and advanced IM-based high-speed services).

113. *Id.*

114. See Fed.-State Joint Bd. Universal Serv., Report to Congress, 13 F.C.C.R. 11501, 11,539-40 ¶¶ 79-82 (1998).

115. *Id.*

116. See William E. Kennard, *Internet Telephony: America is Waiting*, Remarks Before the Voice over Net Conference (Sept. 12, 2000), <http://www.fcc.gov/Speeches/Kennard/2000/spwek019.html>.

117. Proposals to repeal the federal excise tax on telecommunications services have been introduced in both Houses of Congress. The House has voted to repeal the tax by a vote of 420-2 and, as of this writing, the bill has been placed on the Senate's general calendar. The new Presidential Administration should encourage Congress to repeal this outdated tax. Among federal general excise taxes, this tax ranks second after the federal tax on cigarettes in terms of tax collections. See Joseph J. Cordes, Charlene Kalenkoski, & Harry S. Watson *The Tangled Web of Taxing Talk: Telecommunications Taxes in the New Millennium*, PROGRESS ON

to the five percent universal service fee that applies to all interstate telecommunications services, common carriers pay an approximately eight-percent user fee for the "privilege" of their common carrier status.<sup>118</sup> One scholar has estimated that "the fee structure imposed on common carriers . . . is one of the most punishing taxes in the arsenal of the American tax collection system."<sup>119</sup>

Telecommunications services are subjected to a complex system of federal, state, and local fees. The federal obligations include access charges, universal service fees, and required payments for advanced telecommunications services. The classification of these charges as "fees" rather than taxes is inconsistent with the traditional distinction between fees and charges. An item is typically considered a "tax" if it generates only public benefits, while an item is classified as a "fee" if it generates purely private benefits.

In the case of universal service charges and contributions towards enhanced telecommunications services, the major beneficiaries of these programs are not the entities and individuals which pay for them. These fees affect consumers' decisions regarding access to telecommunications services as well as their consumption of those services. Moreover, such charges discourage private investment in telecommunications, and ultimately impede progress and innovation.<sup>120</sup> The Commission has done all it can to preserve this regime, and has even gone so far as to pressure and threaten telephone companies which proposed to clarify their bills to show the federal charges.<sup>121</sup>

The mandatory regulatory fees imposed by the FCC place an additional burden on providers of communications services. As is the case with the charges discussed above, these fees are more accurately categorized as taxes. The yearly increase (200%

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POINT: PERIODIC COMMENTARIES ON THE POLICY DEBATE § II.A (Sept. 2000), at [http://www.pff.org/POP\\_7.12.htm](http://www.pff.org/POP_7.12.htm).

118. See Furchtgott-Roth, *supra* note 61.

119. *Id.* (discussing conclusions of Jerry Hausman of MIT).

120. See Cordes et al., *supra* note 117, § III.D.

121. See Harold Furchtgott-Roth, First Report and Order and Further Notice of Proposed Rulemaking, Truth-in-Billing and Billing Format (May 11, 1999) (dissenting statement of Commissioner Furchtgott-Roth), [http://www.fcc.gov/Speeches/Furchtgott\\_Roth/Statements/sthfr921.html](http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr921.html).

in 6 years) cannot be tied to a concomitant increase in the benefits received by regulated telecommunications entities.<sup>122</sup> Moreover, the fees paid by a single entity are certainly not tied to the amount of services which that entity receives from the FCC. At least in the context of mass media outlets, fees increase simply based upon the television market in which the outlet is located.<sup>123</sup> Because these charges are characterized as fees, the FCC "acts alone,"<sup>124</sup> and lacks accountability to Congress or the public. Allowing the FCC to exist as a self-financing agency is particularly problematic, given its enthusiasm to spend public dollars on unnecessary regulation.

Congress and the FCC should discontinue the use of telecommunications fees and charges as a back door to imposing tax-like obligations on communications service providers and consumers.<sup>125</sup> The current fee structure requires substantial revision, and should be changed to a system that imposes end-user charges instead of access charges and regulatory fees in order to raise revenue. Under such a regime, the price that a carrier or consumer pays will bear a relation to the way in which the costs of access are incurred.

