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WHAT EVER HAPPENED TO CONSUMER WELFARE?

HOW THE FCC'S INTERNATIONAL SPECTRUM RELOCATION POLICIES DETER - RATHER THAN PROMOTE - NEW FACILITIES-BASED ENTRY FOR ADVANCED SATELLITE TELECOMS SERVICES

*Lawrence J. Spiwak**

I. Introduction

This paper seeks to address a very simple and direct question: If the community of nations has made a collective decision that a vibrant global commercial satellite market is in the public interest, then why is the United States, via the Federal Communications Commission, threatening to kill this industry (including America's own significant private space industry¹) by

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¹ Indeed, United States Deputy Secretary of Commerce Robert L. Mallet warned recently that the when it comes to maintaining American leadership in the commercial space industry, it is very possible for ill-formed policies to appear to win a battle yet, in reality, "lose the war." As such, Mallet warned that America public policies must "anticipate the direction space, business and the world are taking so we in the U.S. can benefit." In particular, argued Mallet:

We cannot let innovations pioneered by Americans be captured by the corporations of Europe, the Pacific Rim or anywhere else. We must stand up for what we believe, for if we can fight for our vision of the future, it will be a spectacular launch for the U.S. into the 21st century.

Robert L. Mallet, *Viewpoint*, AVIATION WEEK & SPACE TECHNOLOGY (April 19, 1999) at 74. See also *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC 99-5 (rel. Feb. 2, 1999) at ¶ 39 (hereinafter *Section 706 Report*) (FCC found specifically that since 1993, over \$20 billion has been invested in the space industry, of which much has gone into the broadband satellite telecommunications sector and that satellite infrastructure revenues for the time period 1997-2001 are estimated at \$277 billion).

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enacting poorly conceived – and indeed socially irresponsible – international spectrum policies by erecting naked barriers to entry and threatening to open up yet another front in a growing “telecoms trade war” that is dangerously close to spiraling out of hand?²

The root of the problem stems from the FCC’s ill-conceived notion that new entrants into international satellite markets should be forced to pay spectrum relocation fees just as new entrants had to pay in the U.S. domestic PCS context. Such a “cookie-cutter” approach to spectrum management is *per se* arbitrary and capricious, however, because what is good for the U.S. domestic wireless industry is *not a fortiori* good for the [*292] international commercial satellite industry as well.³ While it is true that there are certain valuable lessons that can be learned from the U.S. domestic experience and applied onto the international market, because the domestic and international markets (as the FCC often readily admits) have very different structural economic characteristics, these markets therefore do not warrant homogeneous regulatory treatment either. As such, the FCC’s policies harm – rather than promote – consumer welfare because they *inter alia*: (a) erect – rather than eliminate – barriers to entry and deter competition; (b) fail to reflect the international context in which spectrum use occurs; (c) increase – rather than reduce – transaction costs to make entry prohibitive; and (d) deter – rather than accelerate – expansion of competitive advanced broadband services to rural and poor areas (whether domestic or abroad).

To illustrate this point, this paper examines first why policy-makers have long-held that a rivalrous private commercial satellite industry is in the public interest. Among other reasons, this paper shows policy makers believe strongly

² Lawrence J. Spiwak, *From International Competitive Carrier to the WTO: A Survey of the FCC’s International Telecommunications Policy Initiatives 1985-1997*, 51 FED. COMM. L. J. 111 (1998), *Addendum*, 51 FED. COMM. L. J. 519 (1999) and citations therein; Lawrence J. Spiwak, *Perspective: Why Cable Could Be the Next WTO Battleground*, COMMUNICATIONS WEEK INTERNATIONAL (16 August 1999).

³ Such an approach is especially odd in light of the FCC’s long-standing policies imposing different regulatory regimes on domestic and international services in light of clearly different economic structural characteristics of these respective markets. See Spiwak, *id.* and citations therein.

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that a rivalrous satellite industry can act as a potent weapon in the on-going battle to promote competition in retail telecoms markets. More importantly, however, this paper shows that – consistent with public statements from the FCC itself – a rivalrous satellite industry could be among the best technologies to provide consumers who live in poor and rural areas with truly “affordable” advanced telecommunications products and services.

Next, this paper examines exactly what economic preconditions are required for a workable global satellite industry. In particular, this paper examines briefly what economic factors come into play when a new firm is contemplating whether to enter a market, and how regulatory policies affect significantly this entry decision.

Third, because the international satellite industry is so wholly dependent on access to spectrum, this paper examines briefly how regulators should formulate policies that achieve the most efficient and pro-competitive use of this scarce resource. To facilitate this analysis, this paper outlines briefly five discrete public policy objectives and then shows how the FCC ignored each of these objectives when formulating its international spectrum policies. Instead, the only thing the FCC’s arbitrary “cookie-cutter” approach to international spectrum management achieves is the unjust enrichment of spectrum incumbents in violation of both U.S. and international law.

Finally, this paper demonstrates how the FCC’s flawed international spectrum policies will adversely affect consumer welfare far beyond the narrow confines of the global satellite industry. In particular, this paper demonstrates that by imposing unilaterally spectrum relocation fees on [*293] new entrants, the U.S. government continues to demonstrate to the international community that America believes that its commitments in the WTO and ITU are not worth the paper they are written upon. Rather than affirmatively promote competition and free trade, the FCC’s actions instead create improperly a strong incentive to *close* markets in direct violation of the letter and the spirit of the February 1997 WTO Accord on Basic Telecoms Services. As Federal Reserve Chairman Alan Greenspan warned recently, such an “essentially adversarial” approach will do nothing but harm overall consumer welfare. More importantly, however, by taxing new entry into the global satellite market, the FCC is in effect taxing the Internet. In doing so, the FCC is once again depriving consumers in poor, rural and other high-cost areas not only in the U.S. but *world-wide* of the very advanced

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broadband services promised to them so prolifically by the Telecommunications Act of 1996 and the February 1997 WTO Accord on Basic Telecoms Services.

II. Why a Vibrant Private Commercial Satellite Industry is in the Public Interest

It is widely recognized among scholars that the “public interest” standard is, at bottom, a consumer welfare-maximization standard.⁴ As such, regulatory agencies subject to this standard should be concerned about solving two basic economic problems: (1) assuring that the regulated firms under their jurisdiction do not engage in anticompetitive behavior or charge captive ratepayers monopoly prices; and (2), where practical, formulating regulatory paradigms designed to improve overall market performance in both the short-run and especially, given the huge sunk costs inherent to the telecommunications industry, the long-run.⁵ This emphasis on improving market performance is key, because as market performance improves and competition takes hold, consumers will receive the benefits of both static (declining prices) and dynamic (increased

⁴ Lawrence J. Spiwak, *Antitrust, the “Public Interest” and Competition Policy: The Search for Meaningful Definitions in a Sea of Analytical Rhetoric*, ANTITRUST REPORT (Matthew Bender, December 1997); Gregory L. Rosston and Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 FED. COM. L. J. 87 (1997).

