

# FAX TRANSMITTAL SHEET



OFFICE OF GENERAL COUNSEL  
LITIGATION DIVISION  
445 12th STREET, S.W., 8th Floor  
WASHINGTON, D.C. 20554

TO: John Morrall

PHONE NUMBER: \_\_\_\_\_

FAX NUMBER: (202) 395-6974

FROM: Laurence Scheckler

PHONE NUMBER: 202-418-1720

FAX NUMBER: 202-418-7540

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Federal Communications Commission  
Washington, D.C. 20554

May 28, 2002

Mr. John Morrall  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
NEOB, Room 10235  
725 - 17<sup>th</sup> Street, N.W.  
Washington, D.C. 20503

Dear Mr. Morrall:

The Federal Communications Commission appreciates the opportunity to comment on the Office of Management and Budget's *Draft Report to Congress on the Costs and Benefits of Federal Regulation*, As explained more fully in the comments attached, the FCC recommends that the *Draft Report's* discussion of FCC proceedings be clarified in several significant respects.

Most importantly, the Report should modify its statement that the FCC did not prepare cost-benefit analyses in its proceedings. As recognized in the Report, independent agencies are not subject to Executive Order 12866. On relevant forms provided to GAO, the FCC therefore noted that the Executive Order's requirement to prepare a formal cost-benefit analysis is "not applicable" to the FCC. Where appropriate, however, the FCC's decisions do take into account the costs and benefits of proposed regulations in order to reduce unnecessary government regulation. The specific FCC proceedings mentioned are, in fact, excellent examples of deregulatory rulemaking actions in which the FCC has used cost-benefit analysis in its decision making.

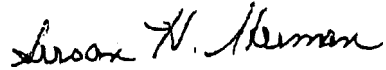
The Report should also expressly recognize that the FCC's use of cost-benefit analyses properly may be affected by statutory requirements. For example, in the two proceedings concerning regulatory fees mentioned in the Report, the FCC's rules and the resulting costs are mandated by Congress. Because the FCC has no discretion to alter the amount of these fees, it would have been neither relevant nor appropriate to conduct a cost-benefit analysis. There are other instances in which Congress has set out specific statutory factors that are necessary to justify deregulatory actions under the Telecommunications Act of 1996. In these contexts, the FCC's deregulatory rulemaking actions properly focus on the specific factors that Congress has identified, and which may be designed to achieve the same deregulatory objectives as cost-benefit analyses.

The Report should further note that its conclusions regarding the FCC are based on less than one-third of the potentially relevant FCC proceedings, During the period in question, the FCC conducted many potentially economically significant rulemaking

**proceedings implementing the Telecommunications Act of 1996 that are not considered in the Draft Report.**

Thank **you very** much for taking **these** comments into consideration. **We very much look forward to** seeing the **final** Report.

Sincerely,

A handwritten signature in cursive script that reads "Susan H. Steiman".

**Susan H. Steiman**  
Associate General Counsel.

## ATTACHMENT

COMMENTS OF THE FCC ON DRAFT REPORT TO CONGRESS  
ON COSTS AND BENEFITS OF FEDERAL REGULATION

The **Federal Communications Commission** (FCC), through its staff, **submits** the following comments on the *Draft Report to Congress on Costs and Benefits of Federal Regulation*. **As** explained below, the FCC recommends that the Draft Report's discussion of **FCC** proceedings be **clarified** and modified in several respects to **better** ensure the accuracy of **the information** that is provided to Congress.

*I. FCC Use of Cost-Benefit Analyses*

At the outset, the **Draft** Report should correct any implication that the **FCC** does not consider costs **and** benefits in its **rulemaking** proceedings. The **FCC** frequently uses qualitative **analyses** of costs and benefits to determine whether regulations **should be** imposed.

Because the **FCC** is not subject to **Executive Order** 12866,<sup>1</sup> it **does** not prepare a **formal** cost-benefit analysis in accordance **with** Executive Branch guidance. The **FCC's** **submissions** to GAO on eight major rules **thus** correctly indicated on **the** appropriate forms that preparation of an analysis of costs and benefits **was** "**not applicable to**" the FCC.<sup>2</sup> Apparently **based** on this information, the Draft Report states that **the Federal Communications Commission** "did not prepare benefit-cost analyses," in contrast to **some** other independent agencies **that** "consistently considered benefits and costs in their rulemaking processes."<sup>3</sup> **This** statement does not accurately describe the **FCC's** **proceedings** and its **use** of cost-benefit analyses.

**The** deregulatory policies underpinning **many** provisions of **the FCC's** governing statute require that **the Commission** aggressively **pursue** efforts to promote competitive **environments** for telecommunication service **providers** by **examining** whether market conditions **currently make** regulation unnecessary, whether there **are** alternatives that **avoid unnecessary regulation**, and, **when appropriate** under statutory mandates, that the **costs** imposed **justify** the **benefits** of proposed regulations. **Many** of the **FCC rulemaking** orders **mentioned** in the Draft Report are, in fact, excellent **examples** of the **Commission's** steps to reduce unnecessary regulation and encourage **market** place **solutions**.