### *I. Increase the Use of Spectrum Auctions and Allow Spectrum Flexibility*

In 1993, Congress granted the FCC the authority to use auctions as a method for awarding spectrum licenses.<sup>126</sup> By September of 1997, the FCC had conducted auctions which resulted in the awarding of over 4,300 licenses.<sup>127</sup> As directed, the FCC reported to Congress on its success and recognized the

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122. See Assessment and Collection of Regulatory Fees for Fiscal Year 2000, 65 Fed. Reg. 44,576, 44,611 (2000) (to be codified at 47 C.F.R. pt. 1) (separate statement of Commissioner Harold Furchtgott-Roth).

123. See *id.* at 44,600-04.

124. Furchtgott-Roth, *supra* note 61.

125. See 65 Fed. Reg. 44,611-12 (separate statement of Commissioner Harold Furchtgott-Roth).

126. See 47 U.S.C. § 309(j) (2000). Congress added this section to the Communications Act as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-92 (1993).

127. FCC, Wireless Telecomms. Bureau, FCC Report to Congress on Spectrum Auctions, FCC 97-353, 9 (Oct. 9, 1997), available at <http://www.fcc.gov/wtb/auctions/papers/fc970353.pdf>.

benefits of using auctions to allocate spectrum.<sup>128</sup> The report stated, "The FCC auctions have dramatically changed the way spectrum licenses are valued, distributed, and aggregated. These changes have fostered the entry of new companies into the market and encouraged the development of innovative wireless technologies."<sup>129</sup> The FCC recognized that auctions "award licenses to productive users, . . . encourage the emergence of innovative firms and technologies, . . . generate valuable market information, and . . . raise revenues for the public."<sup>130</sup> The recent success of two 700 MHz Guard Band auctions, which together raised \$540,809,075, demonstrates that auctions can indeed be a powerful revenue raising tool.<sup>131</sup> Moreover, spectrum auctions produce all of the benefits recognized by the FCC in its 1997 Report "more rapidly and at a lower administrative cost than comparative hearings or lotteries."<sup>132</sup> The new Presidential Administration should ensure that the FCC continues to use auctions as a means to efficiently allocate spectrum and promote innovation.

The Commission's spectrum policy should also allow competing users a considerable amount of flexibility.<sup>133</sup> Such flexibility will permit spectrum users to respond to market forces and to deliver to consumers the services that they demand in an efficient manner.<sup>134</sup> Users should enjoy more freedom to use spectrum for the services that they choose and should be able to easily transfer authorization to use part of its spectrum to a party who may be able to use it more effectively.<sup>135</sup> Replication of these attributes of private property rights in the spectrum context will enhance spectrum users'

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128. *See id.* at 1, 9-10.

129. *Id.* at 1.

130. *Id.* at 2.

131. *See* Press Release, FCC, 700 MHz Guard Band Auction Raises \$519,892,575.00 (Sept. 21, 2000), <http://www.fcc.gov/wtb/auctions>; *see also* Press Release, FCC, Second Guard Band Spectrum Auction Closes (Feb. 22, 2001), <http://www.fcc.gov/Bureaus/Wireless/NewsReleases/2001/nrwl0106.html> (reporting that the second guard band auction raised \$20,916,500).

132. *Id.*

133. Gregory L. Rosston & Jeffrey S. Steinberg, Using Market-Based Spectrum Policy to Promote the Public Interest § IIIB (Jan. 1997), [http://www.fcc.gov/Bureaus/Engineering\\_Technology/Informal/spectrum.txt](http://www.fcc.gov/Bureaus/Engineering_Technology/Informal/spectrum.txt).

134. *See id.*

135. *See id.*

incentives to invest in the expansion of spectrum capacity by permitting them to profit from their investments.<sup>136</sup> A primary goal of the new Presidential Administration should be to ensure that the FCC significantly expands the flexibility enjoyed by spectrum users.