⁵ Spiwak, *id.* It should be noted, however, that the FCC’s challenge is made more complex because telecommunications is clearly an industry characterized by rapid change and innovation. This challenge is now exacerbated with the passage of the Telecommunications Act of 1996; *see also Turner Broadcasting System, Inc., v. FCC*, 117 S. Ct. 1174, 1189 (1997) (regulatory schemes concerning telecommunications have “special significance” because of the “inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change”); *Denver Area Educational Telecommunications Consortium, Inc., v. FCC*, 116 S. Ct. 2374, 2385 (1996) (Court is “aware . . . of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, *see, e.g.,* Telecommunications Act of 1996 . . .”); *Columbia Broadcasting, Inc v. Democratic National Committee*, 412 U.S. 94, 102, 93 S. Ct. 2080, 2086 (1973) (“The problems of regulation are rendered more difficult because the . . . industry is dynamic in terms of technological change”); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (“Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects” of the telecommunications industry).

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innovation) economic efficiencies or, preferably, both. Moreover, as market performance improves and competition takes hold, consumers will enjoy other societal benefits such as the long-term growth of real income per person and greater employment opportunities.⁶ Most importantly, however, is that if a market is performing well, *then the need for stringent “public-utility”-type government regulation should be unnecessary.*⁷

To date, the challenge of promoting competition for local telecommunications service (especially in the United States) has proved to be a difficult process. For this reason, Congress and the FCC have long-found that the public interest is well-served by a vigorous and [294] vibrant private commercial satellite industry that can provide an alternative to the incumbents’ monopoly control of local loop plant and, as such, have traditionally promoted aggressively American leadership in space. One only needs to look back to the Commission’s original “Open-Skies” policies of the 1970’s and 1980s to see how the FCC would take no second to achieve this goal – even if it meant contravening (correctly) the specific findings of the U.S. Department of Justice.⁸ Moreover, the Commission’s ostensible belief in the public interest benefits received from vigorous private competition in the international satellite industry continues directly through to this day.⁹

⁶ See F.M. Scherer & David Ross, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* (3d. ed. 1990) at 4-5.

⁷ See Walter Adams, *Public Policy in a Free Enterprise Economy*, in *The Structure of American Industry* (7th ed. 1986, Walter Adams, ed.) (primary purpose of economic public policy paradigms should be to “perpetuate and preserve, in spite of possible cost, a system of governance for a competitive, free enterprise economy” where “power is decentralized; . . . newcomers with new products and new techniques have a genuine opportunity to introduce themselves and their ideas; . . . [and] the ‘unseen hand’ of competition instead of the heavy hand of the state performs the basic regulatory function on behalf of society”).

⁸ See, e.g., *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*).

⁹ See, e.g., *In re Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Notice of Proposed Rulemaking, FCC 99-50 (rel. March 25, 1999) at ¶ 95 (hereinafter “*March 1999 NPRM*”); see also Rosston & Steinberg *supra* n. 4 at 113:

(Footnote Continued. . . .)

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Most significantly, however, the FCC has repeatedly found that a vibrant commercial international satellite industry is among the best hopes of achieving truly “affordable” universal service and advanced broadband deployment to poor and rural areas in America. According to the FCC’s own words:

Satellites are an excellent technology for delivering both basic and advanced telecommunication services to unserved, rural, insular or economically isolated areas, including Native American communities, Alaska, Hawaii, and Puerto Rico, and U.S. territories and possessions such as communities within the U.S. Virgin Islands, Guam and American Samoa.¹⁰ Satellites may offer a cost advantage over wireline access alternatives in remote areas where a limited population may not provide the economies of scale to support the deployment of wireline or terrestrial wireless networks. The basic build-out required to obtain satellite service is for earth stations to transmit and receive satellite signals.¹¹ The Commission is committed to encouraging delivery of telecommunications services, including satellite services, to unserved and high-cost communities and seeking

United States consumers and producers can also potentially benefit from the development of worldwide seamless networks. Roaming agreements that permit customers of personal wireless services to make and receive phone calls easily while away from their home nations, and agreements that facilitate free circulation of communications equipment between nations, such as mutual recognition agreements for the type approval of terminals, can contribute to the development of such networks. In addition, policies that promote use of the same spectrum for the same services around the world may facilitate the development of global systems and seamless networks by eliminating the need for equipment that can operate on multiple frequency bands, as well as for protocols to convert international communications from one frequency to another. Furthermore, consistency in spectrum allocations among different countries may produce economies of scale for equipment manufacturers, thereby reducing prices for consumers.

¹⁰ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Second Recommended Decision, FCC 98-7, at ¶ 55 (rel. November 25, 1998).

¹¹ In fact, the FCC noted specifically that American Mobile Satellite Corporation, a GSO MSS licensee, is providing service to a police force in the Navajo Nation and to the remote community of Tortilla Flat, Arizona, and that General Communications, Inc., an earth station operator, provides voice and private line services to fifty rural Alaskan Bush communities. See *March 1999 NPRM*, *supra* n. 9 at 44, n. 216.

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to develop cost-effective incentives for such services. Once authorized, many of the 2 GHz MSS systems will be capable of providing voice and data communications to these communities.¹²

In fact, FCC Chairman William E. Kennard himself conceded recently that:

It may well be that the answer, particularly in rural markets, lies in wireless and satellite technologies. It is therefore imperative that we continue to maximize the amount of spectrum available for broadband uses. In short, we must use all the tools we have to accelerate deployment of advanced telecommunications throughout America.”¹³

In light of the above, therefore, responsible public policies must [*295] continue to promote, rather than prohibit, new entry into the global satellite industry.

III. The Economics of Entry

Having therefore determined that a vibrant commercial satellite industry is in the public interest, the next question to ask is what does it take to create a market structure that is conducive to entry and vigorous rivalry?

The telecoms industry in general – and the global satellite industry in particular – is an extremely capital and time intensive business. Under basic economic theory, however, *entry will occur only if firms perceive that entry will be profitable*. This maxim can be illustrated by George Ford’s “Entry Condition.”¹⁴ That is, entry will only occur when:

(1) Post-Entry Profit (**d**) *minus*

¹² *Id.* at ¶ 95.

