

**DECEPTION AND DISTRUST:
THE FEDERAL COMMUNICATIONS COMMISSION
UNDER CHAIRMAN KEVIN J. MARTIN**

A MAJORITY STAFF REPORT

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**DECEPTION AND DISTRUST:
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This is a report by the Majority Staff of the Committee on Energy and Commerce on the bipartisan investigation of the Federal Communications Commission's (FCC) regulatory processes and management practices.

This investigation was prompted by allegations to the effect that Chairman Kevin J. Martin has abused FCC procedures by manipulating or suppressing reports, data, and information. Allegations of a broken process at the FCC came from current and former FCC employees, telecommunications industry representatives, and even other commissioners, and were often reported in the press.

In short, there were a number of indications that things were amiss at the FCC. Most prominently, these issues seemed to come to a head with the Commission's consideration of the 13th Annual Video Competition Report, in November 2007.¹

Against this background, on December 3, 2007, Chairman Dingell wrote to FCC Chairman Kevin J. Martin, noting "an apparent breakdown in an open and transparent regulatory process" at the FCC, and posing an initial set of questions "to ensure that the Commission processes are fair, open, and transparent, and that they serve the public interest."

In an undated letter received by the Committee a few weeks later, Chairman Martin specifically agreed to adhere to the requirements of the Administrative Procedure Act (APA) and to make all but one of the management improvements requested by Chairman Dingell.² In his letter, however, Chairman Martin refused to agree to "publish the text of proposed rules sufficiently in advance of Commission meetings for both (i) the public to have a meaningful opportunity to comment and (ii) the Commissioners to have a meaningful opportunity to review such comments."

While Chairman Martin is technically correct that the APA does not require that he publish the actual text, his reply was a red flag that all was not well. Transparency was plainly not a priority.

On January 8, 2008, Chairman Dingell, Subcommittee Chairman Stupak, and Ranking Members Barton and Shimkus, sent a letter to Chairman Martin announcing "a formal investigation into FCC regulatory practices to determine if they are being conducted in a fair, open, efficient, and transparent manner." This letter was followed by an extensive, bipartisan request for records on March 12, 2008.

¹ The fact that the other Commissioners were frustrated with the operation of the Commission under Chairman Martin is evidenced by a memorandum to Chairman Martin's Chief of Staff from senior staff in the four other offices, outlining an array of process problems and proposing remedies. See Memorandum to Dan Gonzalez, November 27 Open Meeting, Commission Internal and Meeting Procedures, Nov. 16, 2007 (Exhibit 1).

² See Letter from Chairman Martin to Chairman John D. Dingell, undated (December 2007) (Exhibit 2).

Over the course of the investigation, the Committee staff reviewed several hundred thousand documents (both hard copy and electronic), including 95 boxes of paper documents; conducted 73 interviews of current and former FCC employees and individuals associated with the telecommunications industry; solicited and received e-mails from FCC employees and contractors at a secure e-mail address established for this purpose;³ and reviewed dozens of allegations that were delivered by hand, fax, phone, and mail.

As discussed in more detail below, we found:

- **There are instances in which the Chairman manipulated, withheld, or suppressed data, reports, and information.** Chairman Martin withheld important and relevant data from the other Commissioners during their consideration of the 13th Annual Video Competition Report in an apparent attempt to enable the Commission to regulate cable television companies. In addition, Chairman Martin's manipulation of the Second A La Carte Report may have damaged the credibility of the Commission, and certainly undermined the integrity of the staff. Moreover, it was done with the purpose of affecting congressional decision-making, in that it was issued as a report to Congress.
- **Important Commission matters have not been handled in an open and transparent manner, thereby raising suspicions both inside and outside the Commission that some parties and issues are not being treated fairly.** Chairman Martin's peremptory reversal of the First A La Carte Report's conclusions without seeking further public comment or conducting further studies gives the impression that the issue was not handled openly and fairly. Our investigation confirmed this impression.
- **The Commission has failed to carry out some important responsibilities.** The Commission's oversight of the Telecommunications Relay Service Fund has been lax at best. The Chairman's office appears to have ignored evidence that the ratepayers have been overcharged, while the companies providing Telecommunications Relay Service have been overcompensated, potentially by as much as \$100 million per year. In addition, the Commission has failed to submit statutorily required reports to Congress. Finally, the Commission took months to respond to our records request, and many records are still outstanding.⁴ The Commission has yet to produce numerous emails and other electronic records covered by our records request.
- **Chairman Martin's heavy-handed, opaque, and non-collegial management style has created distrust, suspicion, and turmoil among the five current Commissioners.** Relations among Commissioners are not collegial. Chairman Martin does not afford his fellow Commissioners direct and unfettered access to the Commission staff and their

³ We established a web address, fccinvestigation@mail.house.gov, that FCC employees and others could use without fear of their e-mail being seen by others. The March 12, 2008, letter required Chairman Martin to notify all employees and contractors of this e-mail address. More than 100 e-mails were received.

⁴ Due to allegations about the FCC General Counsel's role in withholding records produced by agency employees, we requested the General Counsel to produce all documents that he withheld on the basis that they were "unresponsive." We have yet to receive those records.

expert advice, thereby hindering the ability of the other Commissioners to carry out the duties of their offices and the work of the Commission.

- **Commission staff have not been efficiently managed.** Within a few days of taking office, Chairman Martin imposed a major reshuffling of FCC staff throughout the agency. While a certain amount of reorganization is not unprecedented for a new chairman, it was highly unusual in both its breadth (nearly every senior position at the agency changed hands) and its depth (even a number of non-management line staffers found themselves inexplicably reassigned).⁵ In some instances, senior employees with extensive experience and expertise were reassigned to junior-level positions, a senseless waste of resources. It appears that some important Commission proceedings were delayed as a result.

There is evidence that since our investigation began Chairman Martin has taken some small steps to address some of these problems. For example, we are told that he has initiated regular press conferences and publicized hearing agendas in a timely fashion. We understand that the Commission staff is now being engaged in certain matters where it was largely ignored in the past.

The detailed results of our investigation are laid out below. A few allegations were received so recently that they have not been investigated and are not included here. We have also excluded matters that seemed trivial *per se*. Still other allegations have not been adequately investigated because the FCC has not yet produced all of the records requested by the Committee.

Normally, in the course of an investigation of this nature we would recommend that a hearing be held to receive testimony from witnesses and to further examine the issues. Due to the climate of fear that currently pervades the FCC, however, we found that key witnesses were unwilling to testify or even to have their names become known. Therefore, we recommend that the Committee issue this report in lieu of a hearing to protect the many honest people who came forward under a promise of protection or anonymity.

We provided Chairman Martin and key members of his staff with an opportunity to meet with us to discuss the matters addressed by this investigation. Letters of invitation were sent to Chairman Martin; his Chief of Staff, Daniel Gonzalez; his former senior counsel, Catherine Bohigian; the Inspector General, Kent Nilsson; and the Chief of the Public Safety and Homeland Security Bureau, Derek Poarch. Chairman Martin, Mr. Gonzalez, and Mr. Poarch all ignored our invitation. Ms. Bohigian and Dr. Nilsson declined to meet.⁶

⁵ See, e.g., "All Shook Up: Martin Remakes FCC," Multichannel News, October 17, 2005.

⁶ Dr. Nilsson refused to meet on the grounds that he would not be permitted to have two members of his staff present and that no transcript would be kept of the meeting. Dr. Nilsson cited no legal basis for his demands and there is none.

ISSUES

1. Overcharging Consumers for the Telecommunications Relay Service (TRS) Fund

Allegation

Chairman Martin ignored internal warnings that rates proposed for providers of TRS services were too high and permitted an unjustified rate increase that will cost consumers as much as \$100 million per year in excess charges. This change reportedly allowed the dominant TRS provider to reap millions of dollars in excess of that permitted by regulation.

Findings

Title IV of the Americans with Disabilities Act requires the FCC to ensure that telecommunications companies offer special telephone services to people with hearing or speech disabilities that allow them to communicate with hearing people.⁷ This requirement has been interpreted to include interstate traditional TRS, speech-to-speech relay service, and captioned telephone service, as well as intrastate and interstate video relay service (VRS), and Internet Protocol relay service (IP Relay). All of these services are referred to as TRS.

People with hearing or speech disabilities are not required to pay for these services. Instead, the companies providing the service receive compensation from the TRS Fund, which was created by the FCC for that purpose.⁸

The TRS Fund is financed by contributions from all interstate telecommunication companies, based on a percentage of their revenues.⁹ The companies then pass these charges on to their customers. Thus, in effect, all users of interstate telephone service contribute to the Fund. This charge varies from about 7 to 20 cents per month, depending on the State in which the taxpayer is located. The TRS Fund has now grown to more than \$800 million.¹⁰

The TRS Fund was originally intended to compensate telephone companies for their actual reasonable costs (in effect, their marginal costs) in providing the service. Since the institution of this program, however, the FCC adopted such high compensation rates for VRS service that stand-alone, for-profit companies began to offer VRS on a national basis. The FCC also decided to compensate VRS providers for not only the marginal costs of providing the service, but also for providing free VRS equipment, free installation, free maintenance, free calls, and free long distance.¹¹

⁷ See Americans With Disabilities Act, Pub. L. No. 101-336, § 401, adding Section 225 to the Communications Act of 1934, 47 U.S.C. § 225.

⁸ See 47 C.F.R. § 64.604(c)(5)(iii).

⁹ See 47 C.F.R. § 64.604(c)(5)(iii)(A).

¹⁰ See Order, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing Disabilities*, CG Doc. No. 03-123, adopted and released June 24, 2008, p. 7.

¹¹ See Memorandum from Tom Chandler, *The Interstate TRS Fund and the compensation of TRS providers*, June 22, 2007 (referred to hereinafter as *Chandler Memo*)(**Exhibit 3**).

VRS has become the dominant service compensated by the Fund, receiving 73 percent of the compensation. Moreover, the VRS program has grown very rapidly. The monthly VRS minutes for which VRS providers received compensation grew from 35,000 in June 2002, when the service was first widely offered, to 4.9 million in April 2007.¹²

The FCC is responsible for protecting the integrity of the TRS Fund.¹³ FCC regulations limit TRS providers to compensation for their “reasonable costs,” which are defined by the Commission as actual costs plus a set percentage return on investment (ROI).¹⁴

The main issues raised by the allegation above is whether the FCC is overcompensating VRS providers and whether the Commission is adequately verifying the claims for Fund reimbursement made by the carriers. Each of these issues is discussed below.

Overcompensation

In a highly informative memorandum addressed to senior FCC officials in June 2007, the Chief of the Disability Rights Office, Thomas Chandler, outlined major problems with the FCC’s administration of the TRS program and the TRS Fund. According to Mr. Chandler, a single VRS company [Sorenson Video Relay Services] provides 82 percent of all VRS minutes. Continued Mr. Chandler:

*“ . . . we know that the dominant provider was overcompensated approximately \$80 million in calendar 2006 and \$57 million in calendar 2005 ”*¹⁵

Mr. Chandler went on to point out that,

*“This compensation in excess of costs increases the Fund size. We also know that, with the same compensation rate, some of the smaller providers lost money.”*¹⁶

This was not the first time that Mr. Chandler had warned FCC officials of problems with the TRS program. In a May 21, 2007, e-mail, Mr. Chandler provided “a few thoughts on VRS compensation rates.” Among other things, he expressed his frustration with the way in which the Commission had let the program get out of hand, observing that,

*“We have lost our moorings, with terrible and frustrating consequences (not the least of which is the size of the Fund and the enormous overcompensation of some providers).”*¹⁷

¹² See *Id.*, p. 2.

¹³ See Section 225 of the Communications Act, 47 U.S.C. § 225. The FCC’s Web site provides an overview of its TRS responsibilities. <http://www.fcc.gov/wcb/tapd/trs/>

¹⁴ See 47 C.F.R. § 64.604(c)(5)(iii)(E). See also *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket Nos. 90–571 and 98–67, CG Docket No. 03–123, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCCR at 12,544–45, para. 182.

¹⁵ Chandler Memorandum at p.3 (Exhibit 3).

¹⁶ *Id.* An increase in Fund size translates to an increase in the surcharge on consumer phone bills.

¹⁷ E-mail from Thomas Chandler to Cathy Seidel (Chief, Consumer and Governmental Affairs Bureau), *Long winded e-mail on VRS cost recovery. Some thoughts to consider. Tom*, May 21, 2007 (Exhibit 4).

Despite objections from the FCC staff, three months later Chairman Martin was preparing to circulate a new order setting compensation rates for TRS providers. In a September 4, 2007, e-mail to Chairman Martin's senior staff, Mr. Chandler delivered what he called his "last gasp" on this subject in an attempt to correct the situation:

*"Does the Chairman recognize that these rates perpetuate the enormous (\$100 million a year) windfall for Sorenson, at the expense of the ratepayers. [sic] Does he realize that Sorenson's own filing shows that its actual cost of providing [sic] VRS in calendar 2006 was in the low \$4.00 range, so that the present \$6.64 rate was more than 50% higher than Sorenson's actual costs?"*¹⁸

Mr. Chandler approved of the new tiered rate approach for TRS Fund compensation that the Commission was about to consider, but he pointed out that the proposed rates in the tiers were much too high:

*"I am all for the tiered rate approach, and even locking in the rates for three years. But, honestly, the current rates [in the draft order] . . . are just absurd given the facts as we know them"*¹⁹

Mr. Chandler closed his e-mail with a final plea:

*"Again, I simply hope that some of these issues and concerns will be considered before the Commission adopts an order that is not only (in my view) completely unsupported, but also really rips off the ratepayers to enrich the providers. At bottom, that really isn't the right thing to do."*²⁰

Mr. Chandler's candid analysis evidently went unheeded. Chairman Martin circulated the draft order, and it was adopted by the Commission.²¹ Evidently the Chairman's office did not apprise the rest of the Commission of Mr. Chandler's views.

Verification of Claims for Compensation

In addition to the issue of whether the FCC is overcompensating TRS providers, the FCC has done little to verify the accuracy of claims for compensation from the TRS Fund. A leading example is the case of Sorenson, the dominant VRS provider, with an 80 percent market share. The FCC's Inspector General (IG) engaged KPMG to conduct an audit of Sorenson. On April 10, 2008, KPMG reported to the FCC that Sorenson had denied the KPMG auditors access to the staff and systems necessary to conduct the audit, and refused to permit them to review the

¹⁸ E-mail from Thomas Chandler to Ian Dillner, *Cost recovery order*, Sept. 4, 2007, p. 1 (Exhibit 5).

¹⁹ *Id.*

²⁰ *Id.* at p. 2.

²¹ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order and Declaratory Ruling, 22 FCCR 20,140 (Nov. 19, 2007).

company's unredacted financial statements for 2004, 2005, and 2006.²² KPMG was therefore unable to conduct the audit.

Sorenson's refusal to cooperate with the auditor meant that the company's reported costs and minutes-of-service-charged, for which they sought and obtained compensation from the TRS Fund, could not be substantiated. Yet, the stonewalling by Sorenson has evidently been effective. Nothing has been done to force Sorenson to open its books.²³

The IG also engaged KPMG to audit seven other VRS providers, who share a total of 15 percent of the VRS market. The audits were not reassuring, as KPMG reported that,

*"... pervasive issues . . . came to our attention during the performance audits specifically related to (1) the lack of adequate supporting documentation for the TRS costs reported by the providers . . . and (2) the incorrect or unallowable minutes claimed by the providers in the Monthly Reports of Relay Service Minutes."*²⁴

Conclusion

There is substantial evidence that the FCC has failed to set reasonable rates for compensation of TRS providers. As a result, consumers are being significantly overcharged to finance the TRS Fund and TRS providers are being significantly overcompensated. Despite the detailed evidence provided to the Chairman's office, nothing was done to stop the continued overcompensation of TRS providers. It appears that Mr. Chandler was correct when he told Chairman Martin's office:

*"I hate to say it, but the whole TRS (VRS) compensation regime has become a classic fleecing of America."*²⁵

In addition to the issue of overcompensation, there are questions as to whether all of the minutes that TRS providers submit for compensation have actually been incurred by people with hearing or speech disabilities, and whether provider costs are accurate.