The proceedings at **issue**, **among** other things used alternatives such as economic incentives (bidding credits) to **encourage** telecommunications carriers to serve tribal

<sup>1</sup> Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735, 51737 (1993) (Executive Order 12866) (Section 2(b) specifically excludes independent regulatory agencies).

<sup>2</sup> Pursuant to the Congressional Review Act (CRA), 5 U.S.C. § 801(a)(1)(B)(i), agencies must submit to the Comptroller General and each House of Congress a report that includes "a complete copy of the cost-benefit analysis of the rule, if any."

<sup>3</sup> Draft Report to Congress on the Costs and Benefits of Federal Regulations, 67 Fed. Reg. 13104, 15029 (Mar. 28, 2002) (Draft Report).

**lands, eliminated** service restrictions on **narrow** band PCS service providers, and afforded greater service flexibility to 24 GHz band licensees. **Examination** of these decisions, **which** were supported by the affected industries, also demonstrates that, in appropriate circumstances, the FCC considers and weighs the **costs** of regulation before **determining** that regulation **should** be imposed. <sup>1</sup>

The **FCC** determined, for example, that market conditions **justified imposing** certain restrictions on exclusive contracts with service providers in multi-tenant buildings only **after** considering evidence whether such contracts might have efficiency enhancing or pro-competitive effects. It **also** concluded that these requirements should not be imposed on existing contracts due to the costs reflected in possible **effects** on investment interests. In other instances, it concluded that regulation is unnecessary or that there **is** insufficient information to justify regulation; for **example**, it **declined** to **mandate a uniform demarcation point** for inside **wire** after considering the costs **and** benefits both to proponents **and** opponents of the requirement, concluding that there **was** no convincing evidence that the benefits to one group of competitors outweighed the harms to **the other**.

**As** these examples **show**, the FCC's rulemaking decisions, do utilize cost-benefit analysis **as an** important tool in its decision **making**. Like the other independent agencies mentioned in the **draft** Report, the FCC relies primarily on qualitative rather **than** quantitative analysis of costs and benefits. **As** Executive **Order** 12866 notes, however, some costs and benefits are difficult to quantify; but agencies nevertheless **may make** a reasoned **determination** whether regulations are justified by their qualitative benefits and costs.<sup>4</sup>

## ***II. Statutory Constraints on Independent Agencies***

The Report should correct any implication that it would have been appropriate for the **FCC** to conduct a cost-benefit **analysis** in all of **the** proceedings considered in the **Report**. The Report should acknowledge, for example, that a cost-benefit analysis may not have been relevant to **some FCC** decisions in which statutory requirements afforded it no discretion. **Also, as a general matter** **the** FCC's governing statute may set out specific **statutory** criteria for deregulatory actions that emphasize factors other than cost-benefit analyses. It is entirely proper for independent agencies **like the FCC** to render **their** decisions by focusing primarily on **the** statutory criteria that **Congress** has identified. The Report **should** acknowledge this when discussing independent agencies.

By way of comparison, the Draft Report **explains** that agencies subject to Executive Order 12866 **must** prepare a cost-benefit **analysis** "regardless of whether the underlying statute governing agency action requires, authorizes or prohibits cost-benefit **analysis as an** input to decision **making**" and "regardless of whether it **plays a central** role in decision making under the agency's statute."<sup>5</sup> The Draft Report correctly recognizes, however, that independent agencies **are** not subject to Executive Order 12866 or this **OMB policy**.<sup>6</sup>

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<sup>4</sup> Executive Order 12866, 58 Fed. Reg. at 51735 (Section 1(a)).

<sup>5</sup> Draft Report, 67 Fed. Reg. at 15019.

<sup>6</sup> *Id.*, 67 Fed. Reg. at 15024.

Hence, independent agencies **are** not subject to a blanket requirement that they prepare a cost-benefit analysis **irrespective** of statutory guidance. The Report should thus explain **that** statutory factors properly may influence the extent to which independent agencies use cost-benefit analyses.