¹³ Separate Statement of FCC Chairman William E. Kennard in the Commission’s *Section 706 Report*, *supra* n. 1.

¹⁴ George S. Ford, *Opportunities for Local Exchange Competition Are Greatly Exaggerated*, *ELECTRIC LIGHT & POWER* (April 1998) at 20-21 (http://www.phoenix-center.org/library/ford_1.doc).

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- (2) Inherent (exogenous) Entry Costs **(x)** *minus*
- (3) Incumbent or Regulation-Induced Entry Costs (endogenous) **(e)**
plus any
- (4) Spillover Effects **(s)**
- (5) Are greater than **Zero**

This maxim can be represented by the formula:

$$d - x - e + s > 0$$

With the exception of some exogenous entry costs (x), regulators (especially the FCC) have direct control over all elements of the entry condition equation.

A. Common Examples of Entry Costs for the Global Satellite Industry

Exogenous entry costs are those substantial costs which new entrants must incur, usually up-front, a great deal of which will be irrecoverable (*i.e.*, sunk) if exit is required. Exogenous entry costs for the global satellite industry, to state it mildly, are very high.¹⁵ Not only do global satellite providers face the same exogenous entry costs as any other would-be provider of telecommunications and information services must face (*e.g.*, marketing for, and the retention of, new

¹⁵ The operational and financial importance of capital intensity, sunk costs and investment irreversibility for satellite systems is compounded by the fact that non-geostationary satellite systems, in particular, are not easily divisible into different discrete geographic market units -- unlike a terrestrial radio point to point or broadcast system. While satellite systems can be designed to address a single country or location within a larger area, doing so sacrifices the very economic advantages that make satellite systems attractive. Satellite systems lack much of the scalability -- build a small part, then add another and another -- of terrestrial systems. They are not as easily adaptable to future market or technological change as terrestrial systems. Adding or subtracting capacity or changing design or service capability is difficult and costly even in the few instances in which doing so is even possible. For example, Section 706 Report at ¶ 39 (satellite infrastructure revenues for the time period 1997-2001 are estimated at \$277 billion.); [insert Iridium problems here.] Iridium has spent upwards of \$5 billion for satellite construction (*see, e.g.*, Theresa Foley, *Iridium Faces Launch Delays*, COMMUNICATIONS WEEK INT'L (3 Feb. 1997)) and ICO is spending upwards of \$3 billion to construct 12 satellites in California (Theresa Foley, *ICO Faces Uphill Struggle for U.S. Licenses*, COMMUNICATIONS WEEK INT'L (4 May 1998).

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consumers, investment in new plant, capitalization, *etc.*¹⁶), but the majority of global satellite providers' initial physical plant (*i.e.*, satellites) must be hurled hundreds of miles into outer-space on top of a rocket than can (and often does) explode.¹⁷ Moreover, as FCC Commissioner Susan [*296] Ness has recognized, the planning stages to a satellite launch alone can take five years or longer.¹⁸ Yet, if regulatory policies promote rather than deter entry, (notwithstanding the recent Iridium and ICO bankruptcies) entrepreneurs are still willing to undertake these risks and enter the market because they still expect post-entry profits to be greater than zero.¹⁹

B. How Regulation Effects Entry Into the Global Satellite Industry

Endogenous entry costs are those sunk costs that a new entrant must incur that are induced directly by regulation.²⁰ If these costs are so great as to make post-entry profit less than zero, then entry simply will not occur. Since regulation can be such a significant source of entry costs, however, one should

¹⁶ FCC's *Section 706 Report* found specifically that some estimates reveal that approximately \$65 billion in financing will be required over the next five years to fund the next generation of satellites, including broadband satellite systems. *See supra* n. 1 at ¶ 39.

¹⁷ *See, e.g.*, Theresa Foley, *Iridium and Globalstar hit by Delays*, COMMUNICATIONS WEEK INT'L (21 Sept. 1998) (reporting that 12 of Globalstar's satellites were destroyed in a Russian-Ukrainian Rocket Failure); Theresa Foley, *Iridium Faces Launch Delays*, *supra* n. 15 (reporting that Iridium has "no idea" when the Delta rocket, which will launch 43 or more of its 66 satellites, will be cleared to resume launches after "spectacular" failure that destroyed a military satellite.)

¹⁸ *See* Separate Statement of FCC Commissioner Susan Ness in FCC's *Section 706 Proceeding*, *supra* n. 1.

¹⁹ Theresa Foley, *Special Report: Satellite Funding - Star Attractions*, COMMUNICATIONS WEEK INTERNATIONAL (16 August 1999) (reporting that "[i]nvestment in satellite projects is looking healthier than ever – despite major setbacks in the global mobile services market" and that the satellite industry is set to attract record new investment of \$5 billion in 1999, higher than the \$4.2 billion raised in 1998 for satellites from public debt and equity markets"); *but cf.* *Space Cadet*, LEX, FINANCIAL TIMES 18 August 1999 at 18 ("The only silver lining [of Iridium's bankruptcy] is the damage all this is inflicting on Iridium's rivals. The market it is now targeting does not look like one that can support a number of satellite systems.")

²⁰ Sad to say, but *Business Week Magazine* has proclaimed 1999 as the "Year of the Regulator" for telecoms. BUSINESS WEEK MAGAZINE (11 January 1999) at 98.

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not be surprised to find incumbent firms using regulation (and litigation in the courts) as an entry deterrent.²¹ Indeed, so long as the incumbent protects more profits than it spends on deterrence, the incumbent will find entry deterrence to be profitable undertaking.²² These costs are more than just financial, however. Given the incredibly dynamic nature of telecoms markets, regulatory delay is an equally effective mechanism for quashing prospective competitive entry.²³

For any industry that relies primarily on spectrum, there are three primary types of endogenous entry costs: (a) auctions; (b) spectrum fees; and (c)

²¹ See, e.g., Mark Leibovich, *A Digital Capital Emerges on the Potomac* (WASHINGTON POST Dec. 6, 1998) where it was reported that:

Regulation can make or break any of these [MSS] companies. Which is why [Iridium's general counsel Thomas] Tuttle's attorneys specialize in using the regulatory process to gain a competitive advantage. After Tuttle's meeting, he walks down the hall to another group of regulatory attorneys. They discuss ways of stopping rival ICO Global Communications from getting regulatory clearance for its planned satellite system. * * * [Tuttle] leaves the meeting grinning, pleased that his team is proficient in both regulatory hardball and gentle diplomacy."