We recommend that the FCC immediately initiate a full investigation and audit of Sorenson. It is simply unacceptable that a company subject to Commission regulation and which every year receives millions of dollars from a Government fund can refuse to open its books to Government-authorized auditors. The FCC's apparent failure to insist on auditing Sorenson's books indicates an abdication of its responsibility to administer and protect the integrity of the TRS Fund.

²² See Letter from KPMG LLP to FCC, April 10, 2008 (Exhibit 6).

²³ The Committee staff was very recently informed that as a result of our investigation, the IG was moved to send a formal report to Chairman Martin on the results of the TRS audits. The FCC, however, has still taken no action to force Sorenson to submit to audit or to correct the deficiencies found in the other audits.

²⁴ Letter to Dr. Kent R. Nilsson, Inspector General, from Terry L. Carnahan, KPMG, LLP, July 30, 2008, p.1 (Exhibit 7).

²⁵ Chandler e-mail, note 18 supra, at p.1 (Exhibit 5).

In addition, we recommend that GAO investigate the entire TRS program, including the FCC's efforts to protect the integrity of the Fund and the IG's audits.

2. The FCC's "A La Carte" Report

Allegation

Chairman Martin manipulated report findings and policy direction with regard to "a la carte" cable and satellite television service²⁶ when he ordered that a report to Congress previously issued by the Commission be rewritten with a completely different outcome and issued as a "supplemental" report.

Findings

The first A La Carte Report was not required by statute or regulation, but was a study conducted by former FCC Chairman Michael Powell in response to letters from the House Energy and Commerce Committee and the Senate Commerce, Science, and Transportation Committee requesting the FCC to examine the a la carte issue.²⁷

To address the complex regulatory and legal issues posed by the Committees, the FCC's Media Bureau issued a notice requesting public comment and information on the technical, economic, and legal issues identified in the congressional requests, and conducted a symposium to explore the pros and cons of a la carte service.

In November 2004, the FCC issued its *Report on the Packaging and Sale of Video Programming Services to the Public* (referred to here as the "First Report"), which found that a la carte programming by cable television providers would not benefit consumers. This report was not circulated to the full Commission for review, but was issued at the direction of Chairman Powell as a response to the congressional requests.

Shortly after becoming chairman in March 2005, Chairman Martin ordered the Commission staff to rewrite the report and reverse its findings. Chairman Martin, however, did not request additional public comment or seek additional information.

²⁶ In this context, "a la carte" or "a la carte service" refers to providing cable or satellite television customers with the option to purchase individual television network programming, *i.e.*, individual "channels." Currently, virtually all cable and satellite television system operators make network channels available only in a limited number of large bundles (commonly referred to as "tiers"). There appears to be widespread belief among cable and satellite customers that if they could purchase only the channels they want, it would cost them less. The providers argue that a la carte service would cost more. In addition, it is argued that a la carte programming would frustrate social objectives by inhibiting the growth of small operators and minority programming. In any case, this report makes no attempt to analyze the pros and cons of a la carte service.

²⁷ See Letter from House Energy and Commerce Committee Chairman Joe Barton, John D. Dingell, Fred Upton, Edward Markey, and Nathan Deal, to FCC Chairman Michael K. Powell (May 18, 2004); and Letter from Senate Commerce, Science, and Transportation Committee Chairman John McCain to FCC Chairman Michael K. Powell (May 19, 2004).

In February 2006, the FCC issued the *Further Report on the Packaging and Sale of Video Programming Services to the Public* (referred to here as the “Second Report”), finding substantial consumer benefits in a la carte service, the direct opposite of the finding in the 2004 report. Like the First Report, the Second Report was not reviewed by the full Commission, but was delivered to Congress as a “further report” and released to the public.

Chairman Martin’s reversal of the First Report’s findings with regard to a la carte service provoked suspicion inside and outside the FCC that the Second Report was not based on objective analysis. It was particularly obvious that the Chairman made no attempt to seek additional public comment or to conduct additional studies. As noted previously, the Committee staff takes no position on the merits of a la carte service. We found evidence, however, that Chairman Martin’s office directed the FCC staff to find that the First Report was deficient and that a la carte service could provide substantial consumer benefits.

Interviews with Commission staff indicated that within weeks of becoming chairman in March 2005, Chairman Martin gave the Chief of the Media Bureau 10 days to rewrite the First Report and reverse its findings. The staff then struggled with the problem of rewriting the original report, because the First Report contained what they believed to be their best analysis of the issue. Apparently frustrated with the lack of progress in rewriting the report, Chairman Martin reassigned the project to other staff and demoted the long-time leader of the Media Bureau, who was relegated to an obscure position and ultimately left the Commission.

E-mails obtained by the Committee demonstrate that the outcome of the new report was predetermined and that the underlying analysis was micro-managed by the Chairman’s staff as it progressed. Work on the Second Report was led by Mr. Daniel Shiman, an economist with the FCC career staff, under the direct supervision of Ms. Catherine Bohigian, Senior Legal Advisor to Chairman Martin.²⁸

In a June 30, 2005, e-mail, Mr. Shiman sent to Ms. Bohigian a draft outline of the report for her review. In her reply, she approved the outline and noted that,

“[the] 2nd section should just be criticizing the reports [sic] conclusions that . . . a la carte would be bad for consumers.”²⁹

In a July 6, 2005, e-mail, another FCC employee discusses her notes from an earlier meeting in which Ms. Bohigian has given the team instructions for the writing of the report:

“My notes say that the first part of the document is to be a rebuttal to the previous report, arguing that it was based on failed assumptions and a failure to consider other issues . . .”³⁰

²⁸ Ms. Bohigian, a former law school classmate of Chairman Martin, served as Senior Legal Advisor on his personal staff during the period in which the Second Report was being drafted.

²⁹ E-mail from C. Bohigian to D. Shiman, *Outline for Report*, June 30, 2005 (Exhibit 8).

³⁰ E-mail from Sarah Whitesell to D. Shiman, *Key documents*, July 6, 2005 (Exhibit 9).

On July 8, 2005, Mr. Shiman began an e-mail exchange with Ms. Bohigian, in which he provides his thoughts “on some key issues” including the observation that,

“Prices are therefore likely to be higher under a la carte, and viewership for smaller networks will be lower as people decline to purchase them.”³¹

Evidently Ms. Bohigian was unhappy with that particular observation, as she replied a few minutes later:

“Daniel, I’m concerned about point 3. Regardless of what the first report lacks or assumes incorrectly, the conclusion of this report is supposed to be that a la carte could be cheaper for consumers.”³²

Mr. Shiman, however, held his ground, replying,

“Overall, I think pure a la carte would likely raise most cable bills, with fewer channels delivered.”³³

Within 2 minutes, Ms. Bohigian made her point very clear:

“Daniel, the report cannot conclude that a la carte would likely raise most cable bills, with fewer channels delivered. If that is going to be the conclusion, we need to stop now.”³⁴

The fact that the Chairman’s office dictated the outcome of the report is further confirmed by Mr. Shiman in a July 22, 2005, e-mail to one of his colleagues, where he also notes that the purpose of the report is to influence Congress:

“It is important to remember that we can’t require a la carte, that this would require Congressional action, and this report is meant to give them some information about the options (albeit following the directives of [the Chairman’s Office]).”³⁵

The issue of a la carte programming is highly controversial and has received substantial congressional interest. As a result, the Congressional Research Service (CRS) was asked to review both reports. CRS concluded that “neither [the first or the second reports] . . . should be viewed as providing definitive results.”³⁶ CRS did say, however, that “most of the criticisms of the Initial Report that are presented in the Further Report either are not supported by available market data or cannot be proven one way or the other.”³⁷

³¹ E-mail from D. Shiman to C. Bohigian, *Thoughts on some issues*, July 8, 2005, 2:20 p.m. (Exhibit 10, p.2).

³² E-mail from C. Bohigian to D. Shiman, *Thoughts on some issues*, July 8, 2005, 3:59 p.m. (Exhibit 10, p.1).

³³ E-mail from D. Shiman to C. Bohigian, *Thoughts on some issues*, July 8, 2005, 4:16 p.m. (Exhibit 10, p. 1).

³⁴ E-mail from C. Bohigian to D. Shiman, *Thoughts on some issues*, July 8, 2005, 4:18 p.m. (Exhibit 11, p.1).

³⁵ E-mail from D. Shiman to W. Sharkey and S. Whitesell, *Pricing new consumer options*, July 22, 2005 (Exhibit 12, p.1).

³⁶ See C.B.Goldfarb, *The FCC’s “a la Carte” Reports*, CRS Report RL 33338 (Mar. 30, 2006), Summary and pp. 14–15.

³⁷ See *id.* at Summary.

Conclusion

Our investigation confirmed that Chairman Martin's peremptory reversal of the First Report's conclusions without seeking further public comment or conducting further studies was handled neither openly nor fairly. The Chairman's manipulation of the Second A La Carte Report may have damaged the credibility of the Commission, and it certainly undermined the integrity of the staff. Moreover, as a report to Congress, it was designed to influence congressional decision-making.

This last point is particularly troubling. Congress created the FCC (and the other independent regulatory agencies) to provide independent regulatory and adjudicatory decision-making, and to serve as a center of expertise on telecommunications matters. Over the years, Congress has come to rely on that expertise as it sets telecommunications policy and enacts legislation affecting the industry. Chairman Martin's manipulation of the Second Report calls into question the reliability of telecommunications information and analysis provided by the FCC to Congress.

From a management perspective, Chairman Martin's demotion and reassignment of professional employees who disagreed with him was unprincipled and may have seriously undermined the ability of the FCC to accomplish its mission.

3. The 13th Annual Video Competition Report

Allegation

Chairman Martin attempted to manipulate the data and conclusions contained in the *13th Annual Report to Congress on Video Competition*, a report required by statute to determine, among other things, whether the so-called "70/70 Rule" has been met (a statutory threshold that would permit significant additional regulation of the cable television industry).³⁸ Because the full Commission voted to revise Chairman Martin's draft report to conclude that the 70/70 Rule had *not* been met, Chairman Martin then suppressed the report. It has never been released. In addition, the report was already nine months late when it was circulated to the full Commission for vote.

Findings

Two main issues are raised by the foregoing allegation—manipulation of data and the timeliness of the report.

³⁸ The 70/70 Rule is a statutory threshold that allows the FCC to impose certain regulations on cable providers if cable television service with 36 channels or more is available to at least 70 percent of all U.S. households *and* if 70 percent of those households do in fact subscribe to such cable service. See Section 612(g) of the Communications Act of 1984, 47 U.S.C. §532(g).

Manipulation of Data

The FCC is required by statute to “annually report to Congress on the status of competition in the market for the delivery of video programming.”³⁹

There is nothing in the relevant statute or regulations that requires the FCC to use any particular data in assessing the level of competition in the cable television industry. The FCC, however, has traditionally collected cable system subscriber data from a wide variety of sources, including its own internal data (Cable Price Survey and the Annual Report of Cable Television Systems [known as Form 325 data]); independent data compiled by Nielsen Media Research, SNL Kagan, and Warren Communications; and other information submitted by commenters in response to an annual, public Notice of Inquiry inviting information.⁴⁰

In 2007, Chairman Martin directed the staff preparing the *13th Annual Report to Congress on Video Competition* (covering 2006) not to use the broad base of data it had traditionally used for its analysis, but to use certain data provided by Warren Communications to determine whether the 70/70 Rule had been met.

There appear to be substantial limitations in the data provided by Warren Communications. In fact, Warren Communications was not aware that its data was going to be used to determine whether the 70/70 Rule had been met. When Warren learned that was the purpose, it expressed reservations about using the data for that purpose. According to Warren, the data it provided was incomplete because it did not include all available data on basic subscribers, homes passed, and channel capacity.⁴¹ As Warren Communications’ Managing Editor Michael Taliaferro stated in a letter to Commissioners Tate and McDowell:

“ . . . data compilations that depend on the voluntary cooperation of competitive enterprises obviously will have gaps, and it has been our practice not to attempt to fill these gaps with estimates, even using standard statistical methods I regret that this may have been unclear in my October 10 communication with the Commission. Clearly, any future requests for data from the Television & Cable Factbook database should be accompanied by a discussion of its intended use, and its inherent limitations as well as its acknowledged strengths.”⁴²

Nevertheless, the Martin Draft used the data to find that the 70/70 Rule had been met for calendar year 2006.

In November 2007, Chairman Martin circulated his draft version of the *13th Annual Report* to the full Commission for vote, along with the Notice of Inquiry for the *14th Annual Report* (covering 2007).

³⁹ Section 628(g) of the Communications Act of 1934, as amended, 47 U.S.C. §548(g); *see also* Eleventh Annual Report, p. 2.

⁴⁰ *See* Eleventh Annual Report, 20 FCCR 2755, 2767, para. 20 (2005); and Twelfth Annual Report, 21 FCCR 2503, 2514, para. 34 (2006).

⁴¹ *See* Letter from Michael C. Taliaferro, Managing Editor, Warren Communications News, Inc., to Commissioners Tate and McDowell (November 15, 2007) (Exhibit 13).

⁴² *See id.* at p.2.

At the direction of Chairman Martin, the draft report circulated to the Commission for vote contained only the Warren Communications data. All of the other data collected in response to the Notice of Inquiry was initially withheld from the other Commissioners, and the career staff was directed not to discuss it with them. It was not until after 7:00 p.m. on the night before the Commission vote that the rest of the data was made available to the other commissioners.⁴³

The next day, on November 27, 2007, the Commission majority rejected the Martin draft and voted to issue a report finding that the 70/70 Rule had *not* been met. The Commission also adopted the Notice of Inquiry for the 14th *Annual Report* (covering 2007). The revised report, however, has never been “released”⁴⁴ and submitted to Congress. The Notice of Inquiry for 2007 has not been released either.⁴⁵

Timeliness

As noted above, the FCC is required by statute to “*annually* report to Congress on the status of competition in the market for the delivery of video programming.”(emphasis added)⁴⁶ While the statute does not include a specific date for submission of the report, the passage of nearly 2 years without such a report is clearly a violation of the statutory requirement for an *annual* report.

Notwithstanding the vote of the full Commission, Chairman Martin has withheld from release both the 13th *Annual Report* and the Notice of Inquiry for the 14th *Annual Report*, for nearly a year.

The FCC is also required by statute to submit to Congress a related annual cable report known as the *Cable Price Survey Report*, which contains data cited in the Video Competition Report.⁴⁷ The 2006 edition of this report still has not been released. The FCC is clearly late in submitting this report, as well.

Conclusion

Chairman Martin’s withholding of the majority of the market data from the other Commissioners, combined with his insistence on using the weaker Warren Communications data in the draft report, is evidence that he attempted to manipulate the findings of the report to force

⁴³ See Statement of Commissioner Robert M. McDowell, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, MB Docket No. 06-189 (Nov. 27, 2007), p. 2 (Exhibit 14).

⁴⁴ The FCC makes a rather confusing distinction between items that have been “adopted” by the Commission, *i.e.*, approved by a majority vote, and items that have been “released”, *i.e.*, technical corrections have been made to the adopted version and the item officially issued. Further confusion arises from the fact that some items that have been “adopted” but not “released” have occasionally been published on the Commission’s Web site or other Web sites.

⁴⁵ See “FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report,” FCC News Release, Nov. 27, 2007.

⁴⁶ Section 628(g) of the Communications Act of 1934, as amended, 47 U.S.C. §548(g).

⁴⁷ See Section 623(k) of the Communications Act of 1934, as amended, 47 U.S.C. §543(k).

a conclusion that the 70/70 Rule had been met. In the words of Commissioner McDowell, "The books have been cooked to trigger the 70/70 rule."⁴⁸

Following the full Commission's decision to reject Chairman Martin's draft version of the report and adopt a revised report finding that the 70/70 Rule had *not* been met, Chairman Martin withheld release of the report for nearly a year. In effect, he first attempted to suppress the relevant data, and, when that failed, he suppressed the Commission's decision.

Both the *13th Annual Report to Congress on Video Competition* and the *Cable Price Survey Report* for 2006 have yet to be submitted to Congress. Moreover, at this point it seems unlikely that the 2007 editions of these reports will be issued this year. The failure to submit statutorily required reports to Congress for nearly 2 years after the reporting period indicates a callous disregard for these statutory obligations.

