1-1-2000

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Publication Information
Joseph D. Kearney, Will the FCC Go the Way of the ICC?, 71 U. Colo. L. Rev. 1153 (2000). Reprinted with permission of the University of Colorado Law Review and the author.

WILL THE FCC GO THE WAY OF THE ICC?

JOSEPH D. KEARNEY*

INTRODUCTION

It is widely recognized that telecommunications law, like the industry that it regulates, has changed dramatically over the past quarter-century. In 1977, the D.C. Circuit's *Execunet*[1] decision and the subsequent actions of the Federal Communications Commission ("FCC") helped to forge a competitive long-distance market. In 1982, an antitrust consent decree required the breakup of the nation's telecommunications monolith, the Bell System, from which most of the nation satisfied all of its telecommunications demands.[2] Well after both of these dates,

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1. MCI Telecomms. Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977).

2. *See* United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). *See generally* Joseph

Congress enacted the Telecommunications Act of 1996,[3] which attempts to break down barriers to competition not only in the long-distance industry—where, by most accounts, competition has flourished since the Bell System's breakup—but also in local telephony.

Less discussed has been the fact that many of the legal changes that have swept through the telecommunications industry—in broad outline, the emphasis by regulators on fostering competition wherever possible—have had analogues in other regulated industries. In particular, the transportation industries (rail, air, and trucking) and the energy industries (gas and electric) have been the sites of similar paradigm shifts in regulation from promoting a monopoly or oligopoly model to emphasizing competition.[4]

This article makes further inquiries into this great transformation of regulated industries law, with particular regard to the role of the regulator and towards the specific end of considering the FCC's future. Part I describes the current state of traditional regulation in the transportation industry, which was historically regulated by the Interstate Commerce Commission ("ICC"). It focuses on changes in the past quarter-century in administrative regulation of entry, rates, and service in the railroad and trucking industries. This Part describes the ultimate demise of the ICC at the hands of Congress at the end of 1995, and Congress's simultaneous creation of the Surface Transportation Board ("STB").

Part II undertakes a similar inquiry concerning the telecommunications industry. Specifically, it discusses the extent to which FCC control over entry, rates, and service continues in its historical form or, instead, has given way to other approaches. This Part also describes the FCC's recent and ongoing efforts to remake the agency so that, despite the decline of

D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 HASTINGS L.J. 1395, 1412–20 (1999).

3. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15, 18, and 47 U.S.C.).

4. A colleague and I have described these sweeping changes in regulated industries law and have suggested some of their causes. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998).

its historically most important functions, the agency has a continuing role to play.

Finally, Part III of the article attempts to peer into the future of the FCC. Based on the accounts in Parts I and II, this Part suggests that there are three possible futures for the FCC. First, Congress may abolish the agency. The possibility of abolition or termination can no longer be dismissed out of hand for several reasons. Most notably, there have been a number of recent high-profile calls to abolish the FCC; the increasing emphasis on competition in telecommunications regulation has called into question some of the most important premises upon which the FCC was founded; and Congress has taken a largely abolitionist approach to regulatory reform in some other industries (such as trucking, where the STB did not succeed to the ICC's most important powers over that industry).

A second possibility is that Congress may reduce the FCC's authority without formally abolishing the agency. This scenario finds support in Congress's actions with regard to the railroad industry, where the legislature gave the STB only some of the same regulatory authority that the ICC had possessed, most notably where there were continuing concerns about monopoly control by the railroads.

A final possible future is that the agency may succeed in its effort to stave off the first or second scenarios—legislative abolition or reduction—by reinventing itself. The FCC then would continue to possess most of the same formal authority that it has traditionally held, but would exercise its most intrusive powers, such as rate regulation, only in areas where there were continuing concerns about monopoly power.

The article concludes that, while there is some support for each of these hypotheses and while the premises of the Telecommunications Act of 1996 would most strongly support agency abolition, the FCC's future is most likely to consist of some combination of agency reduction and agency reinvention. In short, to the extent that the FCC staves off abolition, it will largely be because the agency itself will have gone a long way towards effectively reducing its own powers.

I. THE DEMISE OF THE ICC AND THE CREATION OF THE STB

The ICC was laid to rest on January 1, 1996.[5] In some senses, its burial was overdue. In the preceding twenty years, Congress had removed or altered important aspects of the ICC's authority to regulate the railroad and motor carrier industries. Certainly the ICC that remained, even before its termination, was not the equal of the ICC of previous generations in terms of power or importance. In other senses, however, the ICC's demise was overstated, for this regulatory commission left behind an heir. In the same act in which it terminated the ICC, Congress created a new regulatory agency: the Surface Transportation Board. Congress fashioned the STB as an independent agency "within the Department of Transportation."[6] Succeeding to some of the ICC's authority, the STB carries on aspects of its forebear's work.

This Part describes both the gradual diminution of the ICC's powers, beginning in the 1970s, and the extent of the jurisdiction Congress granted to the STB upon the ICC's termination at the end of 1995.[7] It looks at the decline of the ICC by

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5. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

6. 49 U.S.C. § 701(a) (Supp. III 1997) (creating STB within DOT); *id.* § 703(c) (providing for STB independence from DOT). The STB resembles the ICC and other independent agencies in certain usual aspects. For example, there is an odd number of members (specifically, three), who are appointed by the President with the advice and consent of the Senate, and no more than a bare majority may be from the same political party. *See id.* § 701(b)(1), (2). Even more directly, the ICC members serving unexpired terms as of the date that the ICC was terminated automatically became members of the STB. *See id.* § 701(b)(4).

7. No effort is made here to replicate all of the previous scholarship on the ICC, or even that touching upon the past several decades. As the "granddaddy" of regulatory commissions, the ICC has received its substantial share of academic attention since its creation in 1887. *See* Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, 387 (creating ICC); *see, e.g.*, HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937 (1991); GABRIEL KOLKO, RAILROADS AND REGULATION, 1877–1916 (1965); RICHARD D. STONE, THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY: A HISTORY OF REGULATORY POLICY (1991); Clyde B. Aitchison, *The Evolution of the Interstate Commerce Act: 1887–1937*, 5 GEO. WASH. L. REV. 289 (1937); Thomas W. Gilligan et al., *Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887*, 32 J.L. & ECON. 35 (1989); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952); *see also* Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1057–59 & nn.52–66 (1997) (discussing legal literature from the 1950s that assessed the performance of the ICC and other agencies). The foregoing citations only scratch the surface of the legal, economic, and political science literature discussing the ICC. The agency's lingering demise in the decade or two leading up to

considering changes in its historically most important functions.[8] In this way, it will be possible later in the article to draw inferences about the likely future of the FCC.

A. *Regulation of Entry and Exit*

Regulatory agencies in the original paradigm of regulated industries law possessed a number of characteristic functions. The first was that "the regulatory agency would make the initial and central determination of whether companies would be permitted to enter the industry."[9] Correlative to this was the agency's authority to determine whether to permit exit from the industry.

The ICC provided not only the original instance of such authority but also some of its most extensive uses. As amended in 1920, the Interstate Commerce Act gave the agency the authority to determine whether or not construction of an inter-

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1996 is no exception to the wealth of scholarship on the agency. Academics have variously described the political battles and events that culminated in the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, and the contemporaneous Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980), *see, e.g.*, MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION *passim* (1985); William E. Thoms, *Rollin' On . . . To a Free Market: Motor Carrier Regulation 1935–1980*, 13 TRANSP. L.J. 43 (1983), the extent of the ICC's own receptivity to regulatory reform in the years after 1980, *see, e.g.*, Richard D. Stone, *Administrative Deregulation of the Railroads: The ICC's Change of Philosophy*, 61 TRANSP. PRAC. J. 278 (1994), and other, broader matters, *see, e.g.*, Paul Stephen Dempsey, *Transportation Deregulation—On a Collision Course?*, 13 TRANSP. L.J. 329 (1984); Paul Stephen Dempsey, *The Interstate Commerce Commission—Disintegration of an American Legal Institution*, 34 AM. U. L. REV. 1 (1984). Less attention has been given to the forces that resulted in the agency's ultimate termination. This may be attributed to the recentness of that event or, alternatively, to the "pronounced tendency in legal scholarship to concentrate on potential or impending additions to the corpus of legal regulation" and not on apparent subtractions therefrom. Kearney & Merrill, *supra* note 4, at 1408 (characterizing this as a rational approach but noting its costs).

8. The approach taken in this symposium article of looking more closely at the evolving role of the federal regulators in the transportation and telecommunications industries (i.e., the ICC/STB and the FCC) is only one way of examining the great transformation of regulated industries law. *See* Kearney & Merrill, *supra* note 4, at 1330 (proposing to examine "changes in relations between providers and end-users, changes in relations between providers, and changes in the role of the regulators"). An interest in projecting the future role of the FCC recommends a focus on the regulators. For an explanation of the federal focus, see *id.* at 1334 n.39.

9. *Id.* at 1359. The agencies' other characteristic functions are considered in Parts I.B through I.D, *infra*.

state railroad or abandonment of an existing line would serve the "present or future public convenience and necessity."[10] More importantly, given the changing nature of the transportation industry as the twentieth century wore on, the ICC possessed similar authority with regard to the entry of individual motor carriers into the industry.[11]

In both contexts, the ICC was sparing in the permission that it granted. In the motor carrier industry, for example, there were approximately 14,000 ICC-licensed carriers in 1980, "almost all descended from the 28,000 carriers that received grandfather authority when the [original] Motor Carrier Act took effect in 1935."[12] Congress sought to reduce the ICC's control over motor carrier entry long before it eliminated the ICC. With regard to this industry, where no technological basis naturally restricted entry, Congress proceeded through the Motor Carrier Act of 1980. It slightly altered the statutory language, so that instead of an applicant's having to show that its entry was "required by the present or future public convenience and necessity,"[13] the ICC had to permit entry unless it concluded that such entry was "inconsistent with the public convenience and necessity."[14] This change proved sufficient: the number of motor carriers with ICC operating authority increased from 18,045 in 1980 to 36,948 in 1986.[15]

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10. Transportation Act of 1920, ch. 91, 41 Stat. 456, 477–78; *see* 49 U.S.C. § 1(18) (1976) (repealed).

11. *See* Motor Carrier Act of 1935, ch. 498, §§ 206, 207, 49 Stat. 543, 551 (codified as amended and before repeal at 49 U.S.C. §§ 306, 307 (1976)) (prohibiting interstate motor vehicle common carriage without ICC certificate of public convenience and necessity and providing that seeker of such certificate had to demonstrate, *inter alia*, "that the proposed service . . . is or will be required by the present or future public convenience and necessity"). For a demonstration of the increasing importance of motor carrier traffic over the course of the twentieth century, see CLIFFORD WINSTON ET AL., THE ECONOMIC EFFECTS OF SURFACE FREIGHT DEREGULATION 1–2 (1990).

12. STEPHEN BREYER, REGULATION AND ITS REFORM 226 (1982).

13. 49 U.S.C. § 307(a) (1976) (repealed) (providing that applicant must demonstrate that certificate "is or will be required by the present or future public convenience and necessity").

14. 49 U.S.C. § 10922(b)(1) (1982) (repealed) (providing that ICC "shall issue a certificate" authorizing motor carrier transportation "unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity"). This change in language also shifted the burden from the applicant to those opposed to an application.

15. *See* WINSTON ET AL., *supra* note 11, at 11–12.

In the rail context, the problem prompting reform was not entry but exit. Carriers were eager to get rid of unprofitable lines.[16] Although the statistics concerning railroad abandonments are not as stark as the statistics regarding the limited entry into motor carriage, the ICC was reluctant to order abandonment where a railroad's petition was protested, and overall the agency acted as a brake on abandonments.[17] As one observer stated after surveying the ICC's exit decisions in the rail industry, "[t]here is plenty of evidence that before 1976 the ICC would not allow route abandonments, even by failing carriers, if there was any significant protest from shippers or local governments."[18] These determinations nonetheless required substantial attention from the ICC, with some petitions for abandonment of rail lines lingering for years in the agency even before judicial review.[19]

Congress took a series of steps to reduce but not eliminate agency control over abandonment of rail lines. The Railroad Revitalization and Regulatory Reform Act of 1976,[20] better known as the "4R Act," provided that railroads could not be forced to continue service on unprofitable lines, established timetables for agency action on railroads' abandonment requests, and authorized subsidies for the continuation of some lines.[21] The landmark Staggers Rail Act of 1980[22] further con-

16. *See, e.g.*, ANN F. FRIEDLAENDER, THE DILEMMA OF FREIGHT TRANSPORT REGULATION 184 (1969) ("Stressing the need for abandonment, one participant [in a 1967 conference on freight transport regulation] quoted the president of a large midwestern railroad, who said that if he had the freedom he would get rid of one-third of his miles of track."); *cf.* William E. Thoms, *Clear Track for Deregulation—American Railroads, 1970–1980*, 12 TRANSP. L.J. 183, 210 (1982) (contrasting trucking and airline industries, where order of the day was new entrants trying to get into the business, with the railroad industry, where "[r]egulatory freedom . . . meant freedom to merge, freedom to abandon trackage, and freedom to change (usually raise) rates").