²² See Ford, *supra* n. 14. One real-world example of an endogenous sunk cost is the cost of physical collocation in an ILEC central office. That space can, because of regulation, only be used to provide telecommunications services – once procured, the CLEC cannot readily convert collocation space to a condo or a youth education center. ILECs know this, and rationally price collocation in a manner akin to an "entry tax." Sadly, these construction costs are lightly and ineffectually regulated (if at all) and oftentimes are in excess of \$100,000 for each central office. With that type of entry tax, it is not surprising that there has been little entry into smaller or rural central offices. In California, for example, acquiring a customer requires the entrant to make a one-time, nonrefundable payment to the incumbent of about \$400. Acquiring 1,000 customers, a trivial 0.01 percent market share in California, would cost the entrant \$400,000 in nonrefundable payments to the incumbent. Perhaps even more problematic are the high nonrecurring charges for co-location space in the incumbent's central office. These payments, nonrefundable on exit of the industry, are in most states hundreds of thousands of dollars. In New York, for example, 100 square feet of co-location space can require a nonrefundable payment of around \$1 million. Even in the less densely populated Southern states, nonrecurring charges for co-location space can exceed \$300,000. With a 10 percent market share in an average central office, a payment of this size costs the entrant roughly \$5 per customer per month. *Id.*

²³ The need for spectrum is especially acute for the non-geostationary systems that have constellations of satellites that move relative to the earth. Although these systems are capable of providing services anywhere in the world, in order for entry to be profitable, these constellations need adequate spectrum in which to operate. See Rosston and Steinberg, *supra* n. 4 at 113.

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relocation costs. As explained *infra*, while one regulator certainly has the power to make endogenous entry costs so high as to be unprofitable in a single domestic context, endogenous entry costs can be particularly prohibitive in the international satellite context given the multiple levels of regulatory clearance required for entry.

IV. International Spectrum Policy: How Do We Maximize the Public Interest?

C. Regulators Must Formulate Policies that Promote Competition and Reduce Entry Barriers in Light of the Special Conditions of the International Satellite Industry

As mentioned *supra*, the “public interest” standard is a consumer welfare-maximization standard. To achieve this end, Congress has made clear that the United States shall maintain control over spectrum within the nation’s jurisdiction, and that a license to use spectrum shall not constitute ownership of that spectrum.²⁴ Accordingly, as Gregory [*297] Rosston and Jeffrey Steinberg contend:

[T]he public interest is best served by ensuring that the American people receive the maximum benefit from the spectrum resource. Therefore, the Commission’s spectrum policy should advance the goal of ensuring that the full benefit of the spectrum resource accrues to the public and the goal of achieving the most beneficial uses of spectrum.²⁵

²⁴ See Communications Act Section 301, 47 U.S.C. § 301, which provides specifically that:

It is the purpose of this Act, among other things, to maintain the control of the United States over all channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.

²⁵ See Rosston and Steinberg, *supra* n. 4 at 91.

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As such, having first decided that (a) a vibrant commercial satellite industry is in the public interest; but also realizing that (b) entry is expensive and will only occur if it is perceived to be profitable, the next step in the analysis must be to identify the specific public policy decisions society needs make in order to achieve this goal. In their recent paper, Rosston and Steinberg proposed an excellent set of policy guidelines for international spectrum management. These proposals include, *inter alia*, the notions that:

- (1) “Promotion of competition should . . . be a principle consideration” and, as such, the Commission should “strive to reduce barriers to entry”;²⁶
- (2) The “Commission’s spectrum policy decisions should reflect the international context in which spectrum usage occurs. Radio waves do not stop at national borders. Therefore, domestic policies must take into account the spectrum policies of other nations. The United States’ spectrum policies should, among other things, support global systems and seamless international networks, in both satellite and terrestrial operations, where such systems promote the public interest”;²⁷
- (3) Because non-geostationary satellite constellations need adequate spectrum in which to operate in order to be profitable, the FCC “need[s] to develop spectrum policies for the entry of foreign-owned satellite systems into the United States”;²⁸
- (4) The “Commission should pursue policies that facilitate the development of worldwide seamless networks without precluding other uses and technologies. This end can be achieved by promoting policies that *reduce the transaction costs, both in the United States and abroad, of participating in*

²⁶ *Id.* at 97

²⁷ *Id.* at 112; see also Douglas W. Webbink, *Frequency Spectrum Deregulation Alternatives*, FCC OPP WORKING PAPER NO. 2 (October 1980) at 39 (“In any case, as long as U.S. spectrum users abide by international regulations, foreign countries should not be concerned how U.S. users are selected, or who the specific users are.”)

²⁸ Rosston and Steinberg, *supra* n. 4 at 113.

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worldwide seamless networks. Specifically, the United States should support spectrum allocations in the International Telecommunication Union, domestically, and in other countries that would allow the same equipment to operate worldwide but would allow other uses as well”²⁹ and finally

- (5) “[G]lobal spectrum policies, like global wireline telecommunications policies, should seek to extend connectivity to citizens around the **[*298]** world. Intergovernmental satellite organizations such as INTELSAT and Inmarsat have been instrumental in bringing communications to the developing world and ensuring that all nations are interconnected to the global public switched network. As private nongeostationary and geostationary satellite systems are licensed, and the natures of INTELSAT and Inmarsat change, it is important that the United States’ and global policy support expansion of competitive communications in developing nations.”³⁰

As shown below, however, the FCC ignored every single one of these maxims when it formulated its current international spectrum policies and required new entrants to pay spectrum-clearing fees. In particular, by imposing spectrum clearing fees on new entrants, the FCC’s policies, *inter alia*: (a) erect – rather than eliminate – barriers to entry and deter competition; (b) fail to reflect the international context in which spectrum use occurs; (c) increase – rather than reduce – transaction costs to make entry prohibitive; and (d) deter – rather than accelerate – expansion of competitive advanced broadband services to rural and poor areas (whether domestic or abroad). The FCC’s policies therefore do more to harm, rather than to promote, overall consumer welfare.

D. Why the FCC’s Current Approach is both Inappropriate and Anticompetitive

²⁹ *Id.* at 114 (emphasis supplied).

³⁰ *Id.* at 114-115.

