Letter Responding to Rep. Gillmor's Call for Proposals on FCC Reform

By Solveig Singleton

The Honorable Paul E. Gillmor
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Washington, DC 20515-3505

Dear Congressman Gillmor:

Thank you for your letter of June 25 asking for our views on FCC reform. Our chairman, Bill Niskanen, asked me to respond, and I am happy to contribute. The discovery of the potential for competition in telecommunications means that telecommunications can become a market like any other market, governed by the general laws that apply to all businesses, and disciplined by competition. Ultimately, this would mean the elimination of the FCC, after a transition. But we are not there yet; I have confined my analysis to lesser changes.

Many reform proposals have been put forward that would streamline or modernize the FCC, such as folding the regulation of cable and DBS into the mass media bureau. I have analyzed proposals that would bring us significantly closer to recognizing market principles or restoring the rule of law in telecommunications. Also, I've focussed on mainly structural proposals. Ultimately, countless substantive reforms are essential. The next round of reforms might address, for example, the "public interest" standard more generally, the FCC's control of content, whether to extend the FCC's forbearance authority to mass media rules, spectrum reform, small business preferences, and many other issues. Structural changes will not alter the fact that the agency enjoys broad powers, and these powers are at the root of many problems that have arisen there.

The FCC and Congressional Intent

The FCC works hard and does a number of things well, such as making themselves accessible through the web site. Throughout the 1970's and 1980's, the FCC began to block states from passing rules that served as entry barriers to new technologies like SMATV and took many other deregulatory steps. During this period, the FCC appeared to understand telecommunications markets and the need for change.

Perhaps because of this, Congress delegated substantial tasks to the FCC under the Act of 1996--not technical tasks, but fundamental policy decisions. But institutions do not have memories; practices adopted by certain personnel, but not reflected in the rules, will not stick. *Unless the very rules that define an institution grant only modest powers and stipulate modest goals, the institution will exercise broad powers and*

adopt ambitious goals. Discretionary powers under the "public interest" will get far more exercise than discretionary powers under "forbearance;" it's just human nature.

The FCC may attach little weight to the intent of Congress, even when that intent is clear. For example, the universal service rules stipulate that the subsidies are for services, not equipment, yet the FCC has cheerfully extended the subsidies to many types of equipment. Another example is provided by the FCC's "guidelines" for children's programming, contrary to the intent of the Children's Television Act of 1990. Several factors may be contributing to this.

Private companies and citizens often do not challenge the agency's decisions in court or even in rulemakings. While the Telecommunications Act of 1996 looks like a hotbed of litigation, given the stakes and the level of controversy, it is astonishing how little litigation there has been. As far as I know, the FCC has rarely, if ever been disciplined by Congress by having its funding reduced. Sadly, without accountability, it might be expected that the FCC would act as an advocate for expansion of its own powers and political goals.

Until there is Congressional action to narrowly define tasks delegated to the FCC, or a return to the non-delegation doctrine by the courts, this problem is likely to continue. But it would help to restore some accountability checks.

- Reduce the FCC's discretionary power in key areas, such as mergers, to reduce the "chill" on argument (see proposal below).

- Examine the agency's connections with the executive branch. Has the FCC evolved away from its role as an independent agency? Should agency contacts with other branches of government be made public? (I'm not an expert on Sunshine laws, so haven't developed this further).

- Eliminate or segregate selected enforcement functions (see below).

The FCC and the Separation of Powers

The Separation of Powers is fundamental to our way of government. The lawmaker and the judge should not be the same person, especially when the issue to be resolved is a question of the lawmaker's power. The FCC has for many years been both advocate and enforcer. The results include:

- Aggressive lobbying of the FCC to change policy on the run, in enforcement-type actions (for example, the pressure for cable unbundling in the review of the AT&T/TCI merger). Note: it's rarely clear whether public interest inquiries

such as merger reviews are enforcement or policymaking, another part of the problem.

- Acceptance of vague rules at the rulemaking stage, on the theory that unpredictable "case by case" resolutions will substitute for clarity and certainty (as in indecency proceedings).

- The expansion of the FCC's own authority, particularly as so many of its decisions in its own favor are not challenged.

This is a complex problem common to a number of agencies; I know of no extensive research in this area or concrete plans for reform. Areas to explore further might include:

- Changes to the Administrative Procedure Act calling for the courts to give less deference to agencies, especially when the agency has ruled on its own authority.

- Segregating enforcement actions from rulemaking actions within the agency.

- Changes to substantive law that narrowly confine the agency's role in policy-making and redefine the agency's mission along technical lines.

Sincerely,

Solveig Singleton

Reform Proposal to Eliminate FCC Functions

End the FCC's Merger Reviews

47 U.S.C. 310(d) stipulates the transfer of a communications licensees may go forward only "upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." For mergers, the FCC's inquiry ranges from cursory to exhaustive. It might review competition issues, which the Department of Justice also considers. The FCC might decide how existing rules apply to a merged entity (say, if one is under price caps and the other is not). As a condition of approving the merger, the FCC might require the merged entity to comply with new rules beyond those required by statute. The level of scrutiny varies widely; the "public interest" varies depending on whether the transfer is the sale of a single license, the merger of two railroad companies, or the merger of two telecommunications companies.