17. *See* MICHAEL CONANT, RAILROAD MERGERS AND ABANDONMENTS 113–15 (1964). For a helpful summary of the various commentators' views, including Conant's, see Steven R. Wild, *A History of Railroad Abandonments*, 23 TRANSP. L.J. 1, 5 & nn.25–28 (1995).

18. THEODORE KEELER, RAILROADS, FREIGHT AND PUBLIC POLICY 39 (1983).

19. *See* William G. Mahoney, *The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroads' Obligations: The Contrived Collision of the Interstate Commerce Act with the Railway Labor Act*, 24 TRANSP. L.J. 241, 262 (1997); STONE, *supra* note 7, at 97.

20. Pub. L. No. 94-210, 90 Stat. 31 (1976).

21. *See id.* §§ 802, 809, 90 Stat. 127, 146 (codified as amended and before repeal at 49 U.S.C. § 1(a) (1976)); KEELER, *supra* note 18, at 34. Even prior to

strained the ICC's actions on abandonment applications. As a substantive matter, the 1980 Staggers Act permitted railroads leeway to invoke economic grounds in support of an abandonment.[23] Procedurally, it required, among other things, that the ICC render a decision on a proposed abandonment within 255 days.[24]

The anticipated results followed. "Facing far less opposition from the ICC, railroads abandoned thousands of miles of track, selling some of it to the smaller regional and local or 'short-line' railroads. In 1979 Class I railroads owned 277,242 miles of track; by 1987 this figure had fallen to 220,518."[25]

With regard to the foregoing entry-and-exit issues, the STB largely inherited the authority that the ICC had held immediately prior to its termination. As to railroads, this means that the STB has the authority over the creation of a new line or extension of an existing one, and must issue a certificate before such activity may go forward. Congress sought to ensure, however, that the STB would not stand in the way of reasonable railroad development. It required the STB to issue the

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1976, the "3R Act" (the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974)) had spoken to abandonments of lines in the northeastern portion of the county. Specifically, the 3R Act created an agency (the United States Railway Association) whose mandate included determining which components of the northeastern railway system should be maintained and whose net effect was that the "publicly owned corporation (Conrail), arising from the Penn Central and several other bankrupt roads in the Northeast, contained 3000 route-miles less than its [predecessors'] lines." KEELER, *supra* note 18, at 33.

22. Pub. L. No. 96-448, 94 Stat. 1895 (1980).

23. *See id.* §§ 101(a), 402, 94 Stat. 1897–98, 1941–45 (codified as amended and before repeal at 49 U.S.C. §§ 10101a(3), (6), (10), 10905 (1994)) (recognizing need for compensatory return on investment); KEELER, *supra* note 18, at 101–02.

24. *See* Pub. L. No. 96-448, § 402(b)(3), 94 Stat. 1941–42 (1980) (codified as amended and before repeal at 49 U.S.C. § 10904(c)(3) (1994)). The Staggers Act also contained a forced-sale or cramdown provision, under which a railroad seeking to abandon a line could be required—either under negotiated terms or, failing that, terms set by the ICC—to permit the purchase or subsidy of the line. *See id.* § 402(c), 94 Stat. 1942–45 (1980) (codified as amended and before repeal at 49 U.S.C. § 10905 (1994)). For a description of this provision, see Wild, *supra* note 17, at 9–10. Although the focus here (as in the act) is on abandonments, the Staggers Act also acted to facilitate railroad entry. Specifically, it restricted the ability of an existing railroad to block another's construction or extension of a line by refusing to permit the second carrier to cross its property. *See* Pub. L. No. 96-448, § 221(b), 94 Stat. 1928 (1980) (codified before repeal at 49 U.S.C. § 10901(d) (1994)).

25. WINSTON ET AL., *supra* note 11, at 11.

certificate unless the STB "finds that such activities are inconsistent with the public convenience and necessity."[26]

As would be expected, Congress has proved less friendly to the railroads with regard to exit from the industry. Railroads seeking to abandon or discontinue lines must apply to the STB. The STB is to approve an application "only if the [STB] finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance."[27] This standard, which places the burden on the railroad, is essentially the same standard as that which long governed the ICC.[28] Of course, many of the various reforms relating to applications to abandon or discontinue rail service that were implemented in the 4R Act and Staggers Act now govern proceedings before the STB.[29]

As to motor carriers, the STB's powers are more limited than they are over railroads, and certainly do not rival the ICC's authority under the original paradigm of regulated industries law. Indeed, Congress ultimately eliminated regulatory control over entry into the motor carrier industry when it enacted the ICC Termination Act, removing what essentially had become by then a mere licensing requirement.[30] It is true that this Act imposed a requirement that most motor common carriers register with the Secretary of Transportation, though not with the STB itself.[31] The Secretary, however, is required to register—that is, has no discretion not to register—any person so long as the person is willing and able to comply with the Department of Transportation's and the STB's regulations, including the Department's safety regulations, and with certain

26. 49 U.S.C. § 10901(c) (Supp. III 1997).

27. *Id.* § 10903(d). The STB is specifically directed to "consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development." *Id.*

28. *See, e.g.*, 49 U.S.C. § 10903(a) (1994) (repealed) (providing for abandonment or discontinuance only upon ICC finding that "the present or future public convenience and necessity require or permit the abandonment or discontinuance"); 49 U.S.C. § 1a(1) (1976) (repealed) (essentially identical provision).

29. *Compare, e.g.*, 49 U.S.C. § 10904 (Supp. III 1997) *with supra* text accompanying notes 20–24.

30. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, §§ 102(a), 103, 109 Stat. 803, 804, 852 (1995) (repealing, *inter alia*, 49 U.S.C. § 10922(b), (c) (1994)).

31. *See id.* § 103, 109 Stat. 879–90 (1995) (codified in relevant part at 49 U.S.C. §§ 13901-13908 (Supp. III 1997)).

minimum financial responsibility requirements established by the Department.[32]

At the end of the day, it is plain that the transformation of transportation law has included a fundamental reworking of administrative control over entry and exit. Even in areas where Congress preserved some agency authority (for example, on the matter of abandonment of railroad lines), it limited regulatory discretion, both in terms of procedure (how long the agency might take) and substance (what factors the agency had to consider). Moreover, in other areas (for example, entry into the trucking business), Congress essentially eliminated agency control altogether. Finally, while the ICC itself adopted some aspects of these reforms before its termination, it should be noted that Congress was the primary actor in these matters.

B. Regulatory Control Over Rates and Revenues

In the original paradigm of regulated industries law, the other major distinguishing characteristics of administrative agencies lay in their control over the rates that regulated companies could charge, and the revenues that these companies would accordingly receive.[33] The ICC long fit comfortably within this model. For example, the agency regulated, on a cost-of-service basis, the rates that interstate railroads charged.[34] Although in many contexts regulatory agencies engaged in maximum rate regulation, the ICC also superintended the *minimum* rates charged by certain carriers, particularly truckers.[35]

The shift from detailed rate regulation by the ICC in the railroad industry began with the decision to permit contract rates. Perhaps no other change in transportation law was more important. Traditionally, the ICC had taken the position that contract rates were inherently discriminatory and there-

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32. *See* 49 U.S.C. § 13902(a) (Supp. III 1997).

33. *See* Kearney & Merrill, *supra* note 4, at 1358–59.

34. *See* FRIEDLAENDER, *supra* note 16, at 130–37.

35. Indeed, the ICC commenced this undertaking promptly after the Motor Carrier Act of 1935 gave it jurisdiction over the interstate trucking industry. *See* Jurgen Basedow, *Common Carriers—Continuity and Disintegration in U.S. Transportation Law*, 13 TRANSP. L.J. 1, 29 n.173 (1983) (citing ICC administrative decisions).

fore must be "deemed unlawful per se."[36] In the late 1970s, the ICC abandoned this position.[37] In 1980, Congress codified the ICC's new policy in the Staggers Act.[38] Although the Staggers Act required railroads to file their contracts with the ICC, the agency could disapprove those contracts only if the rates discriminated against a port, or contained requirements that effectively rendered a railroad unable to meet its common carrier obligations to other shippers.[39] Further, once it had approved the contracts, the ICC could interfere with them only in time of war.[40] Operating under an approved contract, the railroad was exempted from the general prohibition on discrimination.[41]

Contract rates proliferated after the 1980 enactment of the Staggers Act. Railroads and shippers negotiated thousands of rates for a wide variety of commodities.[42] By 1990, a decade after the Staggers Act's passage, the Association of American Railroads estimated that "more than half of all rail traffic is currently shipped under some form of contract rate."[43]

The ICC Termination Act in the mid-1990s continued the trend toward detariffing and reduced agency control over rates and revenues. Congress retained agency authority to oversee the reasonableness of rail rates for common carrier service,[44] but it eliminated the requirement that rates be filed in tariffs. Instead, it provided that dominant carriers, defined explicitly as carriers with market power, "shall *establish* reasonable . . . rates"—language reminiscent of, but not identical to, the tariff-filing requirement.[45] The ICC Termination Act also continued

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36. *See* Guaranteed Rates, Sault Ste. Marie, Ontario, to Chicago, 315 I.C.C. 311, 323 (1961).

37. *See* Change of Policy, Railroad Contract Rates, 361 I.C.C. 205 (1979) (denying petition for rulemaking); Change of Policy, Railroad Contract Rates, Ex Parte No. 358-F (I.C.C. Nov. 9, 1978) (adopting general policy statement).

38. Staggers Rail Act of 1980, Pub. L. No. 96-448, § 208, 94 Stat. 1895, 1908 (codified as amended and before repeal at 49 U.S.C. § 10713(a) (1994)).

39. *See* 49 U.S.C. § 10713(d)(2)(A) (1994) (repealed).

40. *See id.* §§ 10713(g), 11128 (repealed).

41. *See id.* §§ 10713(h), 10741(f), 11101(a) (repealed).

42. *See* WINSTON ET AL., *supra* note 11, at 11.

43. *Id.*

44. *See* 49 U.S.C. § 10701 (Supp. III 1997).

45. *Compare id.* § 10702 ("[a] rail carrier providing transportation or service subject to the jurisdiction of the [STB] shall *establish* reasonable . . . rates") (emphasis added) *with, e.g.*, 49 U.S.C. § 10762(a)(1) (1994) (repealed) ("[a] carrier providing transportation or service subject to the jurisdiction of the [ICC] shall publish and file with the [ICC] tariffs containing [its] rates") *and* 49 U.S.C. § 6(1) (1976) (repealed) ("[e]very common carrier subject to the provisions of this chapter

the general scheme under which railroads could contract with shippers to provide transportation instead of providing common carrier service.[46] The STB may review such contracts under a narrow set of circumstances, as the ICC previously could, but unless the agency holds a contract unlawful, the transportation proceeds under the contract and is not subject to agency oversight.[47]

Similar developments—in terms of contract rates and detariffing—occurred in the trucking industry in the 1980s and 1990s. For example, having already sharply reduced the requirement that motor carriers file tariffs, Congress eliminated that requirement for virtually all trucking traffic when it terminated the ICC.[48] Tariffs remain only for movements by or with a water carrier in noncontiguous domestic trade and for movements of household goods paid for by the household consumer.[49] Indeed, "only in the former case must the tariffs actually be filed with the Surface Transportation Board, the ICC's limited successor; for the latter traffic category, the 'tariffs' need merely be available for inspection by the Board or by shippers."[50]

In sum, regulatory control over rates and revenues in the transportation industries has given way to an even greater extent than regulatory control over entry and exit. There can be no rate regulation without tariffs, and the tariffing requirement has been largely abolished in one industry (trucking) and substantially scaled back in another (railroads). A contract regime now predominates instead.

C. Regulation of Type and Amount of Service

The ICC also possessed the traditional agency authority to "'regulat[e] the type or amount of a product or service of-

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shall file with the [ICC] and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation").

46. *See* 49 U.S.C. § 10709 (Supp. III 1997).

47. *See id.* § 10709(b), (c)(1), (g).

48. *See* Kearney & Merrill, *supra* note 4, at 1337 & nn.57–58 (and sources cited therein).

49. *See id.*

50. *Id.*; *see also* 49 U.S.C. § 13702 (Supp. III 1997).

fered.'"[51] No statute directly granted the ICC this power. Rather, the authority flowed primarily from the agency's ability to reject rates or practices contained in tariffs if it concluded that they were not just, reasonable, or non-discriminatory, and also stemmed from the agency's authority to regulate entry.