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Over the last several years, however, there has been a significant amount of work supporting the notion that the most efficient way to allocate domestic spectrum is to bestow some sort of “property right” to the license.³¹ While this right falls clearly short of a “fee simple absolute,”³² given the huge sums firms pay to use the spectrum (either via auctions, user-fees or relocation costs), there is a clearly an expectation of use and renewal for this spectrum – a “leasehold” if you will.³³ Douglas Webbink, the current Chief Economist of the FCC’s International Bureau, described this notion close to twenty years ago as an “economic” property right because a “legal” property right is *expressly prohibited* under Section 301 of the Communications Act of 1934.³⁴

The FCC was able to use successfully this notion of spectrum “property rights” when it auctioned off spectrum for U.S. domestic PCS services in the early 1990’s.³⁵ While this analytical “fiction” may make sense in the *domestic* context, however, this notion of “property rights” (economic or legal) simply has *no meaning* when one views spectrum from either a *cross-border* (international) or

³¹ See generally, John W. Berresford, *The Future of the FCC, Promote Competition, Then Turn Out the Lights?* Economic Strategy Institute (May 1997).

³² Indeed former FCC Chairman Reed Hundt constantly sought to impose content requirements on broadcasters because, in his view, “in exchange for use of the public’s airwaves, the Communications Act requires broadcasters to serve the “public interest, convenience and necessity.” See, e.g., Chairman Reed E. Hundt, Federal Communications Commission, Speech to the Annenberg Public Policy Center’s 2nd Annual Conference on Children And Television Washington, D.C., “Getting Better All The Time” (June 9, 1997) (<http://www.fcc.gov/Speeches/Hundt/spreh731.html>); Chairman Reed E. Hundt, Federal Communications Commission, Speech To The Center For Media Education’s Press Conference On The New Children’s Television Act Rules, Washington, D.C. “Kids TV: The Impossible Has Become Inevitable” (September 18, 1997)(<http://www.fcc.gov/Speeches/Hundt/spreh731.html>).

³³ Other commentators have analogized status to a “right of use” such as a “mineral right” (see Glenn Harland Reynolds, *International Space Law: Into the Twenty-First Century*, 25 VAND. J. TRANSNAT’L L. 225, 235 (1992)) another commentator has described this bizarre process as “not establishing property rights, but merely reallocating them with prices.” (see Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. ECON. 393, 421 (1995).)

³⁴ Webbink, *supra* n. 27 at 8-9; Communications Act Section 301, *supra* n. 24.

³⁵ See Rosston & Steinberg, *supra* n. 4 at n. 19 and citations therein.

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outer-space perspective: [*299] First, as Rosston and Steinberg explained *supra*, spectrum emissions respect neither national geographic boundaries nor altitude ceilings. Second, and more importantly, it is legally (and indeed metaphysically) impossible to grant a property right over matter which is clearly not under your jurisdiction or control in the first instance. It is for this very reason therefore that spectrum for international satellite service is allocated on a *global* basis by international consensus through the International Telecommunication Union (ITU) process.³⁶

Notwithstanding the above, however, the FCC decided (in the face of significant political pressure) to apply the domestic PCS model – although the FCC denies specifically doing so – onto the international satellite market as well.³⁷ In so doing, the FCC risks making the transaction costs associated with

³⁶ For a good primer of how the ITU process works, see generally, Jannat C. Thompson, *Space for Rent: The International Telecommunications Union, Space Law, and Orbit/Spectrum Leasing*, 62 J. AIR L. & COM. 279 (1996).

³⁷ Indeed, although the FCC in a recent docket (*In re Matter of Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, Memorandum Opinion and Third Notice of Proposed Rulemaking, FCC 98-309, 13 FCC Rcd 23,949 (1998) (hereinafter “*Third NPRM*”) stated specifically that it did not base its relocation policy for MSS service on its PCS proceeding but instead on its Emerging Technology Proceeding (¶ 22), just three paragraphs later the FCC concedes explicitly that “all new PCS licenses [in the 1850 –1990 Mhz band] were subject to the relocation rules of the Emerging Technology Proceeding.” (¶ 25); see also *In re Matter of Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, First Report and Further Notice of Proposed Rulemaking, FCC 97-93, 12 FCC Rcd 7388 (1997) at ¶ 42 (“We will provide for MSS sharing with, and any relocation of, FS incumbents in accordance with the policies in our Emerging Technology Proceeding.”)

Moreover, procrastination or outright ignoring deliberately this issue won't make it go away either. See, e.g., *Third NPRM* at ¶ 16, noting that the FCC has yet examine specifically whether its Emerging Technology policies should be applied to international satellite services. To her credit, FCC Commissioner Susan Ness wrote separately in a separate statement to “highlight” the fact that because there are “unique regulatory challenges facing international satellite systems globally. . . .” she specifically “encouraged the Commission generally to consider the effect of our spectrum management policies have on international satellite systems seeking to be licensed and begin offering services globally as one of a host of issues that we will explore in the upcoming spectrum management en banc.” Sadly, this did not occur. What makes this statement truly embarrassing, however, is the fact that the European Commission observed publicly that “such a statement implies a tacit recognition that the FCC has not yet given proper consideration to the impact that

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the global satellite industry so exorbitant as to make entry prohibitive.³⁸ That is to say, while spectrum clearing costs may be “manageable” when you are dealing with a single country (*i.e.*, the U.S.’s experience with PCS in the domestic context), these transaction costs are going to be multiplied exponentially as new entrants are forced to pay clearing costs to every single indigenous operator on the planet with whom they cannot share spectrum.³⁹ As U.S.-based Teledesic LLC explained emphatically to the FCC recently:

In addressing this issue, the Commission should be sensitive to the effects its decision will have outside the United States. It has been noted that political considerations may induce [foreign] regulatory authorities to adopt relocation rules that are more generous to incumbents than what economic efficiency would dictate, in order to attract the support (or diminish the opposition) of politically powerful incumbent operators. But the Commission must attend to the likelihood that regulators outside the U.S. will require at least as much from the U.S.-dominated satellite industry as the FCC requires. Because the FCC’s rules may be replicated around the world, giving FS operators a windfall here in the U.S. could ultimately result in a huge and unjustified transfer payment from U.S. satellite companies

the FCC spectrum management policies have at [the] international level.” See 3 March 1999 Reply Comments by the European Commission to the FCC’s *Third NPRM* at ¶ 8.