### *J. Respect States' Rights*

The FCC has frequently demonstrated a lack of respect for states' rights. Traditionally, state public utility commissions have had exclusive authority for regulating local telephone markets. The 1996 Act took some of the states' powers away, but the FCC has gone farther in several instances. Perhaps the most obvious example involves the FCC's rule which requires prices for interconnection and unbundled access to be based on "Total Element Long Run Incremental Cost" ("TELRIC").<sup>137</sup>

The 1996 Act imposed a duty upon all local exchange carriers ("LECs") to provide competitors access to their networks.<sup>138</sup> If an entrant seeking access is unable to reach a private agreement with an incumbent LEC, either party has the right to petition the state public utility commission to arbitrate open issues.<sup>139</sup> The FCC may only intervene if "a State commission fails to act to carry out its responsibilit[ies]."<sup>140</sup> As part of its proceedings to implement the 1996 Act, the Commission adopted its TELRIC rule, which requires that prices for interconnection and unbundled access be based on a "forward looking rather than historic measure."<sup>141</sup> This rule thus negates the power, expressly delegated to the states, to establish or approve rates in arbitration proceedings under the 1996 Act.<sup>142</sup>

Numerous parties challenged the Commission's TELRIC rule, arguing that it displaced the states' authority to conduct arbitrations and approve agreements between carriers.<sup>143</sup> The

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136. *See id.*

137. *See* 47 C.F.R. §§ 51.503, 51.505 (2000).

138. *See* 47 U.S.C. § 251(c) (2000).

139. *See* 47 U.S.C. § 252 (2000).

140. *See* 47 U.S.C. § 252(e)(5) (2000).

141. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 374 (1999) (citing 47 C.F.R. §§ 51.503, 51.505 (1997)).

142. *See* 47 U.S.C. § 252(c) (2000).

143. *See AT&T Corp.*, 525 U.S. 366.

Supreme Court upheld the TELRIC rule as a legitimate exercise of the FCC's rulemaking authority under section 201(b) of the Communications Act.<sup>144</sup> However, this ruling does not force the FCC to exercise its power to interfere with the states' authority. As the dissenting opinions point out, the 1996 Act also "specifically reserves for the states the primary responsibility to conduct mediations and arbitrations and to approve agreements between carriers."<sup>145</sup>

In light of this reservation of rights, the FCC could just as easily—and perhaps more correctly—have acknowledged that in passing the 1996 Act, Congress "consciously designed a system that respected the States' historical role as the dominant authority with respect to intrastate communications."<sup>146</sup> Indeed, the new President should attempt to restore the "100-year tradition of state authority over intrastate telecommunications,"<sup>147</sup> and stop the FCC from expanding its own power at the expense of the states.

### III. CONCLUSION

A great number of the FCC policies carried out under the Clinton Administration did more to harm the primary goals of the 1996 Act—competition and innovation—than to further them. The 1996 Act envisioned deregulation. But after four years, the telecommunications and mass media industries are still waiting. Private investors lack incentives to funnel money into new technologies when those technologies are the subject of intense government scrutiny and tremendous regulatory burdens. Innovation has already suffered because of the FCC's failure to truly deregulate communications, resulting in harm to consumers.

The vast majority of the FCC's rules were enacted at a time when the communications landscape looked nothing like it

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144. *See id.*; 47 U.S.C. § 201(b) (2000) (mandating the FCC's authority).

145. *AT&T Corp.*, 525 U.S. at 402 (Thomas, J., concurring in part and dissenting in part).

146. *Id.* at 410 (Thomas, J., concurring in part and dissenting in part); *see also id.* at 413 (Breyer, J., concurring in part and dissenting in part) (stating that the 1996 Act's "language and structure foresee not national rate uniformity, but traditional local ratemaking—FCC views to the contrary notwithstanding").

147. *Id.* at 407 (Thomas, J., concurring in part and dissenting in part).

does today. Although Congress explicitly recognized this reality and accordingly required the FCC to reexamine all of its rules, the FCC has too often lacked the capacity or willingness to recognize the significance of the changes in the communications marketplace. Not only has the Commission refused to modify its mass media content and ownership regulations, but it has often increased regulatory burdens and threatened to revive policies that the Commission itself declared constitutionally infirm more than a decade ago.

The new Presidential Administration must embrace the promise of the future and ensure that the American public will enjoy the rewards of deregulation. Rather than looking into the future and seeing the benefits of innovation in recent years, the FCC has closed its eyes to economic reality and continued to cling to the past. The new Presidential Administration should work with Congress and the FCC to fulfill the promises of the 1996 Act. America cannot wait another four years to receive the benefits that can be achieved only through true deregulation of the communications industry.