As Professor Ann Friedlaender suggested some time ago, the controversy over the "Big John" railroad car provides an instructive example of regulatory control.[52] The Big John car was a substantial technological innovation that the Southern Railway attempted to introduce in 1961. The car had a capacity twice that of a traditional boxcar and a substantially lower weight. Southern introduced the car in 1961, but the lower rates for this service were immediately challenged and suspended by the ICC.[53] It was not until four years later in 1965, after protracted litigation including two separate Supreme Court decisions, "[that] the railroad [was] able to use the Big John cars freely."[54]

The rise of contract carriage substantially eliminated the ICC's (and the successor STB's) ability to engage in this kind of

51. Kearney & Merrill, *supra* note 4, at 1359 (quoting RICHARD J. PIERCE, JR. & ERNEST GELLHORN, REGULATED INDUSTRIES 1 (3d ed. 1994)). In most industries, this power belongs to the market, not to a government regulator.

52. *See* FRIEDLAENDER, *supra* note 16, at 92–94, 178.

53. The lower rates were essential to Southern, for the entire purpose of the Big John car was to make it economically feasible for the railroad to compete with barges and trucks for grain traffic.

54. FRIEDLAENDER, *supra* note 16, at 93. Two lengthy legal battles are relevant. In the first, the Supreme Court ultimately held that the ICC had exclusive authority to suspend railroad rates and therefore that, after the agency had exercised that authority by suspending the Southern's rates for the maximum period permitted by Congress, the federal courts lacked authority to issue an injunction against the rates. *See* Arrow Transp. Co. v. Southern Ry., 372 U.S. 658 (1963). The second battle then commenced when Southern put the new rates into effect. The ICC ruled that the railroad must raise its rates, but this decision was overturned in the courts. *See* Grain in Multiple-Car Shipments—River Crossings to S., 318 I.C.C. 641 (Div. 2), *rev'd*, 321 I.C.C. 582 (1963) (full Commission), *rev'd sub nom.* Cincinnati, N.O. & T.P. Ry. v. Arrow Transp. Co., 229 F. Supp. 572 (S.D. Ohio 1964), *vacated sub nom.* Arrow Transp. Co. v. Cincinnati, N.O. & T.P. Ry., 379 U.S. 642, *on remand*, 325 I.C.C. 752 (1965). Although the railroad put the rates into effect after the first battle ended and defeated the agency's attempt to enjoin the rates in the second, not only were the rates not effective during the pendency of the first battle, but even thereafter, as Friedlaender notes, "the Southern was operating the cars and investing in them without knowing whether the rates on which their profitability was based would ultimately be accepted." FRIEDLAENDER, *supra* note 16, at 93.

oversight and control.[55] In essence, under a contract regime, the carrier and the shipper alone are the relevant parties to the transaction, as is the case in most industries. This was not the case, however, under a tariff regime, in which other interests might seek to involve the agency. Further, while current law provides for agency review of carrier-shipper contracts, this provision is limited. First, the general rule is that the only entities authorized to seek review are shippers that "individually will be harmed because the proposed contract unduly impairs the ability of the contracting rail carrier or carriers to meet their common carrier obligations to the complainant,"[56] or a port that "individually will be harmed because the proposed contract will result in unreasonable discrimination against such port."[57] Second, as this statutory language indicates, the grounds on which the STB may disapprove railroad-shipper contracts are also circumscribed. Finally, the time for any challenge is limited. A challenger must act within thirty days of the railroad's filing a summary of the contract with the STB, and Congress specifically has forbidden subsequent challenge to the contract on almost any ground.[58]

These various congressional actions, beginning with the Staggers Act in 1980 and continuing through the ICC Termination Act of 1995, have permitted contractual arrangements between carriers and shippers and have limited, in several important ways, the possibilities for challenging those arrangements. This has had profound effects on the agency's ability to superintend the type and amount of service provided by carriers. Certainly most disputes such as the "Big John" controversy could not recur, for the challengers of railroad practices tended to be either the ICC itself, acting *sua sponte*, or the railroads' competitors (most notably truckers but also barge lines)—and in either instance the mechanism for the challenge would be the suspension of (or a petition to suspend) the railroad's tariff. The large-scale elimination of railroad tariffs has thus substantially eradicated the possibility of such challenges. The virtual abolition of tariffs in the trucking industry similarly has re-

55. *See supra* Part I.B (describing administrative and legislative determinations to permit contractual relationships between carriers and shippers).

56. 49 U.S.C. § 10709(g)(2)(A)(i), (ii) (Supp. III 1997).

57. *Id.*

58. *See id.* § 10709(c)(1).

duced the possibility of general agency regulation of service in that industry.[59]

D. Other Regulatory Authority

The ICC also possessed a myriad of other powers with which to superintend the railroad and motor carrier industries. One of the most significant was the requirement that the agency approve any change in control of firms within its jurisdiction. Thus, all railroad mergers, for example, had to be approved by the ICC.[60] The ICC faced a great deal of criticism in this context. As Lawrence White has stated, "[i]n the previous two decades [leading up to 1980] the ICC—often because of its concerns about balancing the demands of various constituencies—had sometimes taken years to decide the fate of mergers."[61] The most notorious example was the Union Pacific's proposed merger with the Rock Island railroad. The proposed merger, as one observer has succinctly stated, "languished for ten years before the ICC, until everyone lost interest and the Rock itself was liquidated."[62]

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59. *See supra* notes 48–50 and accompanying text (describing limited requirement of trucking tariffs).

60. *See generally* FRIEDLAENDER, *supra* note 16, at 138–41, 167–68, 184–85, 187.

61. LAWRENCE J. WHITE, THE DEREGULATION OF THE TELEPHONE INDUSTRY: THE LESSONS FROM THE U.S. RAILROAD DEREGULATION EXPERIENCE 15 n.29 (New York Univ. Center for Law and Bus. Working Paper No. 98-016, 1998), *available at SSRN Electronic Library - Abstract and Paper Download - WHITE Paper* (visited Mar. 16, 2000) <http://papers.ssrn.com/paper.taf?ABSTRACT_ID=164497>.

62. Thoms, *supra* note 16, at 211; *see also* Larry Kaufman, *UP's Play for CNW: From a Slam Dunk to a Tight Game*, J. COM., May 5, 1993, at 2B (briefly recounting course of the Rock Island merger case). ICC approval of motor carrier mergers was also required, originally for instances in which more than twenty vehicles were involved, *see* Motor Carrier Act of 1935, ch. 498, § 1, 49 Stat. 543 (codified as amended at 49 U.S.C. § 5(10) (1964)), and beginning in 1965 for carriers whose combined annual gross revenues totalled $300,000 or more, see Pub. L. No. 89-93, § 1, 79 Stat. 284 (1965) (codified as amended and before repeal at 49 U.S.C. § 5(10) (1970) and 49 U.S.C. § 5(11) (1976)). *See generally* Dale G. Anderson & Ray C. Hutsell, Jr., *Trucking Regulation, 1935–1980, in* REGULATION AND DEREGULATION OF THE MOTOR CARRIER INDUSTRY 34 (John Richard Felton & Dale G. Anderson eds., 1989). Inasmuch as mergers helped solve some of the problems caused by the agency's restrictive policies concerning entry, the ICC actively encouraged mergers in the years between 1935 and 1980. *See id.* at 34–35. *See generally* JAMES C. JOHNSON, TRUCKING MERGERS: A REGULATORY VIEWPOINT (1973).

Congress intervened in this area of regulatory authority as well. In the 4R Act, Congress itself specified the maximum length of time that the ICC could spend on the various segments of merger review.[63] This 1976 statute also established a role for the Secretary of Transportation in considering merger applications.[64] The Staggers Act continued this reform process, requiring, for example, that the ICC make a determination on proposed mergers within 300 days of a request for approval.[65]

Although the STB does not possess the full panoply of powers that the ICC once enjoyed over the railroad and motor carrier industries, Congress did bestow upon the STB the same basic authority to review mergers of railroads that the ICC had possessed.[66] In this regard, it is noteworthy that approval of a merger by the STB immunizes the transaction from the antitrust laws.[67] Specifically, a rail merger may proceed so long as the STB determines that it is "consistent with the public interest."[68] The STB may, short of blocking the merger, permit the merger contingent upon conditions such as the divestiture of parallel tracks or the granting of tracking rights and access to other facilities.[69]

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63. *See* Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 402(b), 90 Stat. 62 (codified before repeal at 49 U.S.C. § 5(2) (1976)).

64. *See id.* § 401, 90 Stat. 61–62 (1976) (codified before repeal at 49 U.S.C. § 1654 (1976)); *see also id.* § 403, 90 Stat. 63–66 (1976) (codified before repeal at 49 U.S.C. § 5(3) (1976)) (providing expedited railroad merger procedure and giving role to the Secretary of Transportation).

65. *See* Staggers Rail Act of 1980, Pub. L. No. 96-448, § 228(d), 94 Stat. 1931–32 (codified before repeal at 49 U.S.C. § 11345 (1994)).

66. This was not an inevitable policy choice by Congress. When Congress eliminated the Civil Aeronautics Board, it initially transferred authority over mergers to the Department of Transportation. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 26, 92 Stat. 1705 (codified before repeal at 49 U.S.C. § 1378(b)(1)(A), (B) (1988)). Congress subsequently permitted this authority to expire, which had the effect of shifting the authority to the Department of Justice and the Federal Trade Commission. *See* Richard D. Cudahy, *The FERC's Policy on Electric Mergers: A Bit of Perspective*, 18 ENERGY L.J. 113, 127 & n.76 (1997) (and sources cited therein). Given the airline mergers that had occurred on the Department of Transportation's watch, Judge Cudahy has termed this "a classic case of closing the barn door long after the horse had escaped for good." *Id.* at 127.

67. *See* 49 U.S.C. § 11321(a) (Supp. III 1997). This is authority that the ICC had possessed since the 1920 Transportation Act. *See* Northern Lines Merger Cases, 396 U.S. 491, 508–09 (1970) (detailing history of provision); *see also* Cudahy, *supra* note 66, at 124–30 & n.88 (discussing statutory approach to airline and electricity mergers).

68. 49 U.S.C. § 11324(c) (Supp. III 1997).

69. *See id.*

The STB has not been willing to require divestiture. For example, in approving the proposed merger of the Union Pacific and Southern Pacific in 1996, the STB was confronted with the Department of Justice's proposal urging that approval of the merger be conditioned on divestiture of more than a thousand miles of track.[70] The STB rejected this structural solution in favor of regulation.[71] The result of the ICC's and its successor's permissive attitude toward rail mergers has been that, "since the Staggers Act, the number of significant U.S. railways has shrunk from 26 to 9," with the giants now reduced "to four major roads—conceivably on their way to one."[72]

The foregoing account has described the state of traditional regulation in the transportation industries as it has evolved in the past quarter-century. The description should also make for possible meaningful discussion of developments in telecommunications regulation over the same general time period.

II. THE STATE OF THE FCC

For some time now, the FCC has occupied the ICC's former status as the most important independent federal agency. The agency was created in the Communications Act of 1934,[73] largely as an amalgam of two agencies—the Federal Radio Commission, which had regulated broadcasting in the United States since 1927,[74] and that portion of the ICC that had regulatory authority over interstate telephone and telegraph companies since 1910.[75]

A. *The Extent of the Great Transformation in the Area of Telecommunications Law*

Telecommunications law has recently undergone a transformation analogous to that which has occurred in transporta-

70. *See* Cudahy, *supra* note 66, at 129.

71. *See* Salvatore Massa, *Injecting Competition in the Railroad Industry Through Access*, 26 TRANSP. L.J. 283, 295 (1999).

72. Cudahy, *supra* note 66, at 128, 135.

73. Act of June 19, 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–1021 (1994 & Supp. III 1997)).

74. *See* Radio Act of 1927, ch. 169, 44 Stat. 1162.

75. *See* Mann-Elkins Act, Act of June 18, 1910, ch. 309, § 7, 36 Stat. 539, 544–45 (1910) (deeming interstate "telegraph, telephone, and cable companies" to be "common carriers" subject to the ICC's jurisdiction).

tion law. The transformation has consisted of a variety of administrative, judicial, and legislative changes occurring over the same general time period as the transformation in transportation (*viz.*, the past twenty-five or so years). Although these changes previously have been discussed in overview,[76] the following describes more precisely the nature of the changes in telecommunications regulation, and in particular, in the role of the FCC.[77]

1. Regulation of Entry and Exit

The FCC always has possessed regulatory authority to control both entry into and departure from the interstate telecommunications industry. Congress bestowed the former power in section 214(a) of the Communications Act of 1934, which prohibits would-be competitors from entering the interstate market "unless and until there shall first have been obtained from the Commission a certificate that the present and future public convenience and necessity require or will require [such entry]."[78] As the FCC has succinctly stated of this provision's purpose, "Congress enacted the section 214(a) entry certification requirements to prevent useless duplication of facilities that could result in increased rates being imposed on captive telephone ratepayers."[79] The latter power—to control exit—was added a short time later.[80] Section 214(a) did not change in any material respect until Congress enacted the Telecommunications Act of 1996 ("1996 Act").[81]

76. *See* Kearney & Merrill, *supra* note 4, at 1329–64.