³⁸ See, *e.g.*, Sheridan Nye, *ICO Faces \$2 Billion Bill as US Rejects EC Complaints*, COMMUNICATIONS WEEK INTERNATIONAL (2 Dec. 1997) (Reporting that Sir Leon Brittan, the European Commission’s Vice President and trade commissioner warned the U.S. that the FCC’s policies of forcing new entrants to pay spectrum relocation fees might provoke copy-cat actions in other countries in which case other MSS operators, “including the U.S.’ own Iridium and Globalstar MSS operators, could find themselves facing similar charges in other overseas markets.”) (Emphasis supplied.)

³⁹ To wit, assume *arguendo* that you want to mail a letter from the United States to Japan. It is affordable currently because you only have to pay one postage rate to the originating country. Yet, if you were required suddenly to pay a postage tariff for every single country through which the letter must pass over or through to reach the end destination during transit, then the cost of mailing this letter has suddenly become cost prohibitive.

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to non-U.S. terrestrial operators. *This would be an extremely expensive way to placate one domestic interest group.*⁴⁰

Pardon the pun, therefore, but it doesn't take a rocket scientist to figure out that when endogenous entry cost – costs that are out of your control but are in complete control of regulators – exceed any conceivable profit margin, entrepreneurial entry simply will *not* occur. Prohibiting entry is the *sine qua non* of anticompetitive conduct and contravenes the core letter and spirit of both the 1996 Act and the WTO. Thus, if the [*300] FCC's policies are not revised quickly, then the only parties left standing may be government-controlled enterprises – the very result the U.S. has been attempting vigorously to eliminate since the notion of private commercial space exploration was first entertained.

Finally, what is so particularly egregious about the FCC's arbitrary and anticompetitive policy is that the FCC *admits openly* that holding incumbent users harmless is a more important public policy objective than promoting new entry into the global satellite industry. To wit, in the FCC's [Third Notice], when the Commission was confronted with the fact that entry simply may not occur if new satellite entrants are forced to pay clearing costs to every single indigenous operator with whom they cannot share spectrum, the FCC nonetheless deliberately “decline[d] to deviate” from its established Enhanced Services policy because “*incumbents arguably could be directly, adversely impacted by such a decision.*”⁴¹ This statement is truly incredulous and such a naked admission of regulatory capture has no place in the public dialectic.⁴² More importantly,

⁴⁰ Teledesic's November 19, 1999 Comments in *In re Redesignation of the 17.7-19.7 GHz Frequency Band*, IB Docket No. 98-172 at 18, n. 39 (emphasis supplied).

⁴¹ *Third NPRM*, *supra* n. 37 at ¶ 16 (emphasis supplied).

⁴² *SBC Communications v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995)(regulator is “not at liberty to subordinate the public interest to the interest of equalizing competition among competitors”)(*citing Hawaiian Telephone v. FCC*, 498 F.2d 771 (D.C. Cir. 1974)); *W.U. Telephone Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir.1981) (“equalization of competition is not itself a sufficient basis for Commission action”). *See also* Frank Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 15-16 (1984)(“[P]eople demand laws just as they demand automobiles, and some people demand more effectively than others. Laws that benefit the people in common are hard to enact because no one can obtain very much of the benefit of lobbying for or preserving such laws.” As (Footnote Continued. . . .)

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however, by telling spectrum incumbents that it is perfectly acceptable to “stay until you are paid to move,” the FCC has unjustly enriched these incumbents by granting them *de facto* property rights in spectrum which is a clear violation of both U.S. and international law!

V. How the FCC’s International Spectrum Policies also Exacerbates a Growing “Telecoms Trade War” that is Dangerously Close to Spiraling Out of Hand

While it is it bad enough that the FCC’s flawed “cookie-cutter” approach to international spectrum could harm materially or even destroy outright the commercial satellite industry, policy-makers must also understand that these poorly-conceived policies will have dire ramifications far beyond the industry itself. In particular, the FCC once again threatens to open yet another front in a growing “telecoms trade war” that is dangerously close to spiraling out of hand.⁴³

such, because “cohesive groups can get more for themselves by restricting competition and appropriating rents than by seeking rules that enhance the welfare of all . . . we should expect regulatory programs and other statutes to benefit the regulated group. . . .” Accordingly, these groups “need not ‘capture’ the programs, because they owned them all along. The burgeoning evidence showing that regulatory programs increase prices for consumers and profits for producers supports this understanding.” (emphasis supplied and citations omitted); see also George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 2-21 (1971).

⁴³ As noted *supra*, the FCC has launched many fronts in its efforts to turn the “telecoms revolution” into an all out international telecoms trade war.

The first salvo came last year immediately after the U.S. and the world concluded the WTO Agreement on Basic Telecom Services, under which numerous countries made market opening and regulatory commitments regarding their respective telecoms markets. Despite such a landmark agreement, however, the FCC – after admitting publicly that it did not trust the market-opening efforts and commitments of other countries – promulgated unilaterally additional stringent regulatory measures (such as naked price controls) to the dismay of the international telecoms community. While space constraints prevent a discussion of whether such additional regulations are in fact warranted (I am on public record that they are not), what is crucial to understand here is that such aggressive unilateral policies have engendered significant ill-will in the international community because our trading partners view such aggressive unilateral measures as both outright

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E. *The FCC's Actions Close Markets and Call into Question America's International Credibility*

1. *International Trade Concerns*

Over 200 years ago, Adam Smith, in his classic treatise THE WEALTH OF NATIONS, powerfully demonstrated that whenever government attempts to coordinate the efforts of its indigenous entrepreneurs, such policies [*301] almost invariably discourage economic growth and reduce economic well-being. Smith called this system "mercantilism."⁴⁴ When applied to the international stage, nationalistic mercantilism harms consumers when one country attempts to win "trade wars" by imposing anticompetitive reciprocity measures on firms from another country. These harms are particularly acute in a trade war involving international satellite services because a trade war will harm the space industry

mercantile as well as extremely hypocritical given the slow pace of competition in U.S. telecoms markets. See Spiwak, *supra* n. 2 and citations therein.

Now, the FCC is also turning its sights towards the undersea cable industry. Last July, as part of an order granting a cable landing license to the Japanese/U.S. Cable Consortia, the FCC announced that it was going to institute imminently a generic proceeding to investigate whether undersea cable consortia "may slow the growth of competition in international telecommunications" in the post-WTO world and, if so, whether the efficiency benefits of undersea cable consortium offset this purported anticompetitive harm. If one reads between the lines, however, what the FCC really is saying here is that if the dominant firms in a foreign destination market are members of a consortium, then entry into this foreign destination market by any U.S. firm that chooses not to participate in the consortium in the first instance is *a fortiori* impossible and that U.S. regulatory intervention is therefore required. *Id.*

⁴⁴ Adam Smith concluded that mercantilism

retards, instead of accelerating, the progress of the society towards real wealth and greatness; and diminishes, instead of increasing, the real value of the annual produce of its land and labour [because of] . . . two basic reasons . . . : a tendency of special interests to turn government programs to their own narrow advantages, and a tendency of joint business efforts to result in collusion to reduce output and raise prices, especially when government willingly permits such collusion. [As such, although] "the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary."