There is no apparent reason why the report approved by the Commission majority should not have been issued.⁴⁹ Past reports, dealing with all the same issues, have been circulated, voted on, and released in a timely manner. For example, the *12th Annual Report* (for 2005) was adopted on February 10, 2006, and released just 3 weeks later, on March 3, 2006. The *11th Annual Report* (for 2004) was adopted on January 14, 2005, and released 3 weeks later, on February 4, 2005.

The FCC's findings pertaining to the 70/70 Rule could have significant implications for the cable industry and its competitors. The failure to issue the *13th Annual Report* has caused needless uncertainty for the industry. In withholding the report, Chairman Martin has therefore abdicated his responsibilities to Congress, the public, and the industry.

4. Network Reliability and Interoperability Council Advisory Subcommittee Report

Allegation

Chairman Martin suppressed a report produced by Subcommittee 1B of the Network Reliability and Interoperability Council VII (NRIC or Council), which was charged with recommending improvements to emergency and Enhanced-911 (E-911) services.

Findings

NRIC VII was a Federal advisory committee established by the FCC in 2003. The Council was charged with providing recommendations to the FCC and to the communications industry to assure optimal reliability and interoperability of wireless, wireline, satellite, cable,

⁴⁸ E-mail from Commissioner McDowell to his personal staff, Nov. 11, 2007, p. 1 (Exhibit 15).

⁴⁹ There is some speculation that Chairman Martin may be withholding the *13th Annual Report* pending Office of Management and Budget approval of changes to the form used to collect data from the cable industry, which is part of the Notice of Inquiry for the next report. That explanation, however, is nonsensical since the changes to the new form have nothing whatever to do with issuing the *13th Annual Report*.

and public data networks.⁵⁰ Under the terms of its charter, NRIC reported to the Chairman of the FCC.⁵¹

Subcommittee 1B of NRIC was charged with recommending improvements for emergency communications networks, including Enhanced-911 (E-911) services that would be implemented by 2010.⁵²

Subcommittee 1B was composed of approximately 40 senior telecommunications industry representatives who spent numerous hours and incurred significant expenses working on these issues over a period of 2 years. The Subcommittee produced several interim reports, including a draft final report that was scheduled to be presented at the final NRIC meeting on December 16, 2005.

Two days before the Council's meeting, then-Acting Deputy Director of the FCC Office of Legislative Affairs, Anthony Dale, sent an e-mail to Daniel Gonzalez, Chairman Martin's Chief of Staff, warning him that,

*"[We] . . . are going thru the [NRIC] documents. bottom line is that there are statements in there that have policy implications. this stuff needs to be scrubbed hard."*⁵³[sic]

The night before the report was to be presented to the full Council for adoption, Mr. Gonzalez, ordered that the report be withheld, due to purported "factual errors." Efforts by the NRIC Subcommittee 1B chairman and other Subcommittee members to learn the nature of those "factual errors" were rebuffed by Commission officials.

Although the final draft report was never officially adopted by NRIC, it is publicly available on the NRIC Web site.⁵⁴

Conclusion

The Chairman's action in this matter was contemptuous of the extensive effort put into this study by 40 senior telecommunications industry experts who spent 2 years on this report. This could seriously hinder future efforts by the FCC to obtain private sector cooperation and participation in similar studies. There is no doubt this action has helped undermine the credibility of the Commission.

Nevertheless, there is no requirement that the FCC produce such a report, and it appears that withholding the report has no direct regulatory implications.

⁵⁰ See Charter of the Network Reliability and Interoperability Council – VII, Section B, http://www.nric.org/charter_vii/NRICVII_Charter_FINAL_Amended_2004_3_12_04.pdf.

⁵¹ See *id.*, Section D.

⁵² See *id.*, Section B.1.b.

⁵³ E-mail from Anthony Dale to Daniel Gonzalez, December 14, 2005 (Exhibit 16).

⁵⁴ As of October 2008, the report could be accessed at the following link: http://www.nric.org/meetings/docs/meeting_20051019/NRICVII_FG1B_Report_September_2005.pdf.

5. The Hatfield Report on Enhanced-911 (E-911) Wireless Services

Allegation

Chairman Martin cut off funding for a final report on E-911 wireless services by outside consultant Mr. Dale Hatfield, a former Chief of the FCC Office of Engineering and Technology, because the Chairman learned that the report would find that certain E-911 wireless location detection services were not technically feasible.

Findings

Enhanced 911 or E-911 refers to the ability of emergency call centers⁵⁵ to automatically determine the location of callers. For standard wireline phones, a database is used that can provide the street address of any call based on the originating phone number. For wireless devices and nomadic Voice over Internet Protocol (VoIP) services (*e.g.*, calls made from a laptop computer), there are greater technological challenges arising from the mobility of the devices.

In 2002, Mr. Hatfield completed his first report, *A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced 911 Services*,⁵⁶ under the FCC's previous chairman, Michael Powell. Because of his unique expertise and his performance on the 2002 report, the FCC entered into a new contract with Mr. Hatfield in September 2003 to compile a second, updated report on technical and operational issues relating to E-911.

The Statement of Work contained in the September 2003 contract contains no specific tasks or deadlines, but simply states that Mr. Hatfield is obligated to conduct certain E-911 activities "as required." Mr. Hatfield's compensation rate, apart from travel expenses, was set at \$250 per hour. Because the Statement of Work estimated 400 hours of work would be required between January 1, 2004, and September 30, 2006, that implies overall possible compensation of \$100,000.⁵⁷

Through subsequent task orders and agreements, Mr. Hatfield was required to submit a draft final report to the FCC by March 1, 2006. He failed, however, to meet this deadline.

On May 10, 2006, Mr. Hatfield briefed the FCC staff on his finding that it is not possible to determine from publicly available information whether the technology is currently available to pinpoint the location of wireless callers with precision, particularly inside buildings.⁵⁸

Mr. Hatfield regarded his finding as "sensitive," which is why he briefed the Commission staff prior to finalizing his report. A member of the FCC's Wireless Telecommunications Bureau who attended the briefing reported that Mr. Hatfield,

⁵⁵ The FCC refers to emergency call centers as "public safety answering points" or "PSAPs".

⁵⁶ Available at <http://www.locatemodelcities.org/library/HatfieldReport.pdf>.

⁵⁷ See Award/Contract No. CON03000023, p. 2, Sept. 23, 2003, and Statement of Work, pp. 1-6.

⁵⁸ See Memorandum from Jeff Cohen to Jim Schlichting, *Dale Hatfield Report on E911*, May 11, 2006 (Exhibit 17).

“suggested that, without agreement between the public safety community and carriers on testing methods, the results of this project may suggest that serious deficiencies in wireless E911 accuracy exist, which may be alarming to the public, and likely lead to contentious debate within the industry.”⁵⁹

Subsequent to the briefing, FCC officials canceled the project, and paid the balance due to Mr. Hatfield. He was paid \$9,500 for his work under the contract. He never submitted a draft final report.⁶⁰

Conclusion

Mr. Hatfield made his May 10, 2006, presentation to the Wireless Bureau staff more than two months after the final report was due, but never produced the final report, even though he was paid most of the money authorized under the task order. Under the circumstances, it appears that Chairman Martin was justified in canceling the contract.

Chairman Martin has strongly supported mandatory implementation of E-911 services. Hatfield's finding that certain wireless E-911 services might not be technically feasible would call this into question, given Hatfield's purported credibility on this issue. Nevertheless, the staff found no evidence that Chairman Martin canceled the contract because he disagreed with the findings.

6. Broadband over Powerline (BPL) Engineering Reports

Allegations

FCC officials ignored complaints of radio frequency interference caused by BPL high-speed internet technology, delayed an enforcement investigation for 2 years, and improperly withheld engineering data regarding BPL from the public.

Findings

BPL is a technology that delivers broadband Internet service to homes and businesses over electrical power lines in the frequency range between 1.7 and 80 megahertz.

In October 2004, during the tenure of Chairman Powell, the FCC issued its final rule defining BPL access and setting technical and administrative requirements to protect licensed radio operators from harmful interference.⁶¹

In issuing its final rule and order, the Commission withheld from the public certain engineering reports on which it relied in promulgating the rule. Although the rule was

⁵⁹ Id. at p. 2.

⁶⁰ See Letter from Chairman Martin to Rep. Mike Doyle, U.S. House of Representatives, Apr. 13, 2007, attachment: “Timeline and Specific Findings” (Exhibit 18).

⁶¹ See *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems, Carrier Current Systems*, 19 FCCR 21,265 (Oct. 28, 2004).

promulgated under former-Chairman Powell, it was under Chairman Martin that the Enforcement Bureau and the General Counsel continued to withhold the redacted engineering reports and insisted on doing so in the course of the ensuing litigation.

On April 25, 2008, the U.S. Court of Appeals for the D.C. Circuit found that the FCC violated the Administrative Procedure Act when it played “hide and seek” with engineering data used in support of the order and “cherry-picked” a study upon which it had relied.⁶²

It appears that many of the interference problems that originally characterized BPL are now moot because of advancements in BPL technology.

Conclusion

The fact that the FCC withheld the required engineering reports in this matter indicates poor judgment and an attempt to hide critical weaknesses in its decision. Ironically, the FCC’s attempts to hide this information only served to provoke suspicion and its handmaiden, litigation. This case illustrates the extent to which a culture of secrecy has developed at the FCC that is as counterproductive as it is unnecessary.

This particular situation has been corrected by the courts, however, and apparently the technological issue has been rendered largely moot over time due to improvements in BPL technology.

7. Bright House Networks v. Verizon California

Allegations

In the case of *Bright House Networks v. Verizon California*,⁶³ Chairman Martin improperly reversed an Enforcement Bureau finding that Verizon had violated Customer Proprietary Network Information rules and then circulated the revised decision to the full Commission for approval. In addition, it was alleged that Martin obtained the substitute language for the draft decision from a source outside the Commission.

Findings

In this case, the Enforcement Bureau prepared a draft decision that found against Verizon for violating Customer Proprietary Network Information rules.⁶⁴ The Office of General Counsel and the Wireline Competition Bureau concurred with the Enforcement Bureau findings and proposed order.

Shortly before the deadline for a vote on the draft decision and order, the Chairman’s office directed the Enforcement Bureau to reverse its earlier recommendation, to find in favor of

⁶² See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008).

⁶³ FCC File No. EB-08-MD-002.

⁶⁴ *Bright House Networks v. Verizon California*, Recommended Decision, File No. EB-08-MD-002, Enf. Bur., released April 11, 2008.

Verizon, and provided the Enforcement Bureau with several pages of text to be inserted in the revised decision and order.⁶⁵

On June 20, 2008, the full Commission rejected the Chairman's decision in a 4–1 vote and adopted the Enforcement Bureau's original recommendation.⁶⁶

The Committee staff found no evidence that the Chairman or anyone in his office obtained draft language for the decision from a source outside the Commission.

Conclusion

The Chairman of the FCC has no obligation to accept a draft decision from the staff, either in an adjudicatory proceeding or in a rulemaking. While it may have been unusual for an FCC Chairman to reverse an Enforcement Bureau recommendation of this nature, Chairman Martin certainly had the right to do so.

The allegation made by several people that Chairman Martin obtained the draft language for the revised decision from an outside source appears to be based on a notion that no one in the Chairman's office was capable of producing such a well-written, complex, multi-page decision in such a short period of time. Given the lack of evidence, this issue must remain a matter of speculation.

8. Retaliation against FCC Employees Who Differed with the Chairman's Policies

Allegations

Chairman Martin has forced the retirement of senior FCC staff. He has also directed the involuntary transfer of senior staff to lesser positions, often without explanation or notice—a practice that is commonly called being “Martinized” or “blue-boxed”—because they disagreed with his policies or agenda, or because of their apparent affiliation with former Chairman Powell.

There is a climate of fear and intimidation at the FCC.

Chairman Martin's micromanagement of both routine and important matters has resulted in decision paralysis at the Commission.

Findings

Under Section 5 of the Communications Act of 1934, the Chairman is the “chief executive officer of the Commission” and has the duty to, among other things, “organize the work of the Commission.”⁶⁷

⁶⁵ Several senior staff reported this sequence of events. *See also Verizon Could Take FCC To Court over Order on Retention Marketing Practices*, Communications Daily (June 23, 2008).

⁶⁶ *Bright House Networks v. Verizon California*, Memorandum Opinion and Order, File No. EB–08–MD–002, Adopted June 20, 2008, released June 23, 2008.

⁶⁷ 47 U.S.C. 155(a).

Chairman Martin has transferred and/or “demoted” numerous staff during his tenure as Chairman. Some senior officials have been transferred to what are essentially junior positions, and these transfers clearly had a demoralizing effect on the individuals who were transferred, as well as on their colleagues. It appears, however, that all of those transferred or demoted retained their salaries and benefits. This practice also took place at the FCC under Chairman Powell and earlier chairmen, although not as frequently at the middle manager and lower levels in which it has taken place at the direction of Chairman Martin.⁶⁸

Chairman Martin has prohibited career staff from talking directly to his fellow Commissioners without prior clearance or without supervision.⁶⁹

Even trivial, routine matters must be cleared by the Chairman’s office. Chairman Martin’s office micromanages virtually every aspect of agency management, resulting in decision paralysis at the Commission. In the beginning of his chairmanship, Chairman Martin proclaimed a “freeze” on decision-making at the agency, and directed all bureaus and offices to obtain clearance from his office regarding virtually all agency matters, with limited exceptions.⁷⁰ While that may be typical of Federal agencies during the transition period for a new chairman,⁷¹ it appears that Chairman Martin’s office has continued to micromanage agency operations, including the most routine of agency matters.

Most, if not all, of the employees that we interviewed indicated that Martin’s micromanagement continues to the present day and has adversely affected the agency. Senior FCC managers stated that because the Chairman’s office reviews everything from critical regulatory items to the hiring of student interns, there appears to be a continuous backlog of matters waiting for Chairman review.

For example, we were told that important reports, regulatory items, enforcement activities, and other agency matters would literally sit in the Chairman’s office for weeks and months, with no explanation or feedback—even after continued reminders from staff about the importance of these items. A prime example may be the *13th Annual Video Competition Report*, which the Commission adopted on November 27, 2007, but which still languishes on the Chairman’s desk. Other examples have been reported in the press.⁷²

Several employees expressed frustration that routine personnel matters, including job postings and re-postings, outside hires, details, reassignments, student appointments, and even paid student volunteers, required Chairman Martin’s approval, which unnecessarily slowed the day-to-day business in their offices.⁷³ Many of the career employees we interviewed stated that

⁶⁸ See “*All Shook Up: Martin Remakes FCC*,” Multichannel News, October 17, 2005.

⁶⁹ This fact was substantiated through interviews with the other Commissioners’ offices and with FCC line staff.

⁷⁰ See, e.g., Memorandum, “*Routine Actions by the Enforcement Bureau Not Requiring Individual Approval by the Chairman’s Office*,” Mar. 24, 2005 (Exhibit 19).

⁷¹ President Bush designated Martin as chairman on March 16, 2005.

⁷² See, e.g., the Adelphia Merger delay reported in “*All Shook Up: Martin Remakes FCC*,” Multichannel News, October 17, 2005.

⁷³ See Memorandum, “*Clarity on Personnel Actions*,” undated (Exhibit 20).

Chairman Martin's micromanagement affected their ability to perform their jobs and affected the morale of the agency.

Astonishingly, FCC employees were even instructed not to talk to their colleagues in the agency without first going through the chain of command.⁷⁴ FCC employees were also told they were restricted from talking to employees at other Federal agencies as well. Examples included not being able to attend or fully participate in working groups, meetings, task forces, and outside telecommunications events. Not surprisingly, most employees we interviewed found restrictions on intra- and inter-agency communication unreasonable, frustrating, and counter-productive.