77. *Cf. supra* note 8. This article does not recount the FCC's gradual elimination of its regulation of the provision of customer premises equipment. *See* Kearney & Merrill, *supra* note 4, at 1340–42 (describing in detail the development of the requirement that carriers "unbundle" provision of service and provision of equipment).

78. 47 U.S.C. § 214(a) (1994).

79. Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, 14 F.C.C.R. 11,364, 11,366 & n.9 (citing 78 Cong. Rec. 10314 (1934) (remarks of Rep. Rayburn)).

80. *See* 57 Stat. 11 (1943) (amending section 214 to provide further that "[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby").

81. *See infra* note 84 (describing Congress's 1996 insertion of provision elsewhere in Communications Act eliminating requirement of section 214 certificate for video programming).

Notwithstanding section 214's static state for more than six decades, the law and regulation concerning entry and exit in interstate telecommunications changed dramatically during this time. The bulk of these changes occurred in the 1970s. After MCI and other "specialized common carriers" had obtained approval from the FCC to provide private-line services (essentially, a dedicated connection between two fixed points), MCI sought to expand its services to compete head to head with AT&T's basic long-distance service. In its so-called *Execunet* ruling, the D.C. Circuit ultimately held that the FCC, having permitted MCI into one part of the interstate telecommunications business, could not artificially cordon it off from other parts unless the agency was willing explicitly to conclude that an AT&T monopoly in long-distance telecommunications was required by the public interest.[82] This series of administrative and judicial proceedings has received substantial attention.[83]

Since that time, the FCC has not sought categorically to prohibit entry into interstate telecommunications. The agency also has taken administrative action to reduce the need for additional section 214 applications. For example, the FCC recently granted "would-be" carriers blanket authority under section 214 to operate new telecommunications facilities, provided that they obtain the FCC's authorization to use any radio frequencies associated with their networks, as required under Title III of the Communications Act.[84] Although the details vary,

82. *See* MCI Telecomms. Corp. v. FCC, 561 F.2d 365, 380 (D.C. Cir. 1977).

83. *See, e.g.*, PETER HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW §§ 9.3.5–9.4.2, at 748–56 (1999); Kearney & Merrill, *supra* note 4, at 1343, 1374–75; Glen O. Robinson, *The Titanic Remembered: AT&T and the Changing World of Telecommunications*, 5 YALE J. ON REG. 517, 524 (1988).

84. *See* 47 C.F.R. § 63.01 (1998); 47 U.S.C. §§ 301, 303, 307–309 (1994 & Supp. III 1997); Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, 14 F.C.C.R. at 11,365–66, 11,372–75; *see also* Application of MCI Communications Corp., Transferor, and So. Pac. Telecomms. Corp., Transferee, for Consent to Transfer Control of Qwest Comm'ns, Inc., 12 F.C.C.R. 7790, 7802–03 & n.81 (1997) (and authorities cited therein). Congress itself provided in section 402(b)(2)(A) of the Telecommunications Act that "the Commission shall permit any common carrier to be exempt from the requirements of Section 214 of the Communications Act of 1934 for the extension of any line." 47 U.S.C. § 214 note (Supp. III 1997). It also eliminated the need for a section 214 certificate for telephone company operation of a cable television system. *See id.* § 571(c) (stating that"[a] common carrier shall not be required to obtain a certificate under section 214 with respect to the establishment or operation of a system for the delivery of video programming").

the FCC has made the granting of section 214 exit authority similarly automatic.[85]

This is not to suggest that the agency's entry-and-exit authority under section 214(a) has become irrelevant. First, the formal requirement of a section 214 certificate remains.[86] Second, and more importantly, in cases of mergers or changes in corporate control, the FCC engages in an extensive practice of conditioning its section 214 approval on a carrier's agreeing to certain provisions or undertakings. For example, the FCC conditioned its approval of MCI's transfer of its section 214 certificates to WorldCom, Inc., which was required to complete the companies' recent merger, on MCI's divestiture of its internet assets.[87] Similarly, in approving NYNEX's transfer of its section 214 certificates to Bell Atlantic, a necessary component of those companies' merger, the FCC imposed a variety of conditions on the merged companies' operations, particularly in order to ensure that other companies could compete for local business.[88] It is well settled that the FCC's determination of whether a transaction would serve the public interest is not

85. *See* Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, 14 F.C.C.R. at 11,378–81. The FCC rejected the contention that various classes of carriers—e.g., rate-of-return LECs and price-cap LECs—should be excluded from this liberalization of the agency's section 214 policies. *See id.* at 11372–74.

86. *See, e.g.*, International Authorizations Granted, Rel. No. DA 99-2058, 1999 FCC LEXIS 4846 (Oct. 1, 1999) (issuing public notice that "serves as each [listed] newly authorized carrier's Section 214 certificate" and noting that "[i]t contains general and specific conditions"). The FCC recently rejected a proposal that it "forbear from exercising [its] section 214 jurisdiction." Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, 14 F.C.C.R. at 11,372. This proposal had been made pursuant to section 10(a) of the Telecommunications Act, which requires the FCC to "forbear from enforcing provisions of the [Communications] Act when it finds that: (1) enforcement is not necessary to ensure that prices are just and reasonable and not unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest," with this last factor being specifically tied in part to whether forbearance will increase competition. *Id.* at 11,370; *see* 47 U.S.C. § 160(a), (b) (Supp. III 1997).

87. *See* Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., 13 F.C.C.R. 18,025, 18,103–04, 18,109–15, 18,118, 18,153 (1998).

88. *See* Applications of NYNEX Corp. Transferor, and Bell Atlantic Corporation Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, 12 F.C.C.R. 19,985, 19,993, 20,069–91, 20,097, 20,107–86 (1997).

limited to traditional antitrust principles, but can encompass factors other than effects on competition.[89]

The FCC's practice of conditioning approval of section 214 certificate transfers has drawn some recent fire. One commissioner testified before Congress as follows:

> Finally, I express some general apprehension about the "conditioning" of grants for license transfer applications and section 214 authorizations. I think it is entirely appropriate, under the Commission's organic statute, for the Commission to condition license transfer and line extension applications on compliance with existing FCC rules or statutory provisions. . . .
>
> All too often, however, this Commission places conditions on license transfers that have no basis in the text of the Communications Act. That is, the Commission requires companies to do certain things—things that it could not for lack of statutory authority require outright in a rulemaking—as a *quo* for the *quid* of receiving a license. Again, this represents a transgression of the Commission's statutory limits and thus a violation of the [Administrative Procedure Act].[90]

Whatever the merits of this criticism, the FCC's use of its section 214 certificate authority is an important part of current telecommunications regulation. The FCC processes more than 500 section 214 applications each year.[91] While many of these are routine and uncontroversial, others such as the Bell Atlantic/NYNEX application provoke substantial public concern. Indeed, in the same order in which it extended blanket section 214 authority for the construction and operation of domestic lines, the FCC refused to grant such a generic authorization for

89. *See* Satellite Business Systems, 62 F.C.C.2d 997, 1069, 1088 (1977), *aff'd sub nom.* United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980) (en banc).

90. Testimony of Federal Communications Comm'r Harold W. Furchtgott-Roth Before the U.S. House of Representatives Comm. on the Judiciary, Subcomm. on Commercial and Administrative Law Oversight Hearing (May 25, 1999) (citations omitted), *attached to* Separate Statement of Comm'r Harold Furchtgott-Roth in Applications of Airtouch Communications, Inc. Transferor, and Vodafone Group PLC Transferee, for Consent to Transfer Control of Licenses and Authorizations, 14 F.C.C.R. 9430, 9474 (1999).

91. *See* The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 F.C.C.R. 17,087, 17,112 (1997).

acquisitions of corporate control (as opposed to mere acquisitions of assets). The FCC justified its position as follows:

> Acquisitions of corporate control . . . often raise serious public interest concerns regarding the state of competition following the proposed acquisition or merger. Such acquisitions are often contested and draw significant public comments that we are bound to consider. We believe that the magnitude of corporate acquisitions and their potential effect on competition distinguishes them from acquisitions of assets and has led us to conclude that corporate acquisitions should not be covered by blanket authority.[92]

In short, the FCC no longer actively regulates exit and entry in the interstate market, but the provision granting the agency such regulatory authority—section 214 of the Communications Act—has become the source of significant agency authority over telecommunications mergers.[93]

2. Regulatory Control Over Rates and Revenues

The FCC has moved away from the rate-of-return ratemaking that traditionally characterized regulated industries law. Quite unlike the situation with regard to entry-and-exit controls, where the FCC initially resisted liberalization, the immediate impetuses for the move away from rate regulation have come from within the FCC. Indeed, as far as government institutions are concerned, the genesis and development of this shift have been almost entirely administrative in nature, although judicial resistance to one of its technical aspects (*viz.*, detariffing) ultimately prompted congressional intervention on the agency's side.

It is, of course, impossible to discuss the FCC's revised approach to ratemaking without referring to the changes in the markets that the FCC regulates.[94] The most prominent development of the last twenty-five years in telecommunications services has been, without question, the development of a competitive long-distance telecommunications market. In addition

92. Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, 14 F.C.C.R. 11,364, 11,374–75 (1999) (footnotes omitted).

93. I shall return to some issues involved in telecommunications mergers. *See infra* Part II.A.4.

94. *Cf.* Kearney & Merrill, *supra* note 4, at 1330, 1349.

to the D.C. Circuit's *Execunet* ruling, events outside the regulatory sphere played a substantial role in prompting this development. Most notable among these was the United States' antitrust action against AT&T, commenced in 1974, which culminated in the breakup of the Bell System.[95] The consent decree resolving the litigation required AT&T to divest itself of its local monopolies, known in the industry as the Bell Operating Companies ("BOCs") and to the public under familiar names such as Illinois Bell and New York Telephone, and further prohibited the divested BOCs from competing in the long-distance market.[96] The theory of the breakup, insofar as is relevant here, was that real competition in the long-distance market could not develop so long as one of the companies in the market (AT&T) was vertically integrated with entities (the BOCs) that possessed bottleneck control of facilities through which all long-distance calls had to travel (the local exchanges).[97] Although it did not oppose the divestiture itself, the FCC unsuccessfully opposed the consent decree's restrictions on the BOCs' post-divestiture activities.[98]

Notwithstanding its opposition to the *Execunet* decision and to the AT&T decree's prohibition on BOC involvement in long distance, the FCC deserves considerable credit for the course of competition in the post-*Execunet* world. Part of the story lies in how the FCC's control over rates and revenues has evolved in the last quarter-century. In its regulation of MCI and other AT&T competitors, the FCC did not attempt to impose rate-of-return regulation. Such regulation had been the historically dominant approach in telecommunications, as well as in other public utility and common carrier industries.[99] Rate-of-return regulation, however, was not dictated by the

95. *See* United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982) (approving consent decree to settle government's lawsuit), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). For a summary of the government's theories and the key events in this lawsuit, see Kearney, *supra* note 2, at 1403–20.

96. *See AT&T*, 552 F. Supp. at 160–70, 186–95 (explaining the divestiture and the line-of-business restrictions); *id.* at 226–28 (setting forth provisions of consent decree that imposed these requirements); Kearney, *supra* note 2, at 1412–20.

97. *See* Kearney, *supra* note 2, at 1403–05, 1409–16, 1420 (and sources cited therein).

98. *See id.* at 1436 n.135 (and sources cited therein).

99. *See* HUBER ET AL., *supra* note 83, § 2.2.3, at 113–15; Kearney & Merrill, *supra* note 4, at 1360–61.

provisions of the Communications Act, which insists merely that rates be "just and reasonable" and not unreasonably discriminatory.[100] In light of MCI's and Sprint's fledgling status as competitors of AT&T, the FCC could assume that a need to compete with AT&T's rates, which were not similarly deregulated, would keep these other companies' rates in line with the statutory requirements.[101] Indeed, beginning in 1985, the FCC even attempted to forbid carriers other than AT&T from filing tariffs containing their rates.[102] While this particular attempt was unsuccessful, the FCC did succeed for a time in adopting a permissive approach under which these long-distance carriers could file tariffs if they wished, but were not required to do so. Tariffs being a *sine qua non* of rate-of-return regulation, this gives some evidence of the FCC's unwillingness to control the rates or revenues of carriers other than AT&T.