James C. Miller, *et. al.*, *Industrial Policy: Reindustrialization Through Competition or Coordinated Action?*, 2 YALE J. ON REG. 1, 5 (1984) (citations omitted).

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and prevent free market forces from playing their normal role of increasing efficiency and improving capabilities.⁴⁵

Sadly, U.S. policies (whether deliberate or by omission) have not been immune from this growing trend. In fact, these mercantile tendencies have become so acute that Alan Greenspan, Chairman of the U.S. Federal Reserve Board, recently took the extreme step of criticizing these policies publicly. In Mr. Greenspan's own words, he "regrets" personally that:

[D]espite the remarkable success over a near half century of GATT, the General Agreement on Trade and Tariffs, and its successor, the World Trade Organization, in reducing trade barriers, *our trade laws and negotiating practices are essentially adversarial*. They presume that a trade concession extracted from us by our trading partners is to their advantage at our expense, and must be countered. Few economists see the world that way. And I am rash enough to suggest we economists are correct, at least in this regard: *trade is not a zero-sum game*. If trade barriers are lowered by both parties, each clearly benefits. But if one lowers barriers and the other does not, the country that lowered barriers unilaterally would still be better off having done so. Raising barriers to achieve protectionist equality with reluctant trading partners would be neither to our benefit, nor to theirs. The best of all possible worlds for competition is for both parties to lower trade barriers. The worst is for both to keep them up. For these reasons, I am concerned about the recent evident weakening of support for free trade in this country. Should we endeavor to freeze competitive progress in place, we will almost certainly slow economic growth overall, and impart substantial harm to those workers who would otherwise seek more effective longer-term job opportunities. Protecting markets from new technologies has never succeeded. Adjustments to newer technologies have been delayed, but only at significant cost. *Even should our trading partners not retaliate in the face of increased American trade barriers, an unlikely event, we do*

⁴⁵ Reynolds, *supra* n. 33 at 238.

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*ourselves great harm by lessening the vigor of American competitiveness. The United States has been in the forefront of the postwar opening up of international markets, much to our, and the rest of the world's, benefit. It would be a great [*302] tragedy were that process reversed.*⁴⁶

Forcing unilaterally new satellite entrants to pay spectrum-clearing costs to every single indigenous operator with whom they cannot share spectrum is precisely the kind of “essentially adversarial” tactic Chairman Greenspan warned specifically about. Indeed, from an international trade perspective, the FCC’s old-standby argument that it is not asserting jurisdiction over international spectrum but only using its authority under the Communications Act of 1934 “to impose on Commission licensees conditions and obligations consistent with the public interest, convenience and necessity” is the very epitome of such an “essentially adversarial” approach.⁴⁷ The FCC must recognize that in *any* international context – where it must deal with multiple *co-sovereign* nations – what is good for the goose also will be good for the gander. In other words, if the U.S. is free to unilaterally impose regulation (spectrum clearing fees, whatever), *then every other* signatory to either the WTO or the ITU may *a fortiori* do so as well! Thus, as explained in more detail *infra*, even though a U.S. court has upheld the FCC’s unilateral “first among equals” approach for IMTS service⁴⁸ it still doesn’t mean that it is good policy in the first instance.⁴⁹

⁴⁶ Remarks by Chairman Alan Greenspan before the Dallas Ambassadors Forum, Dallas Texas (April 16, 1999) (emphasis supplied).

⁴⁷ *Third NPRM, supra n. 37* at ¶16.

⁴⁸ *See Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir, 1999). Sad to say, the court reached its flawed decision by totally misunderstanding the facts and economics of the case, throwing into question established U.S. competition and ratemaking law and, most embarrassing of all, misquoting repeatedly the ITU treaty. *See Spiwak, Addendum n. 2.*

⁴⁹ This reality is nothing unexpected. Even the EC specifically warned the FCC that its approach can have significant impacts on the licensing of MSS and other global services in other countries and that the EC is “particularly concerned” about the “negative precedent” the FCC policies could set in other countries. EC Reply Comments to Third NPRM, *supra n. 37* at ¶ 8.

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This growing “telecoms trade war” must be reigned in. Doesn’t the FCC realize that it is once again “shooting itself in the foot” by inviting a “feeding frenzy” against U.S. firms in this case? Surely the last thing the anyone wants to see the FCC achieve is to place U.S. firms in the difficult position of inadvertent pawns in a telecoms trade war when they seek to enter foreign markets. Yet, until the FCC revises its current policies, the FCC’s “essentially aggressive” policies not only make such retaliation possible, it makes retaliation *inevitable* as well.

In the specific case of the international satellite industry, as both Chairman Greenspan and Teledesic pointed out *supra*, retaliation probably means inevitable naked attempts by foreign to extract supra-competitive spectrum clearing fees from U.S. firms when they seek to enter foreign markets. While these above-cost fees will be designed ostensibly for spectrum clearing purposes, it will be quite clear to all involved that these above-cost fees are, in sad reality, reciprocal measures designed to retaliate specifically against the U.S. and its business community. As such, if these above-cost relocation fees are likely to occur, then why open U.S. firms up to such an easy shakedown? **[*303]**

2. *Effect on U.S. International Commitments in the WTO*

The notions of international comity and respect for treaty obligations are at the heart of public international law jurisprudence.⁵⁰ Yet, as shown below, because the FCC believes that it may impose unilaterally spectrum relocation costs on new satellite entrants, the U.S. government continues to demonstrate to

⁵⁰ See, e.g., Article 38 of the Charter of the International Court of Justice, which provides that the Court shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice of accepted law;
- (c) the general principles of law recognized by civilized nations; [and]
- (d) subject to the provisions of Article 59 [of the Court’s charter], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determinations of the rules of law.

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the international community that America believes that its commitments in the WTO are not to be taken seriously.