In addition, at a time when the agency was called on to publicly answer allegations that two internal "localism" reports had been suppressed, Chairman Martin's office issued a directive that economists were to cease working on all "unapproved" research and papers. The employees were also prohibited from working on "previously authorized work."⁷⁵ In a statement that is almost as humorous as it is uninformative, the agency told its employees that

*"Projects that were authorized in the past are not necessarily considered to be authorized at this time."*⁷⁶

Conclusion

The Chairman of the FCC is clearly authorized by statute to manage the Commission staff and the day-to-day operation of the Commission. The periodic, unexplained staff shakeups and micromanagement practiced by Chairman Martin are demoralizing and inefficient, and make it more difficult for the other Commissioners to carry out their responsibilities. Moreover, while it appears that all of those transferred or demoted retained their salaries and benefits, it is a waste of taxpayer dollars to have senior level employees performing junior level work.

Not surprisingly, there appears to be a very serious morale problem at the FCC caused by Chairman Martin's poor management. Coupled with the fact that various reports and proceedings have been handled with an unnecessary lack of transparency, this mismanagement has created suspicions of a lack of fairness, both inside and outside the Commission. It is very likely that Chairman Martin's policy of micromanagement has caused needless delays in the conduct of Commission business. This is not the hallmark of good management.

The investigation revealed that there is a climate of fear at the FCC. Employees believe that if they express an opinion, even if based on fact, they may be demoted, reassigned, or hounded out of the agency. Most of the current and former employees to whom we spoke did not want to be identified, fearing management retaliation. Although many supplied us with copies of e-mails and other documents, with rare exception they requested that their names be redacted. As discussed at the outset of this report, the unwillingness of current and former employees to present testimony in a public hearing was a major factor in our decision to recommend that we not schedule a hearing as part of this investigation.

⁷⁴ See E-mail, "No Contact With Other Bureaus," May 18, 2007 (redacted)(Exhibit 21).

⁷⁵ See E-mail, "New Rule Regarding Work on Research and Papers," Oct. 24, 2006 (redacted)(Exhibit 22).

⁷⁶ Id.

9. White House Demands for Local Television Programming

Allegation

In September 2007, an unidentified White House official allegedly contacted Chairman Martin's office to complain about DIRECTV not providing certain local television programming to the White House as part of its regular satellite television service. In response, Media Bureau staff were directed to advise DIRECTV that the Commission would not act on the Liberty Media-DIRECTV acquisition that was pending before the Commission until the White House issue was resolved. Upon being informed of the problem, Liberty Media and DIRECTV resolved the issue with the White House in just a few days, and the FCC continued to process the Liberty Media-DIRECTV transaction.

Findings

The Committee staff interviewed certain members of the FCC staff who confirmed the outlines of this allegation through first-hand knowledge, but were not able to confirm details, such as who called from the White House and who at the FCC received the call, and, in turn, whether Chairman Martin had any personal knowledge of these events.

We deem these sources credible, but at this point, we have no records to substantiate this allegation.

Conclusion

This is a serious allegation. We recommend that the Committee open an investigation of this matter by sending letters to Chairman Martin, Liberty Media, and DIRECTV, requesting their replies to this allegation and demanding all records relating to this issue.

10. The T-Mobile Enforcement Action

Allegation

Chairman Martin improperly intervened to reduce a fine imposed on T-Mobile from \$1.3 million to \$100,000, for repeated violations of the Commission's rules relating to the National Do-Not-Call Registry.

Findings

Fines in enforcement cases are recommended to the Commission by the Enforcement Bureau. The Commission has the legal discretion to approve, disapprove, or revise the Enforcement Bureau's recommendations. As a practical matter, however, the Enforcement Bureau's recommendations are first sent to the Chairman, who may circulate the Enforcement Bureau's recommendation to the full Commission for final disposition, or may return it to the Enforcement Bureau for revision.

There is an important exception to this procedure. Under the Commission's rules, the Enforcement Bureau has the authority to impose a fine of \$100,000 or less, without the prior approval of the Chairman or the full Commission.⁷⁷

In this case, the FCC's Enforcement Bureau sent a draft Notice of Apparent Liability (NAL) to Chairman Martin, recommending that T-Mobile be fined \$1.3 million for repeated violations of the Commission's rules relating to the National Do-Not-Call Registry.

After the draft NAL was sent to the Chairman's office, but before it was acted upon, T-Mobile was told of the draft NAL.

Upon learning of the draft NAL, T-Mobile began negotiations with the Enforcement Bureau in an attempt to settle the case. A member of the Chairman's office was also involved in the negotiations. An agreement was reached, and a consent decree was entered on November 23, 2005, under which T-Mobile agreed to pay \$100,000 for violations of the National Do-Not-Call Registry rules and agreed to implement certain internal procedures to ensure compliance with the regulations in the future.⁷⁸

Conclusion

The Chairman of the FCC has no obligation to accept a fine recommended by the Enforcement Bureau. Therefore, the action Chairman Martin took in the T-Mobile case appears to have been legally permissible. It is highly unusual, however, for an FCC Chairman to become so actively involved in the disposition of an enforcement action.

The unusual nature of the Chairman's involvement in this case was magnified by the nature of the case itself. T-Mobile—through its marketing agent—engaged in massive violations of the Do-Not-Call Rules. Such behavior would be of great interest to consumers nationwide and apt to prompt heated reaction. When a culprit is identified, there is often strong public sentiment that the perpetrator should be severely penalized. The Enforcement Bureau's recommendation of a \$1.3 million fine would have been the largest at that time for violation of the Do-Not-Call Rules.

The leaking of the NAL to T-Mobile, prior to its being circulated to the Commission, permitted T-Mobile to negotiate a fine that was within the \$100,000 threshold for Bureau review. This allowed T-Mobile to escape full Commission review and avoid further adverse publicity, as well as significantly reducing the company's ultimate liability.

It remains a mystery as to why the FCC was suddenly willing to reduce the proposed \$1.3 million fine to \$100,000. The compliance program that T-Mobile agreed to implement as part of the settlement would not seem to be adequate to offset the reduction in the fine, as it is little more than T-Mobile was already required to do under the Do-Not-Call Rules as a matter of due diligence.

⁷⁷ See 47 CFR 0.311 (2007).

⁷⁸ *In the Matter of T-Mobile USA.*, Order, File No. EB-04-CT-010 (Nov. 23, 2005).

The “leak” of the NAL to T-Mobile and the reduction of the fine to \$100,000 that allowed T-Mobile to escape full Commission review, provoked suspicion among the staff and others that this case was not being handled fairly. Moreover, Chairman Martin’s departure from the normal procedure for handling enforcement cases, his intervention in the enforcement action to radically revise the outcome, and his apparent failure to explain his reasons for reducing the fine, have contributed to the perception among the Commission staff and the public that the case was handled unfairly. These problems could have been avoided if this enforcement action had been handled under the normal procedure and in an open and transparent process.

11. Independence and Fitness of the FCC Inspector General

Allegations

The FCC Inspector General, Dr. Kent Nilsson, has such a close relationship with senior Commission officials, including members of the Chairman’s staff, that it impedes his ability to conduct internal investigations in an impartial manner. In addition, Dr. Nilsson has violated Federal procurement regulations while hiring outside contractors and overseeing contracts; violated Federal personnel hiring regulations; demonstrated incompetence in overseeing audits; and created a hostile working environment in his own office.

Findings

The FCC Inspector General was appointed by Chairman Martin,⁷⁹ in contrast to the IGs at cabinet agencies who are appointed by the President, confirmed by the Senate, and remain independent from the head of the agency in which they serve.

In June 2008, a complaint against Dr. Nilsson was submitted by a senior member of the IG’s staff to the Integrity Committee of the President’s Council on Integrity and Efficiency (PCIE), alleging, among other things, that Dr. Nilsson:

- Ordered that all documents and e-mail provided by the IG staff in response to the House Energy and Commerce Committee’s records request of March 12, 2008, be screened and directed that documents he did not want transmitted to the Committee be withheld;
- Violated provisions of the Procurement Integrity Act contained in the Federal Acquisition Regulation by engaging in unpermitted contacts with a potential vendor who was interested in bidding on an audit contract issued by the Office of Inspector General (OIG), despite being warned against such contacts;
- Refused to hire qualified candidates, including veterans, for a budget analyst position within the OIG;

⁷⁹ The Chairman of the FCC, like the Chairmen of a number of other independent agencies, has the authority to appoint the IG. See Section 8G of the Inspector General Act of 1978, as amended, 5 App. U.S.C. § 8G.

- Harassed and intimidated a number of OIG employees who have either been reassigned, or have retired or resigned, because of a hostile work environment;
- Ordered an audit of the FCC mail room because he was upset that his mail was being opened and screened for anthrax at a Maryland facility;
- Disregarded findings that the audit of the Universal Service Fund Low Income Improper Payment Information Act program had not been performed correctly and failed to correct erroneous program information that was transmitted to Congress in the OIG's Spring 2008 Semi-Annual Report; and
- Continued to permit the Assistant Inspector General-Audits to approve payment of invoices submitted by outside auditing firms for audit services that were not performed properly and have never been released.

Conclusion

The Committee staff interviewed several FCC employees who described the Inspector General as actively supporting the Chairman and other FCC officials, while discouraging independent investigations by his own office when the outcome might be critical of FCC management. The Committee staff deemed these individuals to be credible. This supports the notion that the IG at the FCC as well as at the other independent agencies should not be appointed by the head of the agencies in which they serve.

Serious allegations against Dr. Nilsson are pending before PCIE. In view of this fact and considering time and resources, we recommend that the Committee suspend its investigation of these matters pending PCIE's disposition of the complaint. We also recommend that the Chairman and Ranking Member of the Committee introduce legislation to amend the Inspector General Act to provide that the IG for the FCC shall be appointed by the President with the advice and consent of the Senate.

12. In re Derek Poarch, Chief of the Public Safety and Homeland Security Bureau

Allegations

Derek Poarch, Chief of the FCC Public Safety and Homeland Security Bureau, has routinely violated Government travel regulations, including using non-contract air carriers without justification; renting premium-class vehicles at Government expense while traveling; receiving per diem for non-work days; receiving reimbursement for inflated travel expenses; and receiving reimbursement for travel to his personal residence in North Carolina. In addition, Mr. Poarch has violated Government regulations by maintaining inaccurate time and attendance records for himself, including failure to charge for annual leave.

Findings

The Committee staff found detailed documentary evidence that appears to substantiate these allegations. In addition, it appears that these violations were committed knowingly, as Mr. Poarch reportedly scoffed at advice from FCC staff that he was violating travel regulations.

Conclusion

The FCC Public Safety and Homeland Security Bureau is a new division created by Chairman Martin, who then appointed Mr. Poarch to head it. Mr. Poarch was formally the Director of Public Safety and Chief of Police at the University of North Carolina at Chapel Hill. Due to the apparent importance of the Public Safety and Homeland Security Bureau and the seniority of the official involved, the Committee staff believes these allegations should be further investigated and resolved. Normally, allegations of this kind and the relevant evidence should be referred to the FCC Inspector General for investigation. In view of the apparent lack of independence of the current IG, however, this matter should be referred to the IG from another agency.

LIST OF EXHIBITS

1. Memorandum to Dan Gonzalez, *November 27 Open Meeting, Commission Internal and Meeting Procedures*, Nov. 16, 2007.
2. Letter from Chairman Martin to Chairman John D. Dingell, undated (Dec. 2007).
3. Memorandum from Tom Chandler, *The Interstate TRS Fund and the compensation of TRS providers*, June 22, 2007.
4. E-mail from Thomas Chandler to Cathy Seidel (Chief, Consumer and Governmental Affairs Bureau), *Long winded e-mail on VRS cost recovery. Some thoughts to consider. Tom*, May 21, 2007.
5. E-mail from Thomas Chandler to Ian Dillner, *Cost recovery order*, Sept. 4, 2007.
6. Letter from KPMG LLP to FCC, April 10, 2008.
7. Letter to Dr. Kent R. Nilsson, Inspector General, from Terry L. Carnahan, KPMG, LLP, July 30, 2008.
8. E-mail from C. Bohigian to D. Shiman, *Outline for Report*, June 30, 2005.
9. E-mail from Sarah Whitesell to D. Shiman, *Key documents*, July 6, 2005.
10. E-mail from D. Shiman to C. Bohigian, *Thoughts on some issues*, July 8, 2005.
11. E-mail from C. Bohigian to D. Shiman, *Thoughts on some issues*, July 8, 2005.
12. E-mail from D. Shiman to W. Sharkey and S. Whitesell, *Pricing new consumer options*, July 22, 2005.
13. Letter from Michael C. Taliaferro, Managing Editor, Warren Communications News, Inc., to Commissioners Tate and McDowell (November 15, 2007).
14. Statement of Commissioner Robert M. McDowell, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, MB Docket No. 06-189 (Nov. 27, 2007).
15. E-mail from Commissioner McDowell to his personal staff, Nov. 11, 2007.
16. E-mail from Anthony Dale to Daniel Gonzalez, December 14, 2005.
17. Memorandum from Jeff Cohen to Jim Schlichting, *Dale Hatfield Report on E911*, May 11, 2006.

18. Letter from Chairman Martin to Rep. Mike Doyle, U.S. House of Representatives, Apr. 13, 2007, attachment: "Timeline and Specific Findings".
19. Memorandum, "*Routine Actions by the Enforcement Bureau Not Requiring Individual Approval by the Chairman's Office*," Mar. 24, 2005.
20. Memorandum, "*Clarity on Personnel Actions*," undated.
21. E-mail, "*No Contact With Other Bureaus*," May 18, 2007 (redacted).
22. E-mail, "*New Rule Regarding Work on Research and Papers*," Oct. 24, 2006 (redacted).

EXHIBIT 1

DRAFT

MEMORANDUM

To: Dan Gonzalez

From: Rick Chessen, Scott Bergmann, Amy Blankenship, John Hunter

Re: November 27 Open Meeting, Commission Internal and Meeting Procedures

Date: November 16, 2007

The four Commission offices are deeply concerned about the lack of adherence to Commission process surrounding adequate notice of Commission open meetings, substantive changes made to items scheduled for consideration at those meetings after those items have been circulated, and overall Commission procedures. This unraveling of process has been particularly egregious with regard to the November 27 open meeting. As a result of our collective concern, we seek several actions by the Chairman's Office.

First, the November 27 open meeting should be cancelled for the reasons set forth below. Second, general procedures governing open meetings and preparation and circulation of items for adoption at open meetings and on circulation set forth below should be adopted and followed.

November 27, 2007 Open Meeting

Cancel the meeting because of lack of 21 days' notice and interruption of the Thanksgiving holiday. This action is necessary for several reasons. First, initial notification to our offices was given on November 8, which was less than 21 days in advance of the proposed November 27 open meeting date. Second, several of the items listed for consideration contained issues that lacked a sufficient public comment period. Third, changes were made to the diversification of ownership item subsequent to circulation that materially changed its substance and thus further contributed to inadequate notice.

Overall Process Reform

Scheduling of Monthly Open Meetings

- Monthly meetings will be scheduled one year in advance, consistent with long-standing FCC precedent. The Chairman's Office will issue a schedule of specific dates to the other Commissioners' offices.
- Meetings will be held on the 3rd Thursday of every month, unless conflicts arise because of holidays, industry conferences or other widely-attended events. Alternative dates will be selected by consensus of all 5 Commissioners.
- An individual Commissioner may request a change in a monthly open meeting date, and another date may be selected but shall be changed only by consensus of all 5 Commissioners.

- Additional meetings for a stated purpose may be set upon request by the Chairman or any other Commissioner, if agreed upon by all 5 Commissioners.

Items for Open Meetings

- All items to be considered at an open meeting shall be circulated, or “white-copied,” to all 5 Commissioners’ offices no later than 21 days prior to the scheduled open meeting.
- Prior to the start of an open meeting, all Commissioners’ offices shall be given the opportunity to propose edits to any item that has been circulated for consideration at an open meeting. All edits shall be made on the official email chain for that item. In order to be accepted, an edit shall receive the concurrence of at least 3 Commissioners’ offices. Edits agreed upon on the chain by 3 or more Commissioners’ offices shall be incorporated in the written item. All accepted edits to an item shall be circulated in writing prior to the start of the open meeting with sufficient lead time for Commissioners’ offices to review final written materials.
- Upon request by a Commissioner and agreed to by at least 3 Commissioners, an item may be deferred for consideration to the next monthly open meeting.
- Upon the request of at least 3 Commissioners’ offices, Bureau staff shall be made available to draft and execute items as agreed to by the majority without delay. The Chairman’s Office shall promptly direct Bureau staffs to cooperate fully and expeditiously with the Commission majority.