The FCC's approach to regulating AT&T's long-distance services also evolved over this time period (the last quarter of the twentieth century). In the 1970s, the FCC had devoted a substantial amount of attention to questions involving rate regulation of the Bell System, particularly in light of emerging long-distance competition.[103] For example, in Docket No. 18128, the FCC considered the Bell System's various major categories of interstate service and addressed numerous ques-

100. *See* 47 U.S.C. § 201(b) (1994) (stating that rates must be just and reasonable); *id.* § 202(a) (stating that rates may not be unreasonably discriminatory). This classic formulation of "just, reasonable, and non-discriminatory" pervades regulated industries law and derives from the original Interstate Commerce Act. *See* Kearney & Merrill, *supra* note 4, at 1330–34.

101. *See* Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 77 F.C.C.2d 308, 324–26, 334–35 (1979) (subsequent history omitted); *see also id.* at 324 & n.27 (noting that these "other common carriers," as non-AT&T carriers were known, "generally report very small or negative rates of return").

102. *See* Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 99 F.C.C.2d 1020, *vacated sub nom.* MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985); *see also* Kearney & Merrill, *supra* note 4, at 1337–39 (describing course of FCC's efforts at detariffing).

103. Prior to this time, until at least the mid-1960s, the FCC tended not to superintend closely AT&T's rates. *See* HUBER ET AL., *supra* note 83, § 2.2.3, at 115 n.139 (citing Richard E. Wiley, *The End of Monopoly: Regulatory Change and the Promotion of Competition*, in TELECOMMUNICATIONS AND THE LAW 147, 148–49 (Walter Sapronov ed. 1998)); Steven M. Spaeth, *Industrial Policy, Continuing Surveillance, and Raised Eyebrows: A Comparison of Informality in Administrative Procedure in Japan and the United States*, 20 OHIO N.U. L. REV. 931, 940–45 (1994) (providing a helpful summary of the FCC's approach to its rate responsibilities from 1934 to the mid-1960s and beyond).

tions relevant to the Bell System's rate of return.[104] Thereafter, in its *Competitive Carrier* proceeding, commenced in 1979, the FCC distinguished between dominant carriers and non-dominant carriers. As the Supreme Court would characterize the matter years later, "in the long-distance market, this amounted to a distinction between AT&T and everyone else."[105] The FCC then required dominant carriers (again, AT&T alone in this context) to continue to file cost-support data for tariff filings and to retain most of the trappings of rate regulation.[106]

The FCC's major innovation in regulating AT&T was its shift a decade later to a price-cap system of regulation. Under such a system, the FCC sets a maximum price, and the carrier then sets its rates at or below that ceiling. The theory is that, because the price caps are not lowered if costs go down, the carrier has a greater incentive than under traditional rate-of-return regulation to act efficiently and closely monitor costs.[107] It is sufficient here to note that price-cap regulation constituted a step away from classic rate-of-return regulation and close agency superintendence of AT&T's rates.[108]

Finally, in 1995, the FCC acceded to AT&T's request to be reclassified as a non-dominant carrier, like all of its competi-

104. *See* AT&T, Long Lines Dept., Revisions of Tariff FCC No. 260 Private Line Servs., Series 5000 (TELPAK), 61 F.C.C.2d 587 (1976) (Memorandum Opinion and Order), *reconsid. granted in part and denied in part*, 64 F.C.C.2d 971 (1977), *further reconsid. granted in part and denied in part*, 67 F.C.C.2d 1441 (1978), *aff'd sub nom.* Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221 (D.C. Cir. 1980).

105. MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 221 (1994). A domestic dominant carrier is defined as "a carrier found by the Commission to have market power (i.e., the power to control prices)." 47 C.F.R. § 61.3(o) (1998); *see also* Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, 14 F.C.C.R. 11,364, 11,367 n.10 (citing various FCC orders creating "dominant/non-dominant" distinction and classifying various carriers).

106. *See* Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 85 F.C.C.2d 1, 2, 33–35 (1980) (subsequent history omitted).

107. I speak of "traditional" rate-of-return regulation because a price-cap system is best viewed as a modified form of rate-of-return regulation that attempts to create some otherwise absent incentives for the regulated company. *Cf.* Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 338 n.29 (1990). For a helpful and succinct exposition of the basic theory of price caps, see National Rural Telecom Ass'n v. FCC, 988 F.2d 174, 177–79 (D.C. Cir. 1993).

108. For the details of price-cap regulation of AT&T, see Howard Griboff, Comment, *New Freedom for AT&T in the Competitive Long Distance Market*, 44 FED. COMM. L.J. 435 (1992) (and sources cited therein).

tors in the long-distance industry.[109] The consequence of this ruling is that AT&T is free to price essentially all of its services solely according to the market. Although the statutory requirements that AT&T's (and all other carriers') rates be just, reasonable, and not unreasonably discriminatory still remain, the FCC has determined in piecemeal fashion over the last twenty years that the existence of a competitive market structure means that the agency need not actively enforce these guarantees.

The foregoing should not be taken as an indication that all regulation of rates has disappeared from interstate telecommunications. The FCC continues to exercise relatively active control over the rates that local exchange carriers ("LECs") can charge long-distance and other service providers for affording access to the LECs' end-users (e.g., both the calling and the called party). Here, too, the FCC frequently employs a price-cap system.[110] The hope underlying much of the Telecommunications Act of 1996 is that sufficient competition will develop in local telecommunications that this area of the industry will witness a transformation similar to the one that occurred in the long-distance segment over the last twenty-five years. If this occurs, rate regulation of the LECs will cease.

3. Regulation of Type and Amount of Service

Historically, the FCC regulated in some respects the amount and type of service that interstate telephone companies offered. This traditional regulatory authority was less prominent in the telecommunications industry than in some other businesses. For example, in the context of the airline industry, the policies of the Civil Aeronautics Board ("CAB") had a substantial effect on the number of flights operating on a daily basis from each airport.[111] The differing nature of the telecom-

109. *See* Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 F.C.C.R. 3271 (1995), *reconsid. denied*, 12 F.C.C.R. 20,787 (1997).

110. *See* Policy and Rules Concerning Rates for Dominant Carriers, 4 F.C.C.R. 2873, 2877 (1989) (subsequent history omitted). For a brief summary of the FCC's regulation in this context, see Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket No. 98-157, Rel. No. FCC 99-365, 1999 FCC LEXIS 6018, paras. 3–4 (Nov. 22, 1999).

111. *See* Donald V. Harper, *Regulation of Aircraft Noise at Major Airports: Past, Present, and Future*, 17 TRANSP. L.J. 117, 140 (1988).

munications industry—where customers have the ability to use service at any time, as opposed to being dependent upon carriers' schedules—meant that the regulatory agency did not have control comparable to the ICC's or CAB's over service decisions.

This is not to suggest that the agency has played no role in controlling the amount of telephone service available to consumers. From its creation in 1934, the FCC has been charged with promoting the goal of universal service.[112] In the original paradigm of regulated industries law, the FCC sought to achieve this goal by permitting widespread cross-subsidies, "meaning that some customers paid rates in excess of the fully allocated costs of service in order to allow other customers to be charged rates less than the fully allocated costs of service."[113] This cross-subsidization was easily accomplished so long as one corporate entity (i.e., the Bell System) provided all types of service (e.g., both local and long-distance service) to all types of customers (e.g., business and residential, urban and rural), and reasonably easily accomplished even after divestiture through above-cost access charges. The company could match shortfalls in revenues in one service or geographic area with revenues that exceeded costs in other areas.

The new paradigm of regulated industries law, as particularly manifested in telecommunications, has yielded important changes in who gets subsidies for universal service and in the mechanism for funding those subsidies. As to the former, there is now a generalized list of entities statutorily entitled to universal service subsidies. These include not only "rural, insular, and high cost" customers but also, more specifically, "educational providers and libraries."[114] As to the latter, the cross-subsidies of the single service provider have been supplemented with fees or taxes imposed by the agency in response to Congress's directive that the agency ensure universal service. Significantly, the agency has not been required to yield its traditional role of ensuring universal service. If anything, the

112. Section 1 of the Communications Act creates the FCC, among other reasons, "[f]or the purpose of regulating interstate and foreign commerce . . . by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151 (1994).

113. Kearney & Merrill, *supra* note 4, at 1346.

114. *Id.* (quoting and discussing 47 U.S.C. § 254 (Supp. III 1997)).

agency must be more involved than in the past, for the new system requires collecting funds from multiple corporate entities and distributing them to others, whereas in the past only intracorporate accounting transfers were required.

Notwithstanding this increased involvement in universal service matters, the FCC cannot engage in some of the same regulation of service as it did, or could have done, in the past. That is because of the decreased emphasis on—indeed, decreased incidence of—carriers' tariffs. Although the FCC ultimately was unsuccessful in persuading the courts that it possessed authority under the original Communications Act to remove or substantially alter the tariff-filing requirement for large numbers of carriers,[115] the agency has claimed much the same authority under the requirement in the Telecommunications Act of 1996 that it "forbear" from enforcing statutory requirements in particular circumstances.[116] Substantial service and rate regulation is not possible in the absence of tariffs—a point that the Supreme Court made forcefully before Congress's award of "forbearance" authority to the FCC expanded the agency's powers.[117] Finally, the telecommunications industry, at the high end of the market, witnessed much of the same kind of migration to contract arrangements as marked the transportation industries.[118] In these circumstances, the FCC's present-day control over service offerings by telecommunications carriers does not approach its previous levels.

4. Other Regulatory Authority

Because the FCC uses its section 214 authority as the vehicle for reviewing proposed mergers of telecommunications companies, this article has already discussed the agency's merger review.[119] While that discussion does not require re-

115. *See* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994).

116. *See supra* note 86 (describing "forbearance" authority); Policy and Rules Concerning the Interstate, Interexchange Marketplace, 14 F.C.C.R. 6004 (1999).

117. *See MCI Telecomms. Corp.*, 512 U.S. at 229–31 (explaining at length that "[t]he tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act" and that much of the rest of Title II is "premised upon the tariff-filing requirement" and "would not be susceptible of effective enforcement if rates were not publicly filed").

118. *See* Kearney & Merrill, *supra* note 4, at 1339 n.65.

119. *See supra* Part II.A.1; *cf. supra* Part I.D (discussing agency review of railroad mergers under rubric of "other regulatory authority"). It has been pro-

peating here, one other aspect of the FCC's authority over mergers bears mention. From its original enactment until the passage of the Telecommunications Act of 1996, section 221 of the Communications Act of 1934 had given the FCC the authority to immunize mergers of telephone companies from antitrust challenges. The FCC was authorized to act upon application of "one or more telephone companies" and determine whether a "proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and [will be] in the public interest."[120] This provision, which derived from the Willis-Graham Act of 1921,[121] was adopted essentially to permit mergers whose effect was to eliminate overlapping local telephone systems.[122]

While the FCC did not use its authority under section 221(a) to immunize mergers of long-distance carriers from antitrust challenges, Congress concluded in the 1996 Act that the provision's elimination was necessary for several reasons. One concern was that "the critical term 'telephone company' is not defined" and that, absent the statute's repeal, the FCC might use the provision to immunize mergers of companies other than regulated local carriers.[123] Another was Congress's conclusion that the Department of Justice should have authority over antitrust issues in telecommunications mergers.[124]

Thus, the FCC has been required to share control over mergers with the Department of Justice. As a technical matter, other than the repeal of the little-used section 221, this has not been a change in the law.[125] As a practical matter, however, the changing nature of the telecommunications industry

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posed that Congress eliminate the FCC's authority over mergers where the Department of Justice or Federal Trade Commission has reviewed them. *See* Jeri Clausing, *Compressed Data; 2 Senators Seek Limits on F.C.C.*, N.Y. TIMES, May 31, 1999, at C3 (reporting criticism of FCC's process).

120. 47 U.S.C. § 221(a) (1994) (repealed).

121. 42 Stat. 27 (1921).

122. *See* MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1100 (7th Cir. 1983) (providing a succinct explication of this provision).

123. H.R. CONF. REP. NO. 104-458, at 200, *reprinted in* 1996 U.S.C.C.A.N. 124, 214.

124. *See id.* at 200–01, *reprinted in* 1996 U.S.C.C.A.N. at 214–15.

125. For a general overview of the FCC's and Department of Justice's respective authority over telecommunications mergers, see James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department over Telecommunications Transactions*, 6 COMMLAW CONSPECTUS 195 (1998).

makes the Department of Justice's merger authority increasingly important. Mergers were simply not a matter of large concern so long as a single behemoth (the Bell System) dominated the telecommunications industry. This was, of course, true not only of the local exchange portions of the industry, where the BOCs provided service under state-franchised monopolies to more than eighty percent of the country's telephone customers, but also of the long-distance industry, where the combination of these monopolies, the Bell System's own actions, and the FCC's long-time failure to require equal access ensured AT&T's dominance.[126] There being no significant entity other than the Bell System, there were no significant mergers.