To illustrate, two of the eight **FCC** rules cited by the Draft Report concerned the FCC's collection of **regulatory fees** for the years 2000 and 2001.<sup>7</sup> The FCC is required by **law** to set and collect **regulatory fees** in specific **amounts** established by yearly appropriations acts.<sup>8</sup> The cost to the public of these fee regulations is expressly determined by **Congress**: the **FCC has** no discretion to modify the amounts collected or refrain from their collection. In these circumstances, absent a **congressional command** that a cost-benefit analysis be conducted, an **FCC analysis** of the **costs** and benefits of this statutory **fee** requirement in its proceedings would not have been relevant or even appropriate. Indeed, Executive Order 12866 itself provides that agency regulations **should** be based on cost-benefit analyses "only to the extent permitted by **law and** where applicable,"<sup>9</sup> and OMB has recognized that a less intensive analysis of regulatory options is needed "when regulatory options are limited by **statute**."<sup>10</sup>

Similarly, independent agency action – even when deregulatory in nature – may be constrained by explicit statutory policies and requirements. The **FCC** conducts **many** proceedings designed to promote deregulatory, procompetitive policies for telecommunications that are **central objectives** of statutory provisions in the Communications Act as amended by the Telecommunications Act of 1996. These statutory objectives are consistent **with** and, in **fact**, very **similar** to the objectives of Executive Order 12866, which likewise is designed to reduce "unacceptable or unreasonable [regulatory] costs on **society**."<sup>11</sup>

Many of the statutory provisions governing the **FCC**, however, contain specific statutory standards for deregulatory actions: Congress **has** tailored its requirements to the specific **market** environment surrounding telecommunications services, **As** a consequence, the **FCC** may be called upon to consider factors other than the cost-benefit analysis required by Executive Order 12866, but the statutory criteria that guide it **may** be very **similar** and **serve** equally **important and** beneficial *purposes*.

Under the Telecommunication Act of 1996, for example, the **FCC** is required to "forbear" **from** applying **any** existing rule or **law** to telecommunications services if the **requirement** is not necessary to prevent unreasonable rates, unjust discrimination and protection of consumers, and where forbearance otherwise **serves** the public interest, especially **when** it promotes competition among providers of telecommunications **services**.<sup>12</sup> **Similarly**, another provision requires the **FCC** *biennially* to review all **rule** that **apply** to

<sup>7</sup> *Id.*, 67 Fed. Reg. at 15039.

<sup>8</sup> See 47 U.S.C. § 159.

<sup>9</sup> Executive Order 12866, 58 Fed. Reg. at 51735 (Section 1(b)).

<sup>10</sup> OMB, Economic Analysis of Federal Regulations Under Executive Order 12666 ("Best Practices Guidance") (January 11, 1996), at 4.

<sup>11</sup> Executive Order 12866, 58 Fed. Reg. at 51735.

<sup>12</sup> 47 U.S.C. § 160.

telecommunications service provides to determine whether **any** such regulation **is** no longer necessary in *the* public interest **as** the result of meaningful competition between providers of such **service**.<sup>13</sup> In these **and** other contexts, the **FCC's** regulatory rulemaking actions properly focus **and** rely on the specific factors that Congress has decided **should** "play a central role" in deregulatory decision **making** under the governing statute.

The **FCC's** primary obligation is to **follow** the statutory commands in its enabling legislation and base its decisions on the statutory criteria set out by Congress. The Report **should** therefore make clear that it **is** proper for independent agencies **to make** decisions that **are** grounded on the specific statutory requirements **and** criteria that apply to them. It should also **recognize** that, in many instances, statutory provisions guiding agencies may be designed to achieve the same beneficial deregulatory objectives as the cost-benefit analyses required by **Executive Order 12866**.

### **III. GAO Data**

Finally, the Draft Report should **recognize that** any conclusions it reaches about the **FCC's** use of cost-benefit analyses have examined less **than** one-third of the potentially relevant **FCC** proceedings. The eight **FCC major** rules **mentioned** in the Draft Report do not provide a comprehensive **basis** for **evaluating** the extent to which the **FCC used cost-benefit** or similar analyses during the period covered by the Report

In discussing major rules **issued** by independent regulatory agencies, the Draft Report considered **only** the "major rules" these agencies submitted to GAO under the Congressional Review Act (CRA). The CRA provides, however, that **FCC** rulemaking proceedings implementing provisions of the Telecommunications Act of 1996 will be deemed **non-major** rules **under** the CRA regardless of **their** impact on the economy.<sup>14</sup> During the 18 month period in question, the **FCC**, in accordance with **the CRA**, submitted **information** to GAO on an additional 21 rulemakings that were deemed non-major rules because they implemented the Telecommunications Act of 1996. Some or all of these proceedings may otherwise have satisfied the criteria for major rules under the CRA. **Therefore, the Report should note** that **the** universe of potentially relevant **FCC** proceedings is **far** larger than the eight proceedings mentioned in the Report.

\* \* \*

**The** FCC recommends that OMB's **final** Report incorporate the clarifications discussed in these **comments**. These changes, **we** believe, **will** improve the accuracy of **the** Report **and** improve its usefulness to Congress. Should you have any further questions about these comments, please contact the **FCC's** Office of General Counsel.

<sup>13</sup> 47 U.S.C. § 161.

<sup>14</sup> 5 U.S.C. § 804(2) ("The term 'major rule' . . . does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by the Act.").