Public Comment of Items

- Items which require public comment shall be made available to the public at least 30 days in advance, unless otherwise specified by the Communications Act or the Administrative Procedures Act.
- Any such item made available to the public shall be designated as a “PUBLIC NOTICE.”
- Any such item shall be provided to each Commissioner’s office at least 48 hours prior to publication. Any such item shall not be made available to the public if at least 3 Commissioners request that it not be released.

EXHIBIT 2



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

The Honorable John Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington D.C. 20515

Dear Chairman Dingell:

Thank you for your letter concerning our processes at the Federal Communications Commission. I agree that the Commission should conduct its affairs fairly, openly and transparently to serve the public interest. I appreciate the opportunity to provide an initial response to your questions.

Since I became Chairman, my approach has been to try to address concerns raised by my colleagues whenever possible including those raised a day before or even an hour before a scheduled Open Meeting. I recognize that at times this may result in a delay or in a less orderly process, but I believe it significant that over 95% of Commission items have been adopted by a bipartisan majority of Commissioners.

1) Will you commit to publishing the text of proposed rules sufficiently in advance of Commission meetings for both (i) the public to have a meaningful opportunity to comment and (ii) the Commissioners to have a meaningful opportunity to review such comments? If so, how?

The Administrative Procedures Act ("APA"), which is the law that governs the process when the Commission adopts new rules, requires that we describe in a notice to the public "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b)(3). The Commission complies with this requirement by publishing Notices of Proposed Rulemakings ("NPRM") that discuss the specific issues that the Commission intends to resolve and seeks comment on them. In response, members of the public then submit comments and reply comments to the Commission providing their views on the various issues discussed in the NPRMs. Commission staff then reviews this record and uses it to draft a detailed Order that the Commissioners will vote. The Order includes background information, a description of the comments, an explanation of the decisions the Commission is making, and the text of any rules.

The APA does not require that we publish the exact text of a proposed rule, and in

fact, it has not been standard practice to publish separately proposed rules prior to adoption of an Order. Recently, however, because of the unusually controversial nature of the media ownership proceeding, I took the extra step of publishing the actual text of the one rule I thought we should amend in advance of the upcoming Commission meeting on December 18.

2) Will you commit to providing your fellow Commissioners with all of the relevant data and analysis upon which a proposed order or rule is based? If so, how?

Yes, I already provide my fellow Commissioners all of the relevant data and analysis upon which a proposed order or rule is based. Proposed orders that Commissioners receive include background discussion, a detailed review of the record, and the rationale supporting our decisions regarding the implementation of any new rules or changes to existing rules.

The specific issue that may have prompted this question relates to our recent consideration of our annual Video Competition Report. This Report was circulated to my colleagues on October 11, 2007. It was considered for adoption at the November 27, 2007 Commission open meeting, almost 7 weeks later.

In 1998, the Cable industry argued that the Commission should eliminate its own collection of data because the data was already provided by Warren and Nielsen. The industry specifically noted that "Warren's TV Factbook and online database ... is relied upon by businesses and researchers for system specific information about the cable industry."¹

In the 2002 Video Competition Report, the Commission specifically noted the differences between data from Warren and Kagan, concluding that "these differences suggest that the Kagan data should be used with a good deal of caution and that they are most reliable as a trend indicator, rather than a precise estimate for only one year."² Although the Commission continued to cite Kagan data in later years, the Report continued to emphasize the limited nature of its use.³

In 2003, the first year the Commission addressed whether the cable industry had met the "70/70" test, the Commission relied solely on Warren Communications data to determine the test had *not* been met.⁴

In 2004, 2005, and 2006, the Commission's reports also discussed data from our Price Survey and Form 325 internal data collection. In 2006, several commenters submitted evidence that the 70/70 test had been met; others submitted evidence showing that it had not been met. Warren found that 67.8% households subscribing to cable systems with 36 or more channels. The Commission explicitly recognized then that

¹ NCTA Comments at 7, CS Docket 98-61 (filed June 30, 1998) ("NCTA Comments").

² 9th Annual Report at para. 18.

³ See 10th Annual Report at para. 21; 11th Annual Report at para. 19; 12th Annual Report at para. 30.

⁴ See 10th Annual Report at para. 22.

"[g]iven the circumstances and the fact that all available data sources are imprecise to some extent, it is possible that the second prong of the 70/70 benchmark has been met." Thus, last year after outlining all the data, the Commission put the public on notice that the 70/70 test might have already been met. Thus, everyone was on notice about this important issue.

In 2007, the Video Competition Report cited Warren's data that found that 71.4% of households passed by cable systems with 36 or more channels subscribed to those systems. This Report cites data as of 2006.

In considering our most recent report, I provided the Commissioners with the data I determined was most relevant and most accurate for the purpose of determining how many subscribers there were to cable systems with 36 or more channels. The proposed report relied on data from Warren Communications, the only outside data source that distinguished cable systems with more than 36 channels and the data that relied on the largest survey of existing cable systems. In addition, Warren collects its data directly from cable television operators or individual cable systems to create a large database of cable industry information.⁵ Warren states that it is the only research entity that directly surveys every cable system at least once every year, providing the most complete source of cable data.⁶ In fact, the cable systems represented in Warren's database serve 96% of all subscribers nationwide.⁷ I therefore believe that Warren is the most accurate and reliable source.

In the draft report that was circulated, I included an explanation as to why the Warren data was more reliable than the Kagan data. Specifically, footnote 94 stated "[w]e note that Kagan, unlike Warren, does not report data for cable systems with 36 or more channels and thus does not provide the precise data we need to perform the calculation specified by the statute. We also note that the Kagan estimate regarding the number of households passed by cable, 113,600,000 is greater than the U.S. Census Bureau estimate of 109,450,000 total households. As a result, we find the Warren data to be more reliable in this regard."

In addition, as I explained in response to a question from Ranking Member Barton prior to adoption of the Annual Report, (see attached) I did not include the Commission's Price Survey or Form 325 data in my proposal to the Commissioners because they are not as accurate as Warren. Specifically, these two sources represent smaller samples of the cable industry and therefore do not provide as reliable information regarding the number of subscribers to systems with more than 36 channels or number of homes passed by systems with more than 36 channels. The Commission currently sends questionnaires to only 781 cable systems for its Price Survey (representing only 10.2% of the total 7,634 systems in our database and collects Form 325 data from approximately 1,150 cable

⁵ See Letter from Michael Taliaferro, Managing Editor, Television & Cable Factbook, to Commissioners Tate and McDowell, Nov. 15, 2007.

⁶ *Id.*

⁷ See John Eggerton, McDowell, Tate Question 71.4% Cable Subscribership Figure, *Broadcasting & Cable*, Nov. 14, 2007.

systems (representing only 14.4% of the total 7,634 systems in our database). In contrast, Warren sends questionnaires to 7,090 cable systems, and states that it has data representing more than 96% of all cable subscribers.⁸ Indeed, as the National Cable Television Association argued, "Warren's TV Factbook and online database, not the Commission's Form 325 data, is relied upon by businesses and researchers for system specific information about the cable industry."⁹ Moreover, when one Commissioner asked for the most recent Price Survey data, it was provided to him within hours.

In retrospect, given the controversy, I should have included in the item a more detailed explanation of why I believed Warren data was more reliable than other sources we have cited in the past or that were submitted in the record.

3) Will you commit to giving your fellow Commissioners adequate time to review proposed orders and rules? Is so, how?

Yes. Today, Commission processes and decision-making time frames remain essentially the same as the general decision-making procedures established nearly ten years ago under Chairman William Kennard. These procedures were modeled on procedures outlined from the Commission's then General Counsel William Kennard during Reed Hundt's tenure as Chairman. During my tenure, I have endeavored to follow these same general procedures and time frames established by my predecessors in order to give Commissioners adequate time to review proposed orders and rules.

The full Commission considers proposed rules or rule changes through one of two methods. Commissioners either vote for proposed rules or rules changes under items that are "on circulation" or they vote for such items at the Commission's required monthly Open Meeting.

The vast majority of the FCC's rules are adopted "on circulation." Under this process, the Commissioners receive and vote electronically proposed orders which include background discussion, a detailed review of the record, and a thorough explanation of our decisions regarding the implementation of any new rules or changes to existing rules. Items on circulation remain in that status until 3 Commissioners vote electronically to approve proposed orders. If an item has been on circulation for at least 21 days, once a majority of Commissioners have voted to approve a circulate item, the remaining Commissioners have 10 days to register their votes or seek an extension beyond the 10 day voting period.

The other method that the Commission uses to adopt rules is to vote at the Commission's required monthly Open Meeting. Under the decision-making procedures of the last three Chairman (two Democratic, one Republican), Commissioners' offices receive items for their review at least three weeks before the open meeting. We have provided to the Commissioners a list of items that we are providing to them that day or that they already have that I would like the Commission to consider at the next open

⁸ *Id.*

⁹ NCTA Comments at 7.

meeting.

Under Commission practice, when an item designated for the meeting has been received by the Commissioners' offices at least three weeks before the meeting, all Commissioners' substantive edits should be provided to the originating Bureau/Office not later than close of business seven days before the meeting. During my tenure, I have not enforced this practice on my fellow Commissioners in order to provide them even more time to consider these items. Unfortunately, many of the delays we have experienced with respect to the starting time of Open meetings have resulted because Commissioners have waited until 24 or 48 hours before the designated start of the Commission meeting to provide input, and have continued to provide edits up to and past the time the meeting was scheduled to begin. While it might be more orderly to enforce the prior, I would be concerned that it would significantly reduce the opportunity to reach a compromise with my colleagues.

As of December 3rd, there were 150 items circulating, waiting for the Commissioners to vote. 136 items were circulating for more than 30 days. Three Commissioners had not yet voted 133 of them. 110 of them had been circulating for more than 90 days. Three Commissioners had yet to vote 107 of them. As of December 9th, there are 154 items circulating, waiting for the Commissioners to vote. 137 items have been circulating for more than 30 days. Three Commissioners have not yet voted 110 of them. 110 of them have been circulating for more than 90 days. Three Commissioners have not yet voted 84 of them. I follow the same practice in place since I was a staffer at the Commission when William Kennard was Chairman of identifying some of these items to be voted at the next meeting. Under the Commissions decision-making procedures, if a circulation item has not been adopted within 30 days, the Chairman may convert it to a meeting item and put it on the Sunshine notice for the next meeting. The practice going back to Chairman Kennard had been to give notice to the other Commissioners at least two weeks before the meeting of an intent to move a circulation item to a meeting. Instead, I have typically provided my colleagues with three weeks notice of my intent to move a circulation item to an Open meeting by including it in the initial list.

Finally, the GAO recently expressed concerns that not all parties are aware of the draft rules and proposals that have been circulated among the Commissioners awaiting a vote. In order to address this concern, last week we posted on our website all of the names of the 154 items that are currently before the Commissioners on circulation and the date the item was originally circulated. This list will be updated on the Commission's website on a weekly basis.

As of December 9th, the oldest item on circulation dates to March 7, 2005.

4) Will you commit to providing your fellow Commissioners and the public with adequate notice of Commission meetings? If so, how?

Yes. I will continue to provide Commissioners with three weeks notice of the upcoming

Open meeting and a list of items that we are providing them or that we have already placed on circulation that I plan to consider at the Open meeting. I would note that, in the past, some Chairmen have only provided Commissioners with 2 weeks notice of items already on circulation that they plan to consider at the open meeting. I have typically provided 3 full weeks and will continue to do so. In addition, as I explained, the Commission will on a weekly basis post to the Internet the names of items that I have put on circulation so that the public has full information regarding what proposals the Commissioners are considering.

5) Please describe the Commission's document retention policies, including policies relating to the retention of internal and external Commission correspondence, including e-mail. If these policies have changed since you became Chairman, please describe those changes, the date the changes were instituted, any staff education and oversight activities related to the changes, and the rationale behind the changes. Please also describe any changes you are contemplating to the Commission's policies regarding document retention.

For more than twenty years, the Commission has had a document retention policy responsive to the requirements established by the National Archives and Records Administration (NARA). This policy is memorialized in a Commission policy statement promulgated by the Commission's Office of Managing Director. I have attached a copy of the policy statement.

The Commission's directive requires all Bureau and Offices to retain, according to specified schedules, official items that describe or document the agency's organization, functions, policies, decisions, procedures or operations. "Official" refers to materials created or received by the agency in the conduct of its business and other materials that show how the agency transacted business.

The Commission updates its directives periodically. In March 2007, the Commission updated its previous document retention directive, but the Commission's 2007 document retention directive is substantially the same as the previous directive.

With respect to staff education and oversight activities, the Commission implemented an agency-wide employee training program on its document retention policies in 2007. As of this date, nearly all of the Commission's employees have successfully completed the training.

Sincerely,



Kevin J. Martin
Chairman

cc: The Honorable Joe Barton, Ranking Member
 Committee on Energy and Commerce

 The Honorable Bart Stupak, Chairman
 Subcommittee on Oversight and Investigations

 The Honorable Ed Whitefield, Ranking Member
 Subcommittee on Oversight and Investigations

 The Honorable Edward J. Markey, Chairman
 Subcommittee on Telecommunications and the Internet

 The Honorable Michael J. Copps, Commissioner
 Federal Communications Commission

 The Honorable Jonathan S. Adelstein, Commissioner
 Federal Communications Commission

 The Honorable Deborah Taylor Tate, Commissioner
 Federal Communications Commission

 The Honorable Robert M. McDowell, Commissioner
 Federal Communications Commission

EXHIBIT 3

MEMORANDUM

To: Cathy Seidel; Nicole McGinnis
From: Tom Chandler
Date: June 22, 2007
Re: The Interstate TRS Fund and the compensation of TRS providers

We have been asked to address steps that might be taken to address the rapid growth in the size of the Interstate TRS Fund and to ensure the integrity of the Fund, *i.e.*, that payments from the Fund are not overcompensating the providers in violation of our rules or being paid for illegitimate minutes that should not be reimbursed.

I. BACKGROUND

A. TRS – What Section 225 and the Regulations Require

1. The Americans with Disabilities Act of 1990 was directed at ensuring that persons with disabilities could have access to, and participate in, virtually all facets of society. To this end, Title IV the ADA requires entities offering telephone voice service to also offer TRS so that persons with hearing and speech disabilities could access the nation's telephone system to call voice telephone users. In other words, the obligation is on telephone companies to offer TRS. The statute also provides that the provision of TRS will largely be regulated at the state level, since most calls are intrastate and states (not the Commission) have jurisdiction over intrastate calls.

2. The statute envisions that consumers using TRS would pay for their "telephone" calls, like all other telephone users, but also provides that the costs necessitated by having a CA relay the call between parties could not be charged to the consumer. Instead, states would compensate providers of intrastate TRS services (in any manner they want; usually a surcharge on all consumers' telephone bills), and the newly created Interstate TRS Fund would compensate providers for the costs of interstate relay service. Of course, the providers would be the same, handling interstate and intrastate calls interchangeable as they come into the relay center – it was just a matter of whether the provider would bill the call to the state or the Fund for a particular call.

B. Compensation of TRS Providers

1. The Fund presently compensates providers of interstate traditional TRS, STS, and captioned telephone service, and providers of both intrastate and interstate VRS, IP Relay, and IP captioned telephone service (IP CTS) (there are presently six different forms of TRS). VRS and IP began to be widely offered in 2002 (IP CTS has yet to be offered). Although these are not "mandatory" services that must be provided by telephone companies, because of their popularity with consumers, and because all such calls are compensated from the Fund (which was to be a temporary arrangement, but has taken on an air of permanency), since the advent of these services the size of the Fund has risen from approximately \$70 million to \$460 million.

GR9-3563

Presently, approximately 73% of the Fund payments go to VRS providers (over \$30 million a month); 20% to IP Relay providers (nearly \$9 million a month); 3% to traditional TRS providers; 1% to captioned telephone service providers; and a negligible amount to STS providers.

2. Interstate telecommunication service providers contribute to the Fund based on a percentage of their revenue. These costs, in turn, are passed on to their customers. Therefore, as a practical matter, all consumers of interstate services contribute to the Fund. The Fund is also considered as part of the federal budget, and therefore is subject to OMB oversight, including the PART analysis (Performance Assessment Rating Tool), which was done for the first time in 2006 (the results are available on the Internet).