The breakup of the Bell System did not substantially alter this situation. On the one hand, the 1982 AT&T consent decree prohibited AT&T from reacquiring any of the divested BOCs.[127] On the other hand, the decree restricted the BOCs, which were owned by seven Regional Holding Companies or Regional Bell Operating Companies ("RBOCs"), from all businesses other than the provision of local telephone service.[128] Even when the courts loosened these restrictions somewhat, the BOCs and their RBOC parent companies continued largely to be restricted from the long-distance and manufacturing businesses until the decree was terminated by the 1996 Act.[129] Under the consent decree, in short, the BOCs were kept out of precisely those businesses where mergers would have been most attractive.

The 1996 Act promises to change all this. It is true that the Act initially retains the restriction on an RBOC's providing long-distance service for calls originating from regions where that RBOC has historically possessed the local exchange franchise. But the FCC has been given authority to remove this long-distance restriction when certain conditions are met.[130]

126. *See generally* United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

127. *See id.* at 142 n.44, 170 n.166, 227.

128. *See id.* at 186–95, 227–28.

129. *See* Kearney, *supra* note 2, at 1420–59 (describing relevant judicial and legislative proceedings from AT&T's divestiture of the BOCs in 1984 through the passage of the Telecommunications Act of 1996).

130. Specifically, in order to enter into the long-distance business, an RBOC must (a) demonstrate that it has complied with a 14-point competitive checklist, which essentially requires the RBOCs to open up their local exchanges to competi-

The prospect of this vertical integration has driven several horizontal mergers among local exchange companies. The number of very large local exchange carriers has thus gone from eight in 1996—the seven RBOCs and GTE—to four in the year 2000.[131] These companies are readying themselves for the removal of the long-distance restriction *in toto*, whereupon it is conceivable that the number of giant telecommunications companies will decrease further upon a merger of some long-distance and local telephone companies. Similar concentration has marked the long-distance industry.[132]

The Department of Justice recently has demonstrated at least some interest in superintending mergers in the telecommunications industry. For example, it reviewed the Bell Atlantic-NYNEX, Bell Atlantic-GTE, and SBC-Ameritech mergers, although it found little to object to in any of these instances.[133]

Such review is part of the increased importance of antitrust law in public utility and common carrier industries, as the traditional model of an agency's regulating entry, rates,

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tion and to unbundle enough network elements that competitors can develop alternatives to the RBOCs' local exchanges; (b) comply with a separate-subsidiary requirement; and (c) persuade the FCC that the RBOC's entry into long distance is "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(b)(1), (d)(3) (Supp. III 1997). The FCC recently approved for the first time an application by an RBOC for authority to offer basic long-distance service in one of the states in its region—over the differing recommendation of the Department of Justice, it might be noted. *See* Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, FCC 99-404, 1999 FCC LEXIS 6522 (Dec. 22, 1999); Seth Schiesel, *First Baby Bell to Gain Approval for Long Distance*, N.Y. TIMES, Dec. 22, 1999, at A1.

131. For an account of the merger trend in telecommunications in the late 1990s, see Jim Chen, *The Magnificent Seven: American Telephony's Deregulatory Shootout*, 50 HASTINGS L.J. 1503 (1999). For a critical popular take, see William Safire, *Clinton's Consumer Ripoff*, N.Y. TIMES, Oct. 11, 1999, at A19.

132. *See* Chen, *supra* note 131.

133. *See Bell Atlantic-GTE; Merger Plan Approved, with a Condition*, CHI. TRIB., May 8, 1999, Bus. Section, at 2 (reporting Department of Justice's approval of merger contingent upon the combined company's eliminating through divestiture overlapping wireless systems in 65 markets in nine states); *SBC Clears Hurdle over Telecoms Acquisitions*, FIN. TIMES (USA edition 2), Mar. 24, 1999, at 1 (reporting Department of Justice approval of SBC-Ameritech merger contingent upon the combined company's divesting itself of one of two overlapping cellular systems in 17 markets); Mark Landler, *Merger of NYNEX and Bell Atlantic Clears U.S. Hurdle*, N.Y. TIMES, Apr. 25, 1997, at A1 (reporting Department of Justice's announcement that it would not oppose merger).

and service has given way.[134] Given the level of concentration that has been achieved in the short time since the passage of the Telecommunications Act of 1996, however, there can be little doubt that neither the Department of Justice's antitrust authority nor any general regulatory authority of the FCC has stood in the way of recent telecommunications mergers.

B. *"A New FCC for the 21st Century"*

If the FCC does not actively regulate entry (at least in a categorical sense), or seek to dictate a carrier's service offerings, or monitor rates as it did in the past, what does the agency do in its regulation of common carriers? The FCC recently has undertaken to answer questions such as this. In August 1999, the FCC delivered to Congress a document entitled "A New FCC for the 21st Century: Draft Strategic Plan."[135] This strategic plan outlines how the FCC envisions itself fulfilling its statutory mandates in the future. The FCC's strategic plan contains a number of elements meriting description and comment.[136]

The premise of the plan is the FCC's expectation that, in five years from the plan's issuance, "U.S. communications markets [will] be characterized predominately [sic] by vigorous competition that will greatly reduce the need for direct regulation."[137] The agency has indicated that this competition will not simply exist within traditional communications market classifications, such as local telephony, long-distance telephony, and cable television, but will arise from what is frequently termed "convergence."[138] Along these lines, the FCC has specifically pointed to "[t]he advent of Internet-based and other

134. For an elaboration on this point concerning the increased importance of antitrust, see Kearney & Merrill, *supra* note 4, at 1361, 1364, 1407 n.382, 1409.

135. This document is available at <http://www.fcc.gov/21st_century/draft_strategic_plan.txt> (visited Feb. 9, 2000) [hereinafter *Strategic Plan*]. The FCC also welcomes comments on the plan by e-mail directed to <newfcc@fcc.gov>.

136. Although editorializing can largely be deferred to Part III of this article, the following account should not be regarded as merely accepting at face value the FCC's stated goals or motivations in this proceeding.

137. *Strategic Plan*, *supra* note 135, at 1.

138. Convergence occurs when content becomes independent of the means of transmission—so that on the one hand, any carrier may be used, and on the other hand, any carrier may transmit any kind of content.

new technology-driven communications services,"[139] which it has concluded "will continue to erode the traditional regulatory distinctions between different sectors of the communications industry."[140]

In broad terms, the conclusion that follows from this premise of vigorous competition is clear to the agency: "[O]ver the next five years, the FCC must wisely manage the transition from an industry regulator to a market facilitator."[141] The strategic plan attempts to set forth, in varying amounts of detail, how the agency intends to make this transition. The FCC organized the bulk of its plan into four constituent goals and objectives: it will seek to "create a model agency for the digital age," "promote competition in all communications markets," "promote opportunities for all Americans to benefit from the communications revolution," and "manage the electromagnetic spectrum (the nation's airwaves) in the public interest."[142]

The essence of the FCC's attempt to "create a model agency for the digital age" is its desire to be "a faster, flatter, more functional agency."[143] As part of this effort, the FCC proposes to alter its current structure, which proceeds "along the traditional technology lines of wire, wireless, satellite, broadcast, and cable communications."[144] If Congress permits, the FCC will first consolidate dispersed functions into a new Enforcement Bureau and a new Consumer Information Bureau. It will then take other steps toward the goal of "a new agency structure comprised of enforcement, consumer information, licensing, competition/policy, and international areas [in place of] the current traditional, industry-specific bureaus."[145] Other elements of this goal will include efforts to "[c]reat[e] a paperless FCC" through automation and electronic filing systems, "[develop] the FCC's web site into a model for accessibility and availability of information," reduce backlogs of licensing applications, reconsiderations, and other proceedings, increase reliance on alternative dispute resolution mechanisms and negoti-

139. *Strategic Plan*, *supra* note 135, at 1.
140. *Id.*
141. *Id.*
142. *Id.* (capitalization removed); *see also id.* at 8–22.
143. *Id.* at 11.
144. *Id.* at 10.
145. *Id.*

ated rulemakings, and make greater use of the agency's forbearance authority.[146]

These goals do not conflict with traditional regulation of the telecommunications industry. Although the Communications Act of 1934 presupposes a sort of basic division between common carrier services and broadcast services,[147] the FCC could take each of the foregoing steps consistent with the original paradigm of regulated industries law. For example, nothing logically turns on whether the FCC receives or disperses information through paper filings and printings or through the internet or other forms of electronic media,[148] or whether it is the familiar Common Carrier Bureau or a new Enforcement Bureau that polices telephone company compliance with the FCC's regulations and the governing laws.

It is in the FCC's second objective—promoting competition in all communications markets—that the agency demonstrates the extent of its commitment to the new paradigm of regulated industries law. One way in which the FCC intends to accomplish this goal is by eliminating barriers to entry in domestic markets. This includes all "legal, economic, or operational" barriers, whether they are the traditional ones described above (such as section 214 of the Communications Act) or newer legal ones (such as the restriction in section 271 of the Telecommunications Act of 1996 on RBOC entry into long distance).[149] Another way is to "deregulate as competition develops."[150] This

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146. *Id.* at 9–12. For a description of the FCC's authority (nay, duty) to "forbear" from regulation in certain circumstances, see *supra* note 86.

147. *Compare* Communications Act of 1934, Pub. L. No. 73-416, tit. II, 48 Stat. 1064, 1070–81 (codified as amended at 47 U.S.C. §§ 201–276 (1994 & Supp. III 1997) (governing "common carrier[s] engaged in interstate or foreign communication service by wire or radio") (quoted material at § 201(a)) *with* Communications Act of 1934, Pub. L. No. 73-416, tit. III, 48 Stat. at 1081–92 (codified as amended at 47 U.S.C. §§ 301–399b (1994 & Supp. III 1997) (setting forth provisions designed to maintain government control but also to provide for private use of "all the channels . . . of radio transmission") (quoted material at § 301)).

148. The FCC proposes to go away from the *Federal Register* in favor of electronic publication of its proposed rules. *See Strategic Plan*, *supra* note 135, at 36. This is among many proposed changes that would require authorization from Congress, which mandated the creation of the *Federal Register* and requires publication in it of various government matters. *See* 44 U.S.C. §§ 1501–1511 (1994). On the origins of the *Federal Register*, see Charles Alan Wright, *"A Man May Live Greatly in the Law,"* 70 TEX. L. REV. 505, 516 n.71 (1991) (and sources cited therein).

149. *See Strategic Plan*, *supra* note 135, at 13.

150. *See id.* at 14 (capitalization removed).

includes an initiative to "[e]nd rate regulation where competition has matured."[151] This, too, has already proved to be part of the great transformation of regulated industries law and, as described above and elsewhere,[152] has already marked much of telecommunications law specifically. Another subsidiary goal, though general in nature, also reflects the transformation: the FCC will seek to "enforce the rules so that businesses compete fairly."[153] This reflects the transformation of the role of the agency "from one of protecting end-users to one of arbitrating disputes among rival providers and, in particular, overseeing access to and pricing of 'bottleneck' facilities that could be exploited by incumbent firms to stifle competition."[154] Finally, the FCC implicitly acknowledges that the transformation is less complete in international communications markets, for the agency pledges to aggressively increase competition in this industry component. Such an increase in competition would not only benefit American consumers directly, through lower rates for international telecommunications services, but also would open new market opportunities for American companies.

This second objective, therefore, simply continues the transformation of telecommunications law that has occurred over the last quarter-century. Much of the FCC's strategic plan uses language to which it would be difficult to object. The FCC speaks of seeking to "eliminat[e] unnecessary rules," "[r]educe . . . burden[s]," "resist regulatory intervention," "show zero tolerance for perpetrators of consumer fraud such as slamming and cramming," "expeditiously resolve complaints," and so on.[155] Nonetheless, under the long view, the extent of the apparent consensus on the part of the FCC and other policymakers is remarkable. Competition is the mantra, and that is different from the long-ago view that some competition is wasteful.[156] It is also different from the more recent view that

151. *Id.*

152. *See supra* Part II.A.2; Kearney & Merrill, *supra* note 4, at 1337-40, 1362.

153. *Strategic Plan, supra* note 135, at 15 (capitalization removed).

154. Kearney & Merrill, *supra* note 4, at 1326.

155. *Strategic Plan, supra* note 135, at 14–15.

156. *See* JAMES C. BONBRIGHT ET AL., PRINCIPLES OF PUBLIC UTILITY RATES 38–40 (2d ed. 1988) (discussing this view); 1 ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 5–6 (1970) (same).

competition, while generally desirable, must be balanced against other concerns such as universal service.

This introduces the third of the FCC's objectives: "to promote opportunities for all Americans to benefit from the communications revolution."[157] To an extent, this objective is in tension with the objective of promoting competition. For example, the traditional telecommunications goal of universal service effectively was pursued under the original paradigm where a monopoly service provider could cross-subsidize its various services and its various customers.[158] Universal service is more difficult to achieve in the new paradigm, for the very promise of a model based on competition is that it will drive prices toward costs.[159] If this occurs, then there is less money from one service or class of customers with which to subsidize another service or class of customers.

None of this suggests that universal service is impossible to promote in the new paradigm of regulated industries law, only that the traditional means towards this end must be replaced. But this shift has practical consequences, because the new subsidies, which in the telecommunications context are likely to consist of new taxes or fees imposed on some users for the benefit of others, will be more transparent and thus more controversial:

> Under the original paradigm, the process of subsidizing some end-users at the expense of others remained largely hidden from view. The cross-subsidies that made this possible were buried in a maze of regulatory complexity, and very few people were aware that a portion of their transportation or utility bill either was paying for someone else's service or was being paid for by someone else. Under the new paradigm, the issue of subsidies must be brought into the open, and hence becomes politicized.[160]

The FCC nonetheless appears committed to promoting the availability of services even where cost-based pricing would not suffice. For example, the agency pledges in its strategic plan

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157. *Strategic Plan*, *supra* note 135, at 17 (capitalization removed).

158. *See* Kearney & Merrill, *supra* note 4, at 1346–47; *supra* text following note 113.

159. *See* Kearney & Merrill, *supra* note 4, at 1347–49.

160. *Id.* at 1348.

to "[w]ork to ensure that universal service funding . . . includes funding for wireless carriers."[161]

The agency has taken its lead from Congress. The original Communications Act merely stated that its purposes included "mak[ing] available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[162] The Telecommunications Act of 1996, by contrast, specifies that the FCC (and each state public utility commission) "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms)."[163] The universal service goals of the FCC now encompass "high-speed, switched, broadband telecommunications [providing] high-quality voice, data, graphics and video telecommunications."[164]

Under the rubric of its third goal of "promot[ing] opportunities for all Americans to benefit from the communications revolution," the FCC includes more than universal service; it also wants to "foster a more consumer friendly marketplace."[165] This includes such varied goals as seeking to "[e]nsure that consumer bills are truthful, clear and easy to understand," "[to] remain vigilant in protecting consumer privacy," to provide parents with information on V-chips and other restrictive technology, and to avoid unnecessary area code changes and the premature exhaustion of the current North American Numbering Plan.[166] As a means of ensuring continued political support, the FCC is well advised to pay attention to matters such as these. Virtually everyone receives a phone bill, is at least somewhat interested in protecting his privacy, and has an area code that he would prefer not to see changed, let alone regularly. Controversies involving these matters are therefore the types of issues that can prompt a groundswell of interest and

161. *Strategic Plan*, *supra* note 135, at 17.

162. Communications Act of 1934, Pub. L. No. 73-416, tit. I, § 1, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 (1994)).

163. Telecommunications Act of 1996, Pub. L. No. 104-104, tit. VII, § 706(a), 1996 U.S.C.C.A.N. (110 Stat.) 153 (set forth as note following 47 U.S.C. § 157 (Supp. III 1997)).

164. *Id.* § 706(c)(1) (set forth as note following 47 U.S.C. § 157 (Supp. III 1997)).

165. *Strategic Plan*, *supra* note 135, at 19.

166. *Id.*

can even result in congressional attempts to legislate if the FCC is perceived as falling short.[167]

The FCC's final stated goal is to "manage the electromagnetic spectrum (the nation's airwaves) in the public interest."[168] While much of this goal relates to the FCC's Title III broadcasting regulation, as opposed to its common carrier regulation under Title II, the use of the airwaves for wireless telephony over the last twenty years and the phenomenon of convergence make any regulation of the spectrum relevant to traditional regulated industries law as well. According to its strategic plan, the most important things that the FCC intends to do in this context are to continue to increase its reliance on the market for allocation of spectrum resources, though not to rely on the market altogether, and to increase the amount of the spectrum that is available, particularly for new services.[169] The FCC has done each of these things in recent years. For example, in the 1990s it made room on the spectrum, including through reallocation, for Personal Communications Services ("PCS"). It then auctioned off licenses for much of this newly available spectrum.[170]

The foregoing strategic plan reflects the fact that the FCC's traditional approach of regulating entry, rates, and service has given way in the last quarter-century. That much is incontestable. The question thus becomes whether the agency's future lies in the direction proposed by the agency itself in the strategic plan, or whether it lies somewhere else instead. The following portion of this article takes up that inquiry, which, being predictive, is more open to debate.

III. THE FUTURE OF THE FCC

This Part begins by sketching out three possible futures for the FCC based on the foregoing account. It then explores the

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167. Caller ID services, telemarketing, and slamming are all examples of issues that prompted some congressional interest (though not necessarily action) in the 1990s. Part of the motivation for congressional attention undoubtedly was to ensure agency attention to the issue.

168. *Strategic Plan*, *supra* note 135, at 20 (capitalization removed).

169. *See id.* at 20–22.

170. For a description of these events, see Thomas W. Hazlett & Babette E.L. Boliek, *Use of Designated Entity Preferences in Assigning Wireless Licenses*, 51 FED. COMM. L.J. 639 (1999) (and sources cited therein).

causes of the transformation that has already occurred over the past quarter-century in transportation and telecommunications regulation. Finally, this Part makes a tentative prediction as to which of the three futures is the most likely for the FCC.

A. *Some Possible Futures for the FCC*

The foregoing account of the developments in transportation and telecommunications regulation in the past twenty-five years and of the FCC's strategic plan suggests a variety of possible futures for the agency. Specifically, each of three possible results—agency abolition, agency reduction, and agency reinvention—finds some support. The following describes each of these possibilities.

The first possibility is that the agency will be abolished. This possibility did not always need to be taken seriously. For example, writing in 1985, Glen Robinson, an academic and former FCC commissioner, attempted to figure out what the agency might look like in the year 2000. He quickly noted that "we need not contemplate for long the possibility that the FCC will soon follow the Civil Aeronautics Board into the sunset."[171] Robinson was correct. But today is not 1985, and the possibility of the FCC's riding off into the sunset requires more contemplation than it did even in the recent past.

There are several reasons that the agency termination scenario cannot be dismissed out of hand. One is that the CAB no longer provides our only example of agency termination. The ICC has also joined the CAB in the history books.[172] Moreover, we must contemplate the agency's abolition because our ways of thinking about the telecommunications industry have changed even in the last fifteen years. As most notably reflected in the Telecommunications Act of 1996, the baseline expectation or at least desire, in every segment of telecommunications, is competition.[173] This, too, could logically culminate in the agency's termination.[174] And, finally, there have been a

171. Glen O. Robinson, *The FCC in the Year 2000*, 37 FED. COMM. L.J. 155, 158 (1985).

172. *See supra* note 5 and accompanying text.

173. *See* Kearney & Merrill, *supra* note 4, at 1361–63.

174. *See id.*

number of high-profile calls for the agency's abolition in recent years.[175]

A second possibility is not abolition but reduction. Under this scenario, the agency's authority would be reduced to situations in which there is some reason to think that reliance on the market, though desirable, is not feasible. Here, too, we can see an analogy in the transportation industry. For it is, of course, not entirely precise to speak, as the previous paragraph does, of the ICC's termination. As discussed in Part I of this article, in the same act in which Congress abolished the ICC, Congress quietly created a new agency, the STB.[176] The new STB possesses *some* of the same powers as the ICC, particularly over the railroad industry.[177] At bottom, the STB retained authority in areas in which there are unusually strong interest group influences or genuine concerns about continued monopoly power by the railroads over particular routes (examples of these areas being railroad mergers and abandonment of local rail lines). The STB generally does not have authority over the trucking industry, which has long been thought to be far less susceptible to market failure than the railroad industry.[178]

A third possibility is agency reinvention, along the lines of the Clinton-Gore efforts of the mid-1990s to "reinvent govern-

175. *See, e.g.*, HERITAGE FOUNDATION, ROLLING BACK GOVERNMENT (Scott A. Hodge ed., 1995); PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM (1997); GEORGE A. KEYWORTH ET AL., THE TELECOM REVOLUTION—AN AMERICAN OPPORTUNITY (1995); *see also* Alan Pearce, *Telecom Reform on the Money for GOP Backers*, NETWORK WORLD, Feb. 20, 1995, at 1, 20 (recounting comment by then-Speaker of the House Newt Gingrich that contemplated abolishing the FCC).

176. *See supra* note 6 and accompanying text. The word "quietly" recommends itself because Congress was savvy about the matter: it made sure to call the act the "ICC Termination Act of 1995," not the "Surface Transportation Board Creation Act." And someone (I do not know that it was Congress) made sure that the STB—which Congress deemed an "independen[t]" agency "within the Department of Transportation," *see* 49 U.S.C. §§ 701(a), 703(c) (Supp. III 1997), a concept beyond this article's contemplation—did not simply operate out of the same offices as the ICC. Indeed, the bronze or gold letters spelling out "Interstate Commerce Commission" alongside the door of the agency's grand building on Constitution Avenue in Washington, D.C., were scraped off in short order in early January 1996. It is also beyond this article's scope to contemplate any significance of the fact that another distinctively American institution—the Internal Revenue Service—soon took up residence in much of the ICC's former quarters.

177. *See generally supra* Part I.

178. *See* Kearney & Merrill, *supra* note 4, at 1334 & n.39, 1391 & n.310 (and sources cited therein).

ment."[179] The FCC itself is expending substantial resources in this direction. Agency reinvention is the purpose of the FCC's docket, described above, aimed at creating "A New FCC for the 21st Century."[180] The docket may be seen as the agency's attempt to seize control of the debate and stave off the first or second scenario (i.e., agency abolition or reduction). Under this third scenario, the FCC would continue to exist and indeed to possess the same formal authority as previously, but its focus would not be the traditional regulation of entry, rates, and service that long characterized this agency and others modelled on the original ICC.

B. *Recalling the Causes of the Great Transformation*

Before essaying a prediction, it is useful to recall that the developments in transportation and telecommunications regulation over the past twenty-five years have been but one part of the sweeping transformation of regulated industries law. To the extent that the developments in transportation and telecommunications regulation had the same (or different) underlying causes, this may give us a sense of the FCC's future. Three features of that transformation seem particularly relevant here.

One is that the role of the courts, though overall that of a random factor sometimes advancing and other times retarding the transformation, has been particularly significant in the telecommunications sphere.[181] Simply put, there are numerous First Amendment arguments available to opponents of telecommunications regulation that never provided viable challenges in the transportation industries. The First Amendment has become and likely will remain "the preferred constitutional assault vehicle for telecommunications companies challenging government regulation."[182]

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179. *See* VICE PRESIDENT AL GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS (1993); Ann Devroy & Stephen Barr, *Clinton Offers Plan to Fix a "Broken" Government*, WASH. POST, Sept. 8, 1993, at A1 (describing unveiling of National Performance Review headed by Vice President Gore and summarizing some of its recommendations).

180. *See supra* Part II.B.

181. *See* Kearney & Merrill, *supra* note 4, at 1370–77.

182. *Id.* at 1370–72.

Second, the role of the agencies has not conformed to the popular theory that many academics and policymakers instinctively credit. Specifically, much of the transformation in the regulation of the transportation, telecommunications, and energy industries cannot simply be explained by a model of agency capture. The transformation rather has been characterized by a variety of administrative agency attitudes. To take the most pertinent example, that of the FCC, once the agency had been boxed around by the D.C. Circuit in the 1970s, it became an active proponent of regulatory change, even when that change did not seem to benefit current actors in the agency or its most powerful regulatees.[183]

Third, the move away from the original paradigm of regulated industries law to a new paradigm (marked by an emphasis on competition) in so many industries is best accounted for not by technological change or some "chain reaction," but by two other factors. One is the rise of interest groups acting to alter the regulatory landscape.[184] While the earlier manifestations of the great transformation did not conform to the interest group theory of politics (including its manifestations in the motor carrier industry and subsequent early developments in telecommunications), many other changes have conformed to that theory. The other substantial force in the transformation has been the perceptions of regulatory failure built up over time.[185] Simply put, given the assault of those such as economists in the Chicago School, numerous elites lost faith in the

183. *See id.* at 1367; *see also* HUBER ET AL., *supra* note 83, § 9.4.1, at 756. For another suggestion that capture theory cannot explain many agency actions of the past several decades, see Paul Stephen Dempsey, *Antitrust Law and Policy in Transportation: Monopoly Is the Name of the Game*, 21 GA. L. REV. 505, 578–80 (1987) (arguing that "[w]hatever validity the theory may have once held for the ICC, it seems to have lost much of its credence during the last decade"). For an argument that capture theory "is a much more promising candidate for predicting regulatory behavior where the regulatory agency in question regulates a single industry whose membership has more or less unified interests and goals," see Jonathan R. Macey, *The Political Science of Regulating Bank Risk*, 49 OHIO ST. L.J. 1277, 1284–85 (1989) (setting this forth as the reason capture theory does not explain actions of ICC). Earlier assessments of the ICC strongly supported the argument of capture. *See, e.g.*, ROBERT O. FELLMETH ET AL., THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC (1970); Huntington, *supra* note 7.