Specifically, on February 15, 1997, under the auspices of the WTO, more than sixty countries agreed to an international accord designed to promote global competition for basic telecommunications services by opening heretofore-closed markets. The U.S. played a significant role in bringing consensus for this landmark agreement, and promised proudly that it would lead by example.⁵¹ Yet, what example has the U.S. really set for the community of nations? Tragically, not a very exemplary one.⁵² Now, by believing erroneously that it may unilaterally “impose a relocation compensation condition on the U.S.-licensed space segments”, the U.S. once again enacts policies that in reality improperly close – rather than appropriately open – American markets. If American markets are closed, however, then other sovereign nations are invited to erect similar barriers to entry. When this “domino-effect” occurs, the U.S. moves the international telecommunications market in the wrong direction and in direct contravention of the fundamental marketing-opening principles of the WTO and the GATT. As such, unless and until the FCC revises its policies, the U.S. may well find itself before a WTO dispute panel for such anticompetitive and market-closing conduct.⁵³

⁵¹ U.S. officials and FCC *Orders* were extremely quick to claim that the world had adopted the U.S. model in the Regulatory Reference Paper as its “gold standard.” See Statement of FCC Chairman Reed Hundt Concerning WTO Agreement on Telecom Services, 1997 WL 63345 (Feb. 18, 1997).

⁵² See *supra*.

⁵³ See, e.g., EU Reply Comments to *Third NPRM*, *supra* n. 37 at ¶ 10:

The EC would like to reaffirm that it will remain attentive to the treatment given to European-based satellite systems in the U.S. The EC will be *particularly attentive to any behaviour which is contrary to the spirit or letter of the commitments undertaken by the U.S. within the WTO agreement on basic telecommunications services.*

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F. *By Taxing Entry, the FCC a fortiori Taxes the Internet and Deprives Consumers Who Live in Poor and Rural Areas of Advanced Broadband Telecommunications Service*

One of the thorniest issues confronting public policy-makers today is how to achieve truly competitive and deregulated markets yet at the same time ensure that all of their citizens receive “affordable” access to advanced telecommunications products and services.⁵⁴ As demonstrated above, exogenous (x) and endogenous (e) entry costs are extremely high, and the necessity to overcome these costs is a major reason for the slow pace of local loop competition to date. What often tips the scales against entry into rural and poor areas is the fact that post-entry profit is likely to be extremely low at the outset, thus virtually assuring that entry will be, by definition, a losing venture. Yet, the nature of global satellite service can actually alter this equation in favor [*304] of entry to these poor and rural areas because global satellite operators, with their huge economies of scale and ubiquitous scope, have excellent spillover effects – *i.e.*, it is far easier for them to enter these markets than for any other firm.

If these statements are indeed true, then what exactly is the problem here? The FCC must realize that its poorly-conceived international spectrum policies are actually yet another *self-defeating exercise* in the quest to bring true “affordable” advanced telecommunications products and services for all Americans. Once again, it does not take a rocket-scientist to figure out the simple fact that no consumer – whether they live in New York City or in the Alaskan tundra – is going to receive the benefit of affordable global satellite services *if entry does not occur in the first instance!* Thus, by charging unilaterally an “entry fee”, the FCC has effectively “taxed” the Internet itself out of the hands of the very consumers who need advanced broadband services most.⁵⁵ Such a

⁵⁴ See, *e.g.*, Communications Act Section 254, 47 U.S.C. § 254; OFTEL Consultation Document, *Universal Telecommunication Services* (July 1999).

⁵⁵ *C.f.* Jerry Hausman, *Taxation by Telecommunications Regulation*, in *TAX POLICY AND THE ECONOMY* (1998). Moreover, by unreasonably deterring the deployment of MSS service, the FCC is also impeding the ability of international humanitarian or disaster relief operations such as the International Red Cross from doing their job effectively. See Mohammed Harbi, *Perspective: Humanitarian Solution to Hardware Constraints*, *COMMUNICATIONS WEEK INTERNATIONAL* (29 June (Footnote Continued. . . .))

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result is clearly the exact opposite of the ostensible goals expressed by both Congress and the Clinton Administration.

More importantly, however, the FCC's unilateral policies encourage other countries to impose a similar entry "tax" on the Internet. By crippling the U.S. global satellite industry, therefore, the FCC effectively helps to remove the "G" from the "GII" or "Global Information Infrastructure" and to return improperly the Internet back to an "NII" or "National Information Infrastructure." This too is in direct contrast to both Congress' and the Clinton Administration's public statements that it wants to promote vigorous international e-commerce.

Finally, such anticompetitive policies have more than just economic implications, for they raise broader societal implications as well. The most obvious effect is that the FCC's policies help deprive people living in developing countries of access to advanced telecommunications products and services, thus helping to retard the economic development of those very countries who need it most.⁵⁶ What is more sad from a U.S. policy perspective, however, is that the FCC's policies also *a fortiori* help to deprive these same people of access to the most effective medium to learn about core American cultural values such as democracy, individual liberty, free speech, and the benefits of a free-market economy.

1998), noting that "[n]ew kinds of systems, such as . . . emerging new handheld global Personal Communications Services (GMPCS) networks such as Iridium or Globalstar, have the added advantage of remaining operation even when local phone networks have been knocked out." However, the author also explains that it "might come as a great surprise that despite the acknowledged importance of telecoms equipment in emergency relief, many disaster victims do not currently benefit from this vital resource. The reason? Simply put, and regrettably, bureaucratic red tape. . . ."

⁵⁶ Indeed, such actions are particularly hypocritical given the fact that current FCC Chairman William E. Kennard has made the promotion of telecoms investment in developing countries a focal point of his administration. See, e.g., Keynote Speech of William E. Kennard, Chairman Federal Communications Commission before the Annual General Meeting Telecommunications Regulators Association of Southern Africa (TRASA) August 11, 1999 Gaborone, Botswana "*Unleashing The Potential: Telecommunications Development in Southern Africa*" (<http://www.fcc.gov/Speeches/Kennard/spwek927.html>).

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VI. Conclusion

If the FCC is truly serious about promoting tangible competition and de-regulation, then the FCC must recognize the inevitable consequences of its policies and take responsibilities for its actions. Remember, for the **[*305]** last twenty years, the industry has invested billions of dollars based upon policy makers' public statements that a commercial international satellite industry is in the public interest. Crippling international commercial efforts to privatize space now by changing horses from pro-entry to anti-entry mid-stream – without any rational explanation – is simply unconscionable. As such, the international community cannot condone the FCC's capricious efforts to abrogate its public interest mandate to maximize consumer welfare by promulgating economically flawed policies that deter, rather than promote, new facilities-based entry and, more importantly, exacerbate a growing telecoms trade war that is dangerously close to spiraling out of hand.

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