3. As indicated above, the size of the Fund has been driven largely by the compensation of VRS. Monthly VRS minutes continue to rapidly grow: June 2002 – 35,000; June 2003 – 211,259; June 2004 – 869,003; June 2005 – 2,136,657; June 2006 – 3,651,199; April 2007 – 4,844,915.

4. The compensation rates for VRS since 2002 (when the service was first widely offered) have been: 2001-2002 – \$9.614; 2002-2003 – \$17.04; 2003-2004 – \$7.751 (modified to \$8.854); 2004-2005 – \$7.293 (modified to \$7.569; 2005-2006 – \$6.6644; 2006-2007 – \$6.644. When the 2003-2004 rate (\$7.51) was adopted, the providers and consumers vehemently argued that the service would go on out business. The minutes noted above reflect that that has not been the case.

5. The rapid growth in VRS minutes began after the Commission adopted the compensation rate of \$17.04 (in a PN, with no discussion or analysis). As a result of that rate, companies that were not telephone companies sought to become VRS providers (generally, companies that offered interpreting services, so they already had a supply of interpreters who could become VRS CAs). The first two such companies were Hands On and Sorenson. The advent of having “stand-alone,” for profit, entrepreneurial companies offering service has created many of the regulatory challenges we face today, given that the ADA contemplated that relay services would be provided by telephone companies to allow persons with hearing and speech disabilities to access their service.

6. The regulations and numerous Commission orders make clear that providers are entitled to their actual reasonable costs of providing service (essentially their marginal costs, again because the service was intended to be offered by telephone companies to give persons with hearing and speech disabilities access to their service). The Commission has therefore repeatedly stated that providers are not entitled to a markup on costs, or profit, but only their reasonable costs of providing service in compliance with the rules and an 11.25% rate of return on capital investment (which is minimal, because relay is not a capital intensive service).

7. The compensation rates are set each June for the following July 1 to June 30 Fund year. Presently, the compensation rates are based on the providers' projected costs and minutes of use for a future two-year period. Beginning in 2003, the Commission began disallowing some submitted costs (including profit) as outside the scope of reasonable costs attributable to the provision of TRS in compliance with our rules.

8. In July 2006, the Commission released an NPRM seeking comment on new cost recovery methodologies for the various forms of TRS. These included the MARS plan for traditional TRS and STS and use of a true-up (principally for VRS). The NPRM also sought

GR9-3564

ment on the extent and nature of allowable costs in various cost categories (e.g., marketing and outreach, overhead, etc).

C. Recent Data on the Compensation of VRS Providers

1. The Fund presently compensates 11 VRS providers. Their respective share of the market varies widely. One provider provides approximately 82% of all VRS minutes. Three other providers each provide approximately 5% of all the VRS minutes. The remaining 7 providers account for the remaining 3% of all minutes. As a result, when a compensation rate is calculated based on all providers' projected costs and minutes, the resulting rate is very close to the rate of the provider with the dominant market share.

2. Based on data submitted by the providers (they are required to submit actual costs and minutes for prior years), we know that the dominant provider was overcompensated approximately \$80 million in calendar 2006, and \$57 million in calendar 2005 (included in the \$57 million is approximately \$40 million in stock options paid to the provider's employees). This compensation in excess of costs increases the Fund size. We also know that, with the same compensation rate, some of the smaller providers lost money.

D. Other Issues that Affect the Size and Integrity of the Fund

1. *Misuse of IP Relay.* We have been aware that non-deaf or non-hard-of-hearing persons use IP Relay – and the anonymity it provides the user – to make purchases from merchants using stolen credit cards. Most of these schemes appear to originate overseas. The IP Relay providers handle these calls like any other calls, even though they can generally detect when a call involves a fraudulent purchase. They are generally happy to do so since they get paid for the calls, but some providers have found that these calls demoralize the CAs and therefore they have authorized their CAs to terminate these calls.

2. The Commission released an NPRM on this issue in May 2006 seeking comment on ways to curtail this misuse. Consumer advocates are strongly opposed to permitting the CAs to terminate suspected fraudulent calls because it would require them to step out of their role as an invisible conduit. We do not have accurate numbers on the percent of IP Relay calls that are illegitimate. At one point we believed it might be 30-40% of all calls, but now it is likely lower than that (there are website chatrooms dedicated to CAs talking about the fraudulent calls they handle). Providers do take steps to block incoming calls from overseas. DRO staff drafted an order that would have required providers to ensure that the minutes they bill the Fund are for legitimate relay calls, and therefore would have permitted them to terminate calls they suspected, and reasonable determined, were likely fraudulent. OCM indicated that they did not want to take this approach.

3. *Submission of Illegitimate Minutes for Payment.* We have received anecdotal and other evidence that some providers use various schemes to boost the number of minutes they submit for payment. These schemes include providing tele-seminars via VRS, making VRS "test" calls while installing VRS equipment in consumers' homes, and encouraging employees to make VRS calls to rack up minutes.

II. DISCUSSION

1. The size of the Fund is not, in and of itself, relevant. If the compensation rates (or methodologies) are fair and reasonable, and the minutes the providers submit for payment are

GR9-3565

legitimate, then the Fund, regardless of its size, works to fulfill the Commission's statutory mandate requiring the availability of TRS and no extra cost to consumers when accessing the telephone system. The integrity of the Fund is really based on two factors: (1) are the providers being compensated for the reasonable costs in accordance with our rules, or are they being overcompensated; and (2) are the minutes submitted for compensation legitimate minutes. The record reflects that, overall, the Fund has made payments to some providers in excess of their costs (and therefore in violation of our rules), and that some minutes submitted for compensation may be not be legitimate. The first point has by far the most effect on the size of the Fund.

A. The Overpayment of Providers

1. The correct and efficient operation of the TRS program results in the compensation of service providers for their actual reasonable costs of providing service. They are not entitled to profit or a markup on expenses. If the providers are appropriately compensated (*i.e.*, not overcompensated), then most of the Fund issues are resolved. The issue, then, is how best to fairly and reasonably compensate the providers for their reasonable costs of providing service.

2. Analysis of this issue must recognize that several fundamental points are in tension: (1) Title IV creates a service that phone companies must offer, and they will be compensated for their costs of providing service so consumers won't have to pay the extra costs required to access the telephone system because they are deaf; so, we pay the providers what should be their marginal costs of providing this service; (2) we now have stand-alone, entrepreneurial, for profit companies offering VRS service on a national basis, with compensation from the Fund being virtually their entire source of income; and (3) we have allowed the service to be one in which consumers neither need to subscribe to, nor pay for (free equipment, free installation, free maintenance, free calls, no long distance charges, etc.).

3. This reality also creates tension between the Commission, on one hand, and the providers and the consumers: the compensation methodology and compensation rates for the providers are intended to give them their reasonable actual costs of providing service, but we and the providers will never agree on what those costs should be. They want compensation from the Fund to cover all facets of running an independent, for profit business – a business that has to keep growing and (in many cases) pay investors. We want to compensate only the costs of actually providing a specific service, mandated by statute, and circumscribed by the mandatory minimum standards. The consumers support the providers in getting higher rates because the consumers do not pay for the service and they believe that higher rates mean better service.

4. As noted above, the present methodology, along with the Commission's decision to continue the 2005-2006 rate for the 2006-2007 Fund year, has resulted in the overcompensation of the dominant provider by approximately \$80 million (in 2006 alone). The only way to avoid this problem is to ensure that the cost recovery methodology results in compensation (or rates) that accurately correlate to the providers' reasonable actual costs, as we define them consistent with the statute and the rules. That requires either more careful application of the current methodology, or the adopting of some other methodology.

5. With regard to the current methodology, there are several steps that can be taken, including:

- Work with the Fund administrator to review cost submissions of the providers to disclose areas of "unreasonable" cost claims, take appropriate steps to let

GR9-3566

providers know which costs are and are not reasonable, and disallow unreasonable or otherwise noncompensable costs. (We have not done this the past two years because the rate has not been set based on projected costs and minutes of use (for 2005-2006, we adopted the median rate of the providers; for 2006-2007 we continued the 2005-2006 rate)).

- Audit providers to ensure that: (1) minutes submitted for payment are legitimate, and (2) the costs they submit in setting rate are accurate and reasonable. Before this year, virtually no auditing of providers occurred. This year, the Inspector General has begun audits of all TRS providers. There are many reasons to perform regular audits. They endorse the accountability of the Commission for its oversight of the Fund. Audits disclose mistakes, assess procedures and permit their improvement. Audits also provide the best mechanism for detecting bad acts. With a program that has operated for more than a decade without auditing service providers, there is also a strong incentive for providers to inflate their cost estimates for purposes of setting the compensation rate.
- Relatedly, the Statement of Work in the procurement for the Fund administrator reflects the Commission's intent to improve its oversight function of the TRS Fund. Under the contract, audits of providers and sub-providers will be performed regularly. The Commission will have input to the audit design and will receive the audit findings. Issues of auditor independence will be minimized because the administrator will select the auditors, the Commission will have oversight of the development of the audit plans, and the fund will pay for the audits. These audits will be annual of all providers. Furthermore, the contract will define a precise and rigorous oversight of the administrator, including quality assurance provisions and penalties for failure to meet specified performance metrics.
- Collect additional information about the number of deaf and hard-of-hearing people in the United States and their utilization of the various TRS services. Presently, there is a lack of such information, which prevents the Commission from specifically assessing the program operations and from setting appropriate objectives for the program. It would be beneficial for the Commission – on its own or through a contract process – to conduct a study to determine these numbers (*e.g.*, how many ASL users there are in the country and what percentage use VRS). Without this data, it is difficult to determine, for example, how much more outreach is necessary (on top of the tens of millions of dollars already spent on VRS outreach).
- Use the TRS Advisory Council to more closely monitor and determine reasonable compensation rates. Unfortunately, however, because the Council is mostly made up of users and providers, it has generally simply advocated for higher rates and has been adversarial to the Commission and to the administrator. (DRO drafted an order abolishing the Council, but that idea was rejected by OCM).
- The PART analysis also suggests some steps that can be taken, including adopting performance measures, addressing the fraudulent use of the service, and entering into a more rigorous contract with the Fund administrator

GR9-3567

6. There are a number of other approaches to compensating VRS providers that do not involve simply adopting a rate based on projected costs and minutes. These options include using a true-up, or fund settlements on company-specific costs, which would ensure that providers are neither overpaid nor underpaid for providing service. We could also adopt tiered rates that would vary depending on the number of minutes offered.

B. Illegitimate Minutes

1. There are two ways to deter the compensation of illegitimate minutes: (1) find a way to stop providers from handling, or providers billing the Fund for, IP Relay calls made by persons to defraud merchants or illegal purposes (since these folks are not deaf, but are just using IP Relay as a conduit that gives them anonymity, these are not legitimate relay calls that should be paid by the Fund); (2) audit the minutes submitted by the providers to ensure that the minutes were actually calls by consumers seeking to use relay. In that regard, the most egregious abuse in reporting minutes (the Publix case) was discovered by looking for anomalies in trends of reported minutes and investigating. The better practice, however, would be to conduct regular audits of reported minutes.

GR9-3568

EXHIBIT 4

Thomas Chandler

From: Thomas Chandler
Sent: Monday, May 21, 2007 4:48 PM
To: Cathy Seidel
Cc: Jay Keithley; Andrew Multz; Gregory Hlibok
Subject: Long winded e-mail on VRS cost recovery. Some thoughts to consider. Tom

I have a few more thoughts on VRS compensation rates. I think we have to be honest with ourselves about the issues we are facing.

In short, I believe that we are trying to do the impossible. We are endlessly frustrated in trying to come up with a viable compensation scheme, but in truth there is simply no way to reconcile the following reality: (1) we interpret (correctly, in my view) that Title IV creates a service that phone companies must offer, and they will be compensated for their costs of providing service so consumers won't have to pay the extra costs required to access the telephone system because they are deaf; so, we pay the providers what should really be their marginal costs of providing this service; *but* (2) we now have stand-alone, entrepreneurial, for profit companies offering VRS service on a national basis, with compensation from the Fund being virtually their entire source of income.

We are also trying to do the impossible because of this additional reality: we have allowed the service to be one in which consumers neither need to subscribe to, nor pay for. What other service is like that??? Hearing folks sign up for wireline and wireless telephone service, and pay for the services and features they want. Everyone has to contract with a company to get cable or satellite TV, Internet service, satellite radio, and, for that matter, electricity, water, gas, etc. Why, of all the services used in this country, is TRS (and particularly VRS) free to consumers with no need to even sign up to get the service? Nothing else works like that, and nothing in Title IV or its legislative history suggests that is what Congress intended. We have lost our moorings, with terrible and frustrating consequences (not the least of which is the size of the Fund and the enormous overcompensation of some providers).

With this reality, we are asked to come up with a compensation methodology and compensation rates for the providers to give them their *reasonable actual costs* of providing service. But we and the providers will *never be able to agree* on what those costs should be. They need compensation from the Fund to cover all facets of running an independent, for profit business – a business that has to keep growing and develop new products, and that (in many cases) has to pay investors. We want to compensate only the costs of actually providing a specific service, mandated by statute, and circumscribed by the mandatory minimum standards. We say – again correctly, in my view – that this is all the providers are entitled to receive from the Fund. But the providers seize of some of the elastic language in the statute and regs.

For example, the providers defend their position saying: the statute requires adoption of new technologies; the statute requires functional equivalency, and with new technologies there are more and more services and features we want to offer; we must be compensated for R&D to meet waived standards and ensure functional equivalency, the regulations require outreach so we have to spend money to do that, etc. They also say that we say we are pro-competition, so we can't let the small providers go out of business, even though their costs may be higher. Some of that may be true, but it does not justify how we are currently going about compensating the providers (*i.e.*, for everything and more).

A few other factors exacerbate the problem. First, consumers have been led to think of this service as an entitlement – as noted above, they bear no costs with respect to the service (other than having a broadband connection, with they can also use for Internet access), so they are happy to support the providers in offering more services and features, with compensation coming from the Fund. Second, we have allowed one provider – with extraordinarily aggressive (and often illegal) marketing practices – to dominate the market (presently, approximately an 82% market share). This imbalanced market share also makes it very difficult to set rates using a rate based on average costs doesn't work in these circumstances; but that, of course, begs the question – in setting rates, just what are trying to accomplish? Fair compensation based on actual reasonable costs (as we define them)? Keep everyone in business? Compensate everyone at the same rate?

We will always be in an adversarial relationship with the providers as long as they are entrepreneurial, for profit companies that look to the Fund for their sole source of income. They have no incentive but to expand the kinds and amounts of costs that recoverable from the Fund as they expand their business and seek revenue to pay their investors (the private equity companies that now own some of the largest providers). They view their compensable costs as those costs that any business must incur to stay in business, compete with similar providers, and make money.

Endlessly arguing about what costs are compensable – when we and the providers have drastically different views on just what this service is supposed to be – will never get us anywhere. The providers will challenge again and again anything we try to do that limits the compensation they want to run their competitive businesses. And, frankly, we probably don't even know the nature and existence of the some of their costs that are buried in their cost submissions.

The only solution is adopting an entirely new approach, and there are only two choices: (1) bid the service out as a federal financed service; or (2) require TRS to be a subscription service, like every other telecom service, and have the Fund simply compensate the marginal cost of call from a deaf person to a hearing person that results from having to have a CA relay the call back and forth. Apart from those costs, providers would compete to sign up customers, and would charge customers for equipment, installation, maintenance, extra call features, long distance, etc. in the same way that voice telephone users obtain and pay for service.

The second approach could be done consistent with the statute, because the statute states that TRS users cannot be required to pay rates “greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination.” This clearly suggests that Congress envisioned that consumers would pay *something* to make a TRS call. The first approach would likely require Congressional action.

I think it is possible we could get the providers to work with us to accomplish the second approach, but only if we have the backbone to make it clear that we are not going to keep compensating them at the ridiculously high rates that we have in the past, and therefore the only way they can keep getting additional revenues in the future is the way all other companies do it – they offer services and features that consumers are willing to pay for. Here, that would be a particular type of TRS – VRS – that has attendant benefits (free video to video calls with the same equipment) and features that consumers can choose to pay for or not. We need to convince the VRS providers that the days of endlessly streams of money from Fund, covering every facet of their business (and more), is over, and that a new system is going to put in place. They will have ample opportunity to make profit under the new system – charge for additional services and equipment, better and fancier equipment, etc. In the long run, this approach will solve a lot of problems. I don't see an alternative that is consistent with the statute and that will actually put this service on a viable footing.

Happy, of course, to hear any thoughts on this. Tom

*** Non-Public: For Internal Use Only ***

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EXHIBIT 5

Thomas Chandler

From: Thomas Chandler
Sent: Tuesday, September 04, 2007 5:59 PM
To: Ian Dillner
Subject: cost recovery order

Ian – I see that Nikki sent you the revised order last week with the tiered rates for VRS. I would love to talk to you about this offline; otherwise, I guess this e-mail reflects my last gasp on this subject. Does the Chairman recognize that these rates perpetuate the enormous (\$100 million a year) windfall for Sorenson, at the expense of the ratepayers. Does he realize that Sorenson's own filing shows that its actual cost of providing VRS in calendar 2006 was in the low \$4.00 range, so that the present \$6.64 rate was more than 50% higher than Sorenson's actual costs? And NECA's public May 1, 2007 filing confirms this – noting that the average 2006 actual cost of providing VRS for all providers was \$4.55 (and Sorenson has over 80% of the market). Does he realize that Senator Hatch's and Wiley Rein's connection to Sorenson (or the private equity company that now owns Sorenson) makes all of this look sort of bad?

We all know that Sorenson (and Hands On and CSDVRS) have been purchased by private equity firms, and thus the whole point is to generate a substantial rate of return for the investors. We also know, for example, that Hands On sells its accounts receivables to Wells Fargo, so it gets only 88% of the present \$6.64 rate – about \$5.84. Why would we knowingly compensate them in the mid \$6.00 range when they are living off of \$5.84, and still presumably making enough money to be attractive to private equity investors?

I hate to say it, but the whole TRS (VRS) compensation regime has become a classic fleecing of America. Shouldn't we be more worried about this exposure than simply making the providers happy by giving them everything that they want (they now come in and just tell us the rates they want, and it seems that is what we do). We know that OMB has concerns about the Fund, and we also know that the IG is looking into some of the providers. I predict that the results of that will not make the providers look good, which in turn will not make us look good. Also, when I started in this job five years ago, the VRS rate was \$17.00. When we battled to get the rate down to the \$7.00 range (and a battle it was), the providers and consumers were outraged, held a sit-in outside the CGB's chief's office, and screamed that that rate would put them out of business. What really happened? Five years later the VRS world flourishes, and we know they are making a fortune off \$6.64 a minute and that a rate reflecting actual reasonable costs (as required by our regs) would be in the mid -\$4.00 range.

I am all for the tiered rate approach, and even locking in the rates for three years. But, honestly, the current rates (\$6.30, \$6.50, and \$6.77) are just absurd given the facts as we know them and as reflected in NECA's filing, and the justification for them in the order (that I just made up, per the directions I received) is completely at odds with the rest of the order that addresses permissible costs in certain categories and the history of our concern over high rates. I originally proposed tiered rates of \$4.76, \$5.64, and \$6.52. Maybe those rates would be too much of a shock (though they are still over-generous). But how about something like \$6.14 (adjusted provider costs), \$5.75 (close to what Hands On already gets), and \$5.00 (which would still give Sorenson a windfall of \$30-\$40 million – they do about 4 million minutes a month, so figure 50 million minutes a year, overcompensating them by even 50 cents a minute would result in a \$15-20 million gain). Of course, we could do the true-up approach (that Michelle Carey originally suggested), although admittedly that would create a lot of annual administrative work.

These are just my views, but they are informed by the facts and experience. Also, I have a selfish interest in this. I don't want to be hung out to dry so that in future years, when the public learns about what has gone on, it is said that all that happened on Chandler's watch.

Finally, I will add that the consumer groups, wonderful folks though they are, and rightfully deserving of high quality relay services, have really made a mistake hitching themselves to the providers. Their concern should not be the rates, but rather whether the services are available and provided consistent with our rules. But now most of the leading consumer advocates work for the providers. They run the risk that if/when someone ever appeals one of our orders and the D.C. Circuit gets a hold of what we are doing, much of what they have gained may be lost, as surely the present way relay is offered was never what Congress intended (but that is another story)

There is much more that can be said, on this topic and others, but I have overstayed my welcome already.

GR9-3529

9/4/2007

Again, I simply hope that some of these issues and concerns will be considered before the Commission adopts an order that is not only (in my view) completely unsupportable, but also really rips off the ratepayers to enrich the providers. At bottom, that really isn't the right thing to do.

Tom

GR9-3530

9/4/2007

EXHIBIT 6



KPMG LLP
2001 M Street, NW
Washington, DC 20036

Sorenson Video Relay Services (VRS)

Telecommunications Relay Service (TRS) Fund

Federal Communications Commission:

KPMG LLP (KPMG) was engaged by the Federal Communications Commission Office of Inspector General to conduct a performance audit of the telecommunications relay services provided by Sorenson Video Relay Services (Sorenson). Sorenson management was responsible for certifying and submitting Monthly Reports of Relay Service Minutes (Monthly Report) and a Relay Services Data Request (RSDR) in accordance with the Federal Communications Commission's 47 C.F.R. Part § 64.601 through 64.605 and related orders. Our responsibility was to review the supporting documentation and records for the Monthly Reports and the RSDR to evaluate: (1) if those submissions were consistent with applicable laws and regulations and (2) whether the supporting documentation reasonably supported the costs reported in those submissions to warrant reimbursement with Telecommunications Relay Services (TRS) funds for calendar years 2004, 2005, and 2006.

Except as described in the following paragraph, our performance audit was performed in accordance with *Government Auditing Standards*, issued by the Comptroller of the United States.

Sorenson provided us with the appropriate minutes information to evaluate the Monthly Report. However, Sorenson did not permit us access to their staff and the relevant systems to document and test the controls associated with accumulating and reporting the minutes. Furthermore, Sorenson did not provide us with a reconciliation of the audited financial statements for 2004, 2005, and 2006 to the submitted RSDR costs (filed for calendar years 2004, 2005, and 2006). Also, Sorenson did not provide us with unredacted audited financial statements for 2004, 2005, and 2006. Without access to the staff and systems to assess the controls and the reconciliation and unredacted audited financial statements for 2004, 2005, and 2006, we did not have the information needed to evaluate both the Monthly Report and the submitted RSDR costs to conduct a performance audit. Accordingly, it was not practical to complete our audit procedures to determine: (1) if the RSDR and Monthly Report submissions were consistent with applicable laws and regulations; or (2) whether the supporting documentation reasonably supported the costs reported in those submissions to warrant reimbursement with TRS funds for calendar years 2004, 2005, and 2006.

Due to the limitation on the scope of our work as a result of the matters described in the third paragraph, we are unable to complete our performance audit and can not conclude with respect to whether the RSDR and Monthly Report submissions by Sorenson were (1) consistent with applicable laws and regulations; or (2) whether Sorenson's supporting documentation reasonably supported the costs reported in those submissions to warrant reimbursement with TRS funds for calendar years 2004, 2005, and 2006.

KPMG LLP

April 10, 2008

EXHIBIT 7



KPMG LLP
2001 M Street, NW
Washington, DC 20036

July 30, 2008

Dr. Kent R. Nilsson, Inspector General
Federal Communications Commission
Office of the Inspector General
445 12th Street SW
Room 2-C762
Washington, DC 20554

Dr. Nilsson:

The Federal Communications Commission (FCC) Office of Inspector General (OIG) engaged us to conduct performance audits on seven Telecommunications Relay Service (TRS) providers to determine whether the Relay Service Data Requests (RSDR) and the Monthly Reports of Relay Service Minutes for the funding years 2004, 2005, and 2006 that were certified and submitted by TRS Providers are (i) consistent with applicable laws and regulations and (ii) supported by sufficient documentation to warrant reimbursement with TRS funds.

The seven provider audits were conducted as performance audits in accordance with 2007 Revision of Government Auditing Standards issued by the Comptroller General of the United States. Those standards require that we plan and perform the audits to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

KPMG completed our performance audits of seven of the TRS providers that represented over 15% of the TRS payments made during the calendar year of 2006. This overall capping letter is intended to inform FCC management of the pervasive issues that came to our attention during the performance audits specifically related to (1) the lack of adequate supporting documentation for the TRS costs reported by the providers on the RSDR and (2) the incorrect or unallowable minutes claimed by the providers in the Monthly Reports of Relay Service Minutes.



Background

TRS is mandated by Title IV of the Americans with Disabilities Act of 1990¹ and allows people who are deaf, hard of hearing, or have speech disabilities to communicate by telephone with a person without such a disability. Implementing regulations for TRS are provided in Part 47 of the Code of Federal Regulations.² There are five types of TRS services: Traditional TRS, Speech-to-Speech, Captioned Telephone Video Carry Over, Internet Protocol Relay, and Video Relay Service. For most forms of TRS, these centers are staffed by specially trained communications assistants (CAs) who relay conversations between persons using various types of assistive communication devices and persons using a standard telephone.

Persons with a qualifying disability receive TRS free of charge. The cost of providing TRS on an intrastate basis is paid by the respective states whereas the cost of interstate TRS is paid for by the TRS Fund under the auspices of the FCC on a minute of use basis. Reimbursement is made at rates established annually by the FCC after a data collection from the providers facilitated by National Exchange Carrier Association (NECA). The TRS Fund receives its funding from user fees collected from the approximately 2,800 common carriers providing telephone voice transmission services. This collection is administered by NECA.

The TRS Fund increased dramatically in recent years. Founded in 1993, the fund's annual allotment for disbursements was initially \$30.8 million. By 1999, disbursements increased to \$38 million in 1999. With the significant growth of the TRS Fund, there has been an increased number of certified VRS and IP providers, and growth in the disbursements being made. During the next three years disbursements began a period of rapid growth, increasing to \$64 million by 2002. The TRS Fund has increased approximately 50-80% each year since then to over \$440 million in disbursements for the 2007 funding year.

¹ Public Law No. 101-336, § 401, 104 Stat. 327, 336-69 (1990), adding section 225 to the Communications Act of 1934; see 47 U.S.C. § 225.

² 47 C.F.R. Part 64, Section 601(14)



I. Overall Results

During our examinations of the TRS Providers, we identified exceptions to the specified FCC Rules and Orders, and the RSDR and Monthly Report of Relay Service Minutes forms. The following paragraphs provide a brief overview of the most common examination findings.

a. Lack of Supporting Documentation

We found several instances where the supporting documentation was not readily available or maintained for indirect cost allocations, travel costs, sponsorship, and research and development. As a result, we could not validate the costs reported on the RSDRs. In some instances, the providers claimed travel costs, sponsorship costs and research and development costs, but could not provide supporting documentation to demonstrate that the costs were appropriate to be submitted as TRS costs. In some instances, the TRS providers had to obtain copies of the documentation from other sources. In other instances, estimated costs were used instead of the actual costs on the RSDRs. We also found that some providers did not have a methodology to allocate indirect costs, and could not reconcile the costs claimed on the RSDR to their accounting records. Without the documentation from the providers' accounting records to support the actual cost data for the RSDR, the costs reported on the RSDR could not be relied upon.

According to CFR Part 64.604, TRS providers shall provide the administrator with accurate data, both historical and projected, including total TRS operating expenses and total TRS minutes of use data, necessary to determine TRS fund revenue requirements and payments as part of the mandatory minimum standards for providing TRS services.³

NECA's RSDR Instructions, required TRS providers to issue a Cost Allocation Manual or equivalent guidance that describes the underlying basis for all cost allocations.⁴ Costs must be allocated between TRS and Non-TRS services and the allocation must be described.⁵

Until funding year 2008, the RSDR costs were used as a basis for developing the rates to be used in reimbursing the providers for the minutes of service provided under the TRS program. Beginning in funding year 2008, the FCC set the rates for a three year period, subject to adjustment. However, even the present rates set for three years were developed based upon the information provided from the RSDR's from the various providers and the costs reported could not be relied upon as accurate.

³ 47 C.F.R. Section 64.604 (c)(6)(iii)(C) See previous footnote for full criteria. (EF200.13)

⁴ NECA Relay Service Data Request Instructions (EF200.14)

⁵ FCC Red 04-137, paragraph 182 footnote 520 (EF200.3)



b. Monthly Reports of Relay Service Minutes Are Not Substantiated

The Monthly Reports of Relay Service Minutes filed monthly with NECA by the TRS providers included duplicate minutes in some instances and unallowable minutes in other cases. Some of the TRS providers did not have processes and/or controls in place to support the minutes claimed for reimbursement. As a result, the TRS providers could not provide reasonable support for the minutes claimed for reimbursement on their Monthly Report of Relay Service Minutes filed with NECA and some of the providers were paid for duplicate or unallowable minutes.

The following is the criteria associated with the unsubstantiated reports:

-- According to FCC DA 05-141, under Improper Handling of TRS calls, released January 26, 2005, VRS is to be used only when a person with a hearing disability, who absent such disability would make a voice telephone call, desires to make a call to a person without such a disability through the telephone system (or if, in the reverse situation, the hearing person desires to make such a call to a person with a hearing disability).⁶

-- FCC Order 07-186 states that costs attributable to relay hardware and software used by the consumer, including installation, maintenance, and testing are not reimbursable from the TRS Fund. The order further states that reimbursable expenses do not include expenses for the equipment itself, equipment distribution, or installation of the equipment or necessary software.⁷ Minutes associated with the remote installation of video phones are a cost of installation and could not be submitted to NECA for reimbursement from the TRS Fund.

i. TRS Provider was paid for duplicated Minutes

VRS service line, which allowed callers to call multiple parties, within the same VRS call session. During a conference call, the call should have been recorded as a single call. However, the provider's conferencing feature caused a duplication of call records which resulted in one VRS billable call being recorded as multiple call records. The TRS Provider was overpaid by NECA.

⁶ FCC DA 05-141, page 3, Improper Handling of TRS Calls (EF200.1)

⁷ FCC Order 07-186 Paragraph 82



ii. TRS Providers Submitted Minutes for Internal Testing Calls on Monthly Minute Submissions to NECA.

The TRS Providers claimed the minutes for quality assurance and test calls for VRS as reimbursable by the TRS Fund. Traditional TRS contracts with states require quality assurance test calls and allow for reimbursement of these calls within the states' programs. Based on that process, TRS Providers adopted the same quality assurance process for VRS. The Quality Assurance calls are made during daily operating hours and the test call process includes checking the normal VRS call traffic to ensure that customers are not inconvenienced by the calls and the quality assurance tests do not interfere with the regular VRS traffic. However, the TRS program does not allow reimbursement of quality assurance calls.

Various TRS Providers informed us that in preparing the information for the audit that they had identified certain months with testing minutes, which were reported inadvertently. Test calls initiated by TRS Providers are not subject to reimbursement from the TRS Fund. The purpose of these calls is to assess the technical system skills of VIs by testing the amount of time that it takes to answer, set-up, and sign-off a call. These calls were made by internal staff of the various TRS Providers to another VI in same location. Therefore, these minutes are not reimbursable by the TRS Fund.

iii. TRS Provider Inappropriately submitted VRS conversation minutes associated with the installation of VRS phones to the TRS Fund.

A TRS Provider included billings for technical support and customer service calls associated with the installation of the video phone. According to the VRS Management, the video phone had user-installation capabilities, so physical installation by the provider personnel was not needed. However, the customers who received the video phone for the first time often called the TRS Provider's Technical Support or Customer Service in order to set up the video phone correctly.

We determined through testing of call detail records provided by the TRS Provider that the technical calls were transferred to the manufacturer of the Video Phone, and inappropriately billed to the TRS Fund. The TRS provider's management informed us that technical support VRS minutes, most of which are the installation calls, were not removed from the call detail, and were claimed on the Monthly Report of Relay Service Minutes.

TRS Provider's reporting system extracted VRS call records from a server which documented each call made on the TRS Provider's server. These call



records were separated by call queues, which reported normal VRS call traffic, testing calls, and training for the VRS call system. The TRS Provider's management then sorted the call records to separate the billable calls from the non-billable calls. We discovered through call detail analysis that TRS Provider' included technical support and installation minutes in a billable VRS call queue, and allowed such minutes to be included in calculating the total conversation minutes per month. These minutes were not billable to the TRS fund.



II. OBSERVATIONS AND OPPORTUNITIES FOR IMPROVEMENT

- FCC and/or NECA TRS program management could develop and implement policies and procedures to more specifically define the documentation requirements for the TRS program expenses incurred by providers.

- NECA TRS Administration could perform more invasive testing and auditing of providers call detail in order to ensure that duplicated minutes are not reported and reimbursed by the TRS Fund.

- FCC and/or NECA TRS program management could more specifically define the rules related to the unallowable minutes specifically related to calls for quality assurance, testing and installation.

- FCC TRS program management could require NECA to develop a cyclical program to perform audits of the providers supporting documentation for costs reported on the RSDR and the call minutes claimed.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Terry L. Carnahan', is written over the typed name.

Terry L. Carnahan

EXHIBIT 8

Daniel Shiman

From: Catherine Bohigian
Sent: Thursday, June 30, 2005 6:51 PM
To: Daniel Shiman
Cc: Heather Dixon
Subject: RE: Outline for report

Thanks, Daniel. The outline looks fine with a few tweaks. Keep in mind that this IS about mandatory a la carte, not voluntary, because we are critiquing the first report, which assumed mandatory. If anyone wanted to do a la carte, they'd be doing so now. Since no one is, we're only talking about mandatory. So 2nd section should just be criticizing the reports conclusions that (mandatory) a la carte would be bad for consumers. The 3rd section should be exploring at least 2 options the first report didn't consider: a digital theme tier, and, for lack of a catchy name right now, "limited a la carte" where a consumer picks (I'm making up numbers here - use whatever works) 30 of these 40 channels for \$25, or 50 of these 60 channels for \$40. (These would, of course, also be mandatory. No reason to explore voluntary)

Finally, while the document is likely to be a report to congress, don't worry now about what it is called or whom it's for. Let's just get the substance right for now.

Leslie starts in August - I assume you'll have a draft before then. I asked the Chairman whether it would be appropriate to call her to talk about her comments, and he said no. So we'll have to make do with what we have from her.

Thanks!

*** Non-Public: For Internal Use Only ***

-----Original Message-----

From: Daniel Shiman
Sent: Thursday, June 30, 2005 4:00 PM
To: Catherine Bohigian
Subject: Outline for report

Catherine,

You asked in our meeting for an outline. Attached is a tentative outline of the report. I used the structure of the Media Bureau draft as starting point. Let me know if you want any changes.

With my division chief's approval, I have recruited two people from my division to work on this, an economist who is familiar with the details of the Booz Allen report, and someone who is good at proofreading, to review and edit this report.

I have some questions as well:

1. What is this document to be called, and how will it be issued? Is it a letter to Congress (like the original report), or a Commission report, or a staff report, or a working paper from me?
2. When does Leslie Marx arrive, and should I consult her? I found her comments to be very useful.
3. Can I presume that we are not interested in mandatory a la carte? The original report focussed on the difficulties with adopting a mandatory a la carte regime (which prohibits bundling). Some of the

arguments in that report are correct as they apply to mandatory a la carte, so I was considering emphasizing how voluntary a la carte and themed tiers avoids much of the harms of mandatory a la carte (since consumers can still buy the big bundle if they choose), while providing significant benefits to consumers who don't want the bundle.

BTW, I am working at home today, since I usually telecommute on Thursdays. I will be in my office tomorrow, and working on this over the weekend, probably at home.

Daniel Shiman

office: 418-7153

home: 301-803-7038

EXHIBIT 9

Daniel Shiman

From: Sarah Whitesell
Sent: Wednesday, July 06, 2005 5:13 PM
To: Daniel Shiman
Subject: RE: Key documents

Thank *you!* Thanks for the download today. My notes say that the first part of the document is to be a rebuttal to the previous report, arguing that it was based on failed assumptions and a failure to consider other issues, which, if considered, could lead one to conclude that _____ could be in the consumer's best interest (not sure what goes in that blank). The second part is to criticize the initial report for failing to consider the idea of a digital themed tier which would be in the consumer's best interest. She said a themed tier is just a matter of marketing. Let me see what else I can find out and I'll report back. I can't be sure AT ALL that this is precisely what she wants the report to say, but this was her initial summary.

*** Non-Public: For Internal Use Only ***

-----Original Message-----

From: Daniel Shiman
Sent: Wednesday, July 06, 2005 4:06 PM
To: Sarah Whitesell
Subject: Key documents

Sarah,

Attached are the electronic versions of some of the documents I gave you (Outline, Booz Allen report, article, MB/Johnson supplemental report, Duvall report). I don't have electronic copies of the 2 short Media Bureau evaluations of the assumptions of the original report, or the new chief economist's letter, for which you have paper copies. I will send the pdf for the full report separately, and hope our email system delivers it (it is a 9 megabyte file). Thanks for your help on this project!

Daniel

<< File: Outline of new report.doc >> << File: Booz_Allen_a_la_Carte_Report.pdf >> << File: Billing World article Cable%20A%20La%20Carte%209-04.pdf >> << File: SupplementalALaCarte_Draft_20050624final.doc >> << File: final copy for Jerry 05.26.05.doc >>

*** Non-Public: For Internal Use Only ***

EXHIBIT 10

Daniel Shiman

From: Daniel Shiman
Sent: Friday, July 08, 2005 4:16 PM
To: Catherine Bohigian
Cc: Heather Dixon; Sarah Whitesell; Donna Gregg
Subject: RE: Thoughts on some issues

My comment here was addressing the fact that bundling is better able to get revenues from consumers, but it came across as more pessimistic about a la carte than does my draft report.

In my report I have a variant of the point that you make, that under a la carte prices could be lower for some consumers because:

- 1) some consumers only watch the most popular networks, whose revenues may actually rise under a la carte because of an increase in viewership, and therefore will not need to charge high prices;
- 2) some consumers who only watch a few channels will find their total bill to be less than the bundle price;
- 3) bundle prices may be inflated above cost, since bundling enables MVPDs to better extract consumer surplus than does a la carte pricing, and therefore a la carte pricing could force prices down.

I treat these as flaws in the original report, which did not analyze these possibilities, and not as definite outcomes.

Overall, I think pure a la carte would likely raise most cable bills, with fewer channels delivered. I am much more optimistic about the impact of mixed bundling, which allows MVPDs to continue offering bundles at a good price if consumers want it, and of themed tiers and limited a la carte (i.e., flexible small bundles).

Daniel

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-----Original Message-----

From: Catherine Bohigian
Sent: Friday, July 08, 2005 3:59 PM
To: Daniel Shiman
Cc: Heather Dixon; Sarah Whitesell; Donna Gregg
Subject: RE: Thoughts on some issues

Daniel, I'm concerned about point 3. Regardless of what the first report lacks or assumes incorrectly, the conclusion of this report is supposed to be that a la carte could be cheaper for consumers. While the cable operator will need to charge more for each network, prices will vary considerably. The price will not be much higher than the current price for popular networks (those most will select under the a la carte model), since there is predicted to be something like 80% overlap of consumer choice. So the most widely subscribed to channels will see only a small drop in subscribership. Consumers who select only those channels are likely to see a cost savings because they typically will now be paying for only 13 channels, not 50. Channels with narrow appeal will see a sharp rise in the price they must get, and consumers who want several of those could see a cost increase, but (according to research and almost by definition) those are not the majority of consumers.

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-----Original Message-----

From: Daniel Shiman
Sent: Friday, July 08, 2005 2:20 PM
To: Catherine Bohigian
Cc: Heather Dixon; Sarah Whitesell; Donna Gregg
Subject: Thoughts on some issues

Catherine,

To let you know what is going into the draft, here are my thoughts on some key issues you have mentioned:

1. **Public good:** The report is wrong, MVPD programming does not meet the definition of a public good. A good has to have two properties to be a public good: (1) non-rivalrous consumption (so additional people can consume it at no cost); (2) non-excludability (so the producer can't prevent anyone from consuming it). Broadcast TV meets the definition, but

cable TV does not, because cable providers can exclude people from their service, and therefore have the ability to charge enough to cover their costs.

2. Cross-subsidy: Again, the report is wrong, there is no cross-subsidy involved with bundling most of the time. The explanation is complicated, however. When bundling is used to generate enough revenues to just pay the fixed costs of the networks, economic theory shows that consumers are, in effect, contributing different amounts to cover those fixed costs. Thus if I value a network highly, and you value it just a little, with bundling we are effectively contributing to the network according to how much we value it (so my contribution is much larger than yours). If you don't watch it at all, then you are not contributing to it at all.

This is because MVPDs only want to include networks which add enough to the bundle revenue to cover their cost. The MVPD adds a network to its bundle with the expectation that the network will allow the MVPD to either raise its bundle price (because many consumers find it more valuable), or increase the number of subscribers (because a certain group likes the network enough to buy the bundle). Thus the additional bundle revenue depends on how much each consumer values that network. There is no reason for an MVPD to add a network to the bundle that many consumers don't watch, unless other consumers like it a lot.

3. Pricing of networks under a la carte: Because under pure a la carte the MVPDs lose the ability to price discriminate (to effectively get revenue from each consumer for each network according to how much that consumer likes the network), they will get less revenue for each network. A la carte pricing requires that MVPDs set a single price for each network, which gets less revenue from (a) people who value it much more than the price, but only have to pay the fixed price; and (b) people who like it less than the price, and thus don't buy it. Prices are therefore likely to be higher under a la carte, and viewership for smaller networks will be lower as people decline to purchase them. The larger viewership for large networks will help them somewhat, but this is offset by the weaker ability of a single price to generate revenues from the customer base.

I am happy to answer any questions you might have.

While there are undeniable benefits to using bundling, my draft points out it has many failings, and there are many circumstances under which consumers are better off with a la carte. It also appears that mixed bundling combines the advantages of both. I am going to send out today the draft of the first half of my report, concerning the problems with the first report. It is about 30 pages long. I will work on the the second half, evaluating the alternatives, over the next week. I expect it to be much shorter.

Daniel

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EXHIBIT 11

Daniel Shiman

From: Catherine Bohigian
Sent: Friday, July 08, 2005 4:25 PM
To: Daniel Shiman
Cc: ~~Heather Dixon; Sarah Whitesell; Donna Gregg~~
Subject: RE: Thoughts on some issues

OK, please work with Sarah on the consequences/conclusions. Thanks for all the hard work.

*** Non-Public: For Internal Use Only ***

-----Original Message-----

From: Daniel Shiman
Sent: Friday, July 08, 2005 4:22 PM
To: Catherine Bohigian
Cc: Heather Dixon; Sarah Whitesell; Donna Gregg
Subject: RE: Thoughts on some issues

It does not say that, it focuses on the original report's deficiencies and weaknesses. That statement was my guess as to the consequences. I was trying to point out here that mixed bundling and themed tiers appear to me to have distinct advantages over the alternatives.

*** Non-Public: For Internal Use Only ***

-----Original Message-----

From: Catherine Bohigian
Sent: Friday, July 08, 2005 4:18 PM
To: Daniel Shiman
Cc: Heather Dixon; Sarah Whitesell; Donna Gregg
Subject: RE: Thoughts on some issues

Daniel, the report cannot conclude that a la carte would likely raise most cable bills, with fewer channels delivered. If that is going to be the conclusion, we need to stop now.

*** Non-Public: For Internal Use Only ***

-----Original Message-----

From: Daniel Shiman
Sent: Friday, July 08, 2005 4:16 PM
To: Catherine Bohigian
Cc: Heather Dixon; Sarah Whitesell; Donna Gregg
Subject: RE: Thoughts on some issues

My comment here was addressing the fact that bundling is better able to get revenues from consumers, but it came across as more pessimistic about a la carte than does my draft report.

In my report I have a variant of the point that you make, that under a la carte prices could be lower for some consumers because:

- 1) some consumers only watch the most popular networks, whose revenues may actually rise under a la carte because of an increase in viewership, and therefore will not need to charge high prices;
- 2) some consumers who only watch a few channels will find their total bill to be less than the bundle price;
- 3) bundle prices may be inflated above cost, since bundling enables MVPDs to better extract consumer surplus than does a la carte pricing, and therefore a la carte pricing could force prices down.

I treat these as flaws in the original report, which did not analyze these possibilities, and not as definite outcomes.

Overall, I think pure a la carte would likely raise most cable bills, with fewer channels delivered. I am much more optimistic about the impact of mixed bundling, which allows MVPDs to continue offering bundles at a good price if consumers want it, and of themed tiers and limited a la carte (i.e., flexible small bundles).

Daniel

EXHIBIT 12

Daniel Shiman

From: Daniel Shiman
Sent: Friday, July 22, 2005 4:09 PM
To: William Sharkey; Sarah Whitesell
Subject: RE: Pricing new consumer options

Sorry, I have not been able to get internet access for the last 2 days because our phone is out. Bill has raised a number of good points, but I don't think he fully understands the subtext here. He is right about raising concerns about how prices are set, whether MVPDs would choose to use mixed bundling on their own if it increased profits, and what the competitive conditions are in the industry. It is important to remember that we can't require a la carte, that this would require Congressional action, and this report is meant to give them some information about the options (albeit following the directives of OCH). Therefore we cannot assume a particular set of regulations, awkward as this is for our analysis. My assumptions and thoughts on each point Bill raises:

1. MVPD choices - I just compared MVPD's likely actions if they were only to use pure bundling and pure a la carte, and attempted to extrapolate the impact on consumers if mixed bundling were used, with prices set at pure a la carte levels (which is an awkward assumption). I mostly ignored institutional and regulatory details, for a number of reasons. It will be Congress that decides what laws to put into effect, so I can't predict what regulations will be implemented. Also, we don't have time to do a full analysis of how the market looks. I assumed that our task is to show how the first report is flawed, which I did on mostly theoretical grounds. To prove that a la carte will do better requires a much more complete analysis.

I assumed MVPDs are decision-makers, with at least some market power to choose prices. However, they claimed they cannot provide a la carte because of conditions in their contracts with the networks, and thus can only provide pure bundling. Bill is right that for certain examples the MVPD would prefer to use mixed bundling, since it gives higher profits. I just compared the consequences if the MVPD stuck to a particular regime. However, I may be arbitrarily imposing some restrictions on the MVPDs (can't change regime, mixed bundling prices are fixed), while giving them freedom to choose most prices and which networks to offer. Perhaps this should be cleaned up, especially by tightening up the discussion of mixed bundling. Also remember that while profits may rise for some customers using mixed bundling, they may go down for others, so mixed bundling may not be a generally profitable regime. Unfortunately, we can't provide a comprehensive analysis using just examples. This would be messy, and I think OCH mostly wanted to show the flaws of the first report for the first half.

2. Pricing - this is a very sticky point. Obviously under mixed bundling MVPDs would raise prices on a la carte items to make them unattractive, if they made greater profits under pure bundling. So we have to assume that Congress finds a way to figure out the pricing problem. MVPDs might decide to offer reasonable prices under themed tiers, if just to keep the politicians happy. My proposal under mixed bundling was just a suggestion, since I want to avoid us having to set prices. I believe the upstream suppliers will, if their market is competitive, set prices that will often be better for some consumers than the big bundle price, and will likely increase sales. However, I have not done the formal analysis needed to prove this, so perhaps this is too risky to leave in. As to multipart prices - I assume that a regulator will have to set the fixed fee, since with a la carte a fixed fee will be essential. I just didn't want to discuss it, since we are still trying to make pure a la carte look good.

3. Competitive state of the market - If the wholesale and retail market is fully competitive, however, the analysis is probably quite different from what I gave. And I have not done the analysis, nor has anyone else, on what happens if an oligopoly of MVPDs with market power are imperfectly competing. As Bill

said, the literature has not focused on the welfare effects. I assumed that if the firms had market power, then they could raise the bundle price. Competition might drive down the bundle price, and might even encourage MVPDs to offer networks a la carte, if the networks let