184. *See* Kearney & Merrill, *supra* note 4, at 1393–97.

185. *See id.* at 1397-1403.

idea that regulatory forces were any more likely than market forces to protect the public interest (whatever that might be).

C. A Prediction

So which will it be—agency abolition, along the lines of the ICC trucking model; formal agency reduction, wherein the agency continues to exist in some form but with a reduced sphere of authority essentially limited to situations where there is some irreducible monopoly power, along the lines of the ICC railroad model; or government reinvention, along the lines of the FCC's strategic plan? It would be imprudent to speculate—virtually no one correctly predicted back in 1975 what would become of the CAB and ICC.[186] But it would be discourteous, having accepted the invitation to participate in this symposium, for me not to speculate. And so, caught between two values, I shall cast aside prudence and err on the side of courtesy.

There is much to be said for the prediction that the course of telecommunications regulation will follow the ICC trucking model and that the agency will be abolished. If the 1996 Act works as advertised, the FCC should be history. If there are competitive options along all segments of the communications grid, then there is no need for regulation to forestall leveraging of bottlenecks. Traditional regulation, we now recognize, rises and falls with monopoly.[187] If localized monopolies give way to universal competition, then traditional regulation has no enduring rationale.

So far, the 1996 Act has not produced a revolution. But it may yet. All the merger activity along the lines of convergence—in other words, not only the Bell Atlantic-NYNEX and SBC-Ameritech-type mergers, but also the AOL-Time Warner merger and the AT&T-TCI and AT&T-MediaOne mergers—suggests that the telecommunications world is rapidly repositioning itself for the day when two or three mega-companies offer "one-stop shopping" in the form of traditional telecommunications service, wireless service, internet access,

186. *See id.* at 1407 & n.383.
187. *See generally id.* at 1359–65.

remote video, and all the rest.[188] If that day comes, what conceivable function does the FCC serve in terms of policing monopoly power? We do not even have anything analogous to abandonment of local railroad lines that would draw support for the agency's continued existence.

Continuing on with the argument for predicting abolition, what about reinvention? One possibility is that the FCC can become a kind of consumer protection agency—a Federal Aviation Authority ("FAA") for the communications world.[189] Under this reinvention scenario, the agency would monitor slamming complaints, provide information about V-chips, and occasionally (to the extent the First Amendment permits) sanction Infinity Broadcasting for the Howard Stern show.[190] But relative to regulating the Bell System's rates, this is penny-ante stuff. And the forces of competition among the behemoths should provide a much more effective constraint against consumer abuses than regulation could. There are also some reasons in the trends in First Amendment law to think that some of these agency efforts would be struck down in the courts (and I am not just referring to broadcast regulation).[191]

The prediction of abolition and against government reinvention would also have to dispose of the possibility that the need to superintend universal service will support the agency's

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188. On these mergers, see generally Kearney, *supra* note 2, at 1399–1400 & nn.14–15; Kearney & Merrill, *supra* note 4, at 1373 n.238; Chen, *supra* note 131; Saul Hansell, *America Online Agrees to Buy Time Warner for $165 Billion; Media Deal Is Richest Merger*, N.Y. TIMES, Jan. 11, 2000, at A1; Seth Schiesel, *For AT&T's Chief, A Redefined Cable Landscape*, N.Y. TIMES, Jan. 16, 2000, § 3, at 1.

189. It is helpful to recall that, although the CAB was abolished, and with it almost all direct government control over entry, rates, and service in the airline industry, there already was another agency, the FAA, that acted as a consumer-protection agency in the airline context by, for example, regulating airline safety. *See generally* Stephen E. Creager, Note, *Airline Deregulation and Airport Regulation*, 93 YALE L.J. 319, 319–21 (1983) (and sources cited therein) (summarizing CAB's and FAA's historical powers). That separate agency was not eliminated. The FCC, by contrast, has played both the role of imposing classic economic regulation, like the CAB, and the role of otherwise seeking to protect consumers, like the FAA.

190. For some sense of the FCC's actions to date in the particular areas noted, see Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49 (1992/1993) ; Charles W. Logan, *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1695 (1997); Christopher R. Day, Comment, *Hanging Up on Consumers: Why the FCC Cannot Stop Slamming in the New Telecommunications Market*, 47 AM. U. L. REV. 421 (1997).

191. *See supra* note 182 and accompanying text.

continued existence. The future mandate of the FCC may be to tax ordinary telecommunications users in order to provide subsidies to politically favored classes of users, such as schools, libraries, and the rural poor. There are indications of this future in the 1996 Act. But this may be a pipe dream. Once the taxing and subsidizing become highly visible—and they must be, for we are no longer talking about intracorporate transfers here as was the case in the days of old under the Bell System—the behemoths will have an incentive to mobilize customers in opposition to purely redistributive taxes. This already has happened in response to the FCC's initial efforts to implement the universal service provisions.[192]

A final possibility is that we need the FCC to allocate and police uses of the broadcast spectrum. There is merit to this point. On the other hand, once allocated, the spectrum could be bought and sold without regard to "public interest" inquiries.[193] The recent decisions to allocate PCS licenses through an auction suggest that we may be headed in this direction.[194]

In short, there is much basis for thinking that the ICC trucking model will win out and the FCC will be abolished. But I expect that it will not, for a number of reasons. The future is more likely to be some combination of the agency-reduction/agency-reinvention scenarios described above.[195] In other words, the agency will continue to exist in some form (though perhaps as an executive branch agency), but with the more intrusive forms of regulation that characterized FCC and ICC regulation in the past—that is, regulation of entry, rates, and service—radically diminished and only in force where there is some reason to expect market failure.[196]

This is my prediction for several reasons. One reason is that developments in telecommunications law have not traced precisely the same arc over the last twenty-five years as those in transportation law. Both share the same historical origins—

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192. *See* Kearney & Merrill, *supra* note 4, at 1348–49 n.115.

193. *See* HUBER, *supra* note 175, at 63–76 (arguing for such an approach); R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959) (landmark article proposing such a system).

194. *See supra* note 170 and accompanying text.

195. *See supra* Part III.A.

196. For some suggestions of specific changes in the Communications Act that Congress might make short of abolishing the FCC, see William H. Read & Ronald Alan Weiner, *FCC Reform: Governing Requires a New Standard*, 49 FED. COMM. L.J. 289 (1997).

the rate-regulated, entry-restricted model derived from the Interstate Commerce Act and its amendments—and both have undergone, along with other regulated industries, a thoroughgoing transformation in the last twenty-five years. While there are many common aspects of this transformation—elimination of entry controls, severely curtailed tariff filing, and less government regulation of service decisions—there are some important differences. One need only look at the checklist of section 271 of the Telecommunications Act of 1996 to realize that the trend in telecommunications law is not necessarily the same trend toward deregulation and common law as has marked the trucking industry.[197]

Section 271 brings me to a second reason that I expect that the agency will continue to exist. The day will come when all the RBOCs will have received long-distance authority in all areas where they are landline local service providers (although it is not likely that this day will be in the next couple of years). Even then, however, there will be a reason—albeit not a need, it may be conceded, as is currently the case—to continue to have an agency that handles interconnection disputes. In other words, trucking is not a network industry in anything like the sense that telecommunications is. There is reason to think that, even if the local exchange companies' bottleneck monopolies disappear, telecommunications will, in the eyes of many, benefit from having a regulator that can adjudicate interconnection disputes.

A third reason weighing against the FCC's elimination is the aforementioned need for some federal entity to superintend at least some spectrum-related matters. There are multiple aspects of current spectrum management, including allocating the resource among different uses, developing the service rules governing the usage of spectrum within the allocations, assigning licenses to particular users within the allocations, enforcing the resulting rights conveyed by the license, and protecting the resource against "pollution." It is worth noting that not all of these functions are carried out exclusively by the FCC, as is often instinctively assumed.[198] It is also true that

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197. *See* 47 U.S.C. § 271(c)(2)(B) (Supp. III 1997) (setting forth fourteen-point checklist that each RBOC's access or interconnection arrangements must meet before the RBOC will be allowed to provide in-region long-distance service).

198. For example, the use of the spectrum by the federal government is reserved to the President, who has delegated this responsibility to the Secretary of

the extent of reliance on markets for spectrum matters—as opposed to the traditional command-and-control agency model—likely will increase in the coming times.[199] But it is also probable that some of these functions will not be easily privatized or outsourced. In these circumstances, the advantages of removing independent-agency superintendence of all the foregoing spectrum functions are not likely to be so overwhelmingly clear as to generate mass support for such a wholesale change of a more than seventy-year tradition of government regulation.[200]

A final reason that I do not foresee the ICC trucking scenario (or CAB scenario) playing out in the context of the FCC is the amount of political will that would be required to abolish the FCC. The current political climate does not favor outright abolition of agencies. Indeed, both the CAB's termination and the ICC's quasi-termination were products of particular political times. In the instance of the CAB in the late 1970s, there was particular reason to seek a structural "fix" for inflation and other economic maladies of the time. In the instance of the ICC in 1995, both the Republicans who had swept into control of Congress in 1994 (but who had largely failed to dramatically reduce the size of government as they had promised) and President Clinton (who had an interest in showing himself a

Commerce and thence to the National Telecommunications and Information Association ("NTIA"). *See* Dale N. Hatfield, *Spectrum Issues for the 1990s: New Challenges for Spectrum Management*, Paper Delivered at Centre for International Research on Communication and Information Technologies (Nov. 23, 1993), *available at Spectrum Issues for the 1990s* (visited Mar. 21, 2000) <http://www.annenberg.nwu.edu/pubs/spectrum>. The NTIA coordinates with the Interdepartmental Radio Advisory Committee concerning the federal government's use of its portion of the spectrum. *See id.*

199. For some suggestions as to how this may (and in the authors' view should) occur, see Gregory L. Rosston & Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest* (last modified Jan. 1997) <http://www.fcc.gov/Bureaus/Engineering_Technology/Informal/spectrum.txt>.

200. I do not wish to overstate the importance of mass support if deregulation is to occur. As suggested elsewhere and as recalled above, it is in many senses more important whether or not elite opinion has moved toward a consensus on the matter. *See* Kearney & Merrill, *supra* note 4, at 1399–1403 (describing importance of "elite opinion about economic regulation of public utilities and common carriers" in the transformation of regulated industries law) (quoted material at 1399); *supra* text accompanying note 185. In this regard, perhaps one should say that the views of Coase, *see supra* note 193, have not been so universally accepted in the ensuing 41 years among elites as to suggest that there will soon be a consensus in that quarter supporting complete elimination of government regulation of commercial use of the spectrum (else the consensus already would have emerged and had more substantial effects).

"new Democrat") had reason to seek out the political trophy of the ICC. I do not wish naively to suggest that economic times will always remain good, as they currently are, or that political contexts will not change. Indeed, once the FCC is reduced to a mere shell of its former self—as to some extent has already happened and as will continue to happen—somebody will be able to make some political hay by seeking to terminate the agency. I expect these efforts not to succeed, but mainly because the agency's own actions will have reduced its sphere of authority to politically acceptable levels.

CONCLUSION

The FCC is likely to remain with us for some time. I am not the first to make that observation,[201] nor is this the first time that I have made it.[202] The observation is nonetheless a prediction at best and, moreover, focuses on a formality. As for the predictive aspect, the changes in transportation regulation over the last quarter-century demonstrate that continued existence of even the most longstanding of agencies—the ICC—cannot be regarded as an inevitability. That brings us to the formality: to say merely that the FCC will continue to exist is to say little about the future course of federal telecommunications regulation.

It is for these reasons that the foregoing not only recounts the course of developments in the transportation and telecommunications industries but also summarizes the FCC's own tentative plans for remaking itself. The possibility of successful agency reinvention cannot simply be dismissed, particularly given the considerable extent to which, since *Execunet*, the FCC has shown itself to be generally committed to paring back traditional regulation in favor of relying on markets and, simultaneously, to be able to avoid a major scaling-back by Congress. By this reinvention process, the FCC will likely be able to stave off more fundamental congressional efforts to elimi-

201. *See* Robinson, *supra* note 171, at 158; Harry M. Shooshan III, *A Modest Proposal for Restructuring the Federal Communications Commission*, 50 FED. COMM. L.J. 637, 639–40 (1998) (stating that "[l]ike it or not . . . the FCC is not going away any time soon," but proposing "a fairly radical reform—replacing the multimember FCC with a single administrator").

202. *See* Joseph D. Kearney, *Twilight of the FCC?*, 1 GREEN BAG 2D 327, 329 (1998).

nate the agency altogether. And yet, even if this is true, and even if Congress does not move much further towards formal reduction of the agency's powers, it appears that the end result of the reinvention process will be that the agency, though still in existence, will have gone a long way toward abolishing itself.