The FCC's merger authority should be eliminated or sharply curtailed, first, to prevent duplication of the DOJ's inquiries.(Note: Similar arguments could be made for eliminating the FCC's review of competition issues in broadcasting ownership decisions. Section 202(h) of the 1996 Act requires the FCC to examine broadcast ownership rules as part of the biannual review.) Second, it would end the uncertainty of a broader "public interest" review. Investors cannot predict what the "public interest" will entail, or which mergers will bring lobbying and delays on a massive scale. Third, the FCC's power to impose conditions on mergers divorces communications governance from Congressional intent. The Telecommunications Act of 1996 freed companies from a patchwork of decrees and special rules. A series of conditioned mergers will recreate the patchwork, vastly complicating statutory issues such as Section 271 applications.

One grave problem is that the FCC's discretionary power over mergers (and other matters) often "chills" companies from pressing arguments that would displease the FCC--arguments needed to enrich the public debate.

Reforms might include

- Setting a time limit. Under the Hart-Scott-Rodino Act, the DOJ must complete its review of some mergers within 30 to 50 days.

- Revising 47 U.S.C. § 0 (d) to permit license transfers without review, or placing the burden of proof on opponents of the merger (that is, presume that mergers are in the public interest, a natural step away from the rule that that which is not expressly permitted is forbidden).

- Removing 47 U.S.C. § 0 (d)'s reference to section 308, and to clarify that the FCC should not consider competition issues, or to create new rules for merging companies. The FCC might retain some role in deciding how existing laws apply to the merged entity.

Reform Proposal: Eliminate FCC Functions

Eliminate Control of Consumer Protection

Consumer Protection functions at the FCC include processes for adjudicating consumer complaints, truth in billing rules, slamming rules, tariffing, and fraud.

Slamming rules fall into the category of consumer protection. Slamming can be regulated by the states or the FTC. Resolution of consumer complaints, on the other hand (especially about pricing, equipment, or service) should be left to market forces.

Tariffing should be abandoned; for many carriers even minimal tariffing is an entry barrier and/or an opportunity for collusion.

Fraud and deceptive billing and advertising are covered by the FTC. Having two (or more) government agencies responsible for enforcement in the same area increases the uncertainty for businesses operating in that area. The FTC and the FCC agreed that the FCC has sole jurisdiction over deceptive advertising in "all media." But this does not solve the problem. It makes little sense for two American businesses to be governed by different agencies or regimes, simply because, for example, one is a broadcaster and one is a newspaper.

As well as reducing duplication, eliminating these FCC functions would help bring telecommunications under the general rules that govern other businesses, consistent with the growth of competition. It would encourage consumers to look for and exercise choices in the competitive market.

The FCC regulation of advertising and billing content raises serious first amendment issues. Most recently, the FCC issued a troubling "Truth in Billing" order regulating the adjectives a carrier could use to describe the portion of a customer's bill attributable (indirectly) to universal service policies. This action amounts to control of speech relating to an important and controversial policy. The FCC showed itself to be a strong advocate for one position, not an objective arbiter of what is false and deceptive. Making enforcement of billing and advertising exclusively the province of the FTC would lessen the chance that the FCC would use "consumer protection" to get leverage on other issues.

Specific reforms might include:

- Stipulating that the agency has no power to regulate advertising or billing terms without specific direction from Congress.
- Repealing 47 U.S.C. § 3 (m) (D)(1), or clarify that it does not refer to signal content.
- Repeal provision of 47 U.S.C. § 8, concerning slamming.
- Clarify that 47 U.S.C. § 1(b) does not empower the FCC to regulate the language of billing statements.

Reform Proposal: Eliminate FCC Functions

Adopt Sunset Dates for Regulation

Regulatory "transition" rules such as those governing pricing and requiring unbundling and interconnection should be phased out. But no date certain has been set for the transition to a free market. This leads to uncertainty for investors. It also might lead new entrants to become entirely dependent on regulation for their very survival--they will never begin to build their own facilities, develop their own billing mechanisms, and so on. Ultimately, of course, this sets the stage for the argument that moving towards a fully free market is not possible.

The use of sunset dates in interconnection or unbundling might tempt some companies to use delays to evade the restrictions. This argument cuts both ways--once we recognize the enforcement problems inherent in mandatory "sharing" of private property, and the rancor it creates, we have yet another reason to view mandatory access as a costly policy tool that ought to be cast aside. From a regulatory standpoint, delays might be seen as a reason not to sunset. But delays can be controlled by routing disputes under transition rules into fast-track arbitration.

The benefits of increased sunset dates would include:

- Increased focus on the long run at the FCC and among telecommunications companies.

- Strong incentives to develop innovative business models that do not require regulatory support.

- Increased focus at the FCC on Congressional intent as expressed in the Telecommunications Act--continuous movement away from obsolete regulatory models.

The simplest way to enact these reforms would be to identify rules to be "sunsetted" and add these dates to 47 U.S.C. § 0 (forbearance provisions). The sunset date should be set by Congress, not left to the discretion of the FCC.

Reform Proposal to Eliminate FCC Function

Eliminate the FCC's Office of Workplace Diversity

The FCC's Office of Workplace Diversity advises the commission on affirmative action issues and enforces civil rights laws relating to employees and applicants. In its enforcement capacity, the office duplicates the work of the Equal Employment Opportunity Commission. In its advisory capacity, the Office performs functions that could be equally well performed by the Commissioners' legal advisors or by the Office of Plans and Policy.

Eliminating the Office of Workplace Diversity would be desirable to avoid the waste inherent in offices that perform redundant government functions. The Office of Workplace Diversity performs some functions that do not duplicate those of the EEOC, such as operating training for Commission employees on race relations and sexual harassment. Commission employees responsible for these functions could be transferred to the Office of the Managing Director, the Inspector General, or the General Counsel.

Enacting these reforms would require the repeal of 47 U.S.C. § 4 and amendments to 47 U.S.C. § 4, concerning 47 C.F.R. 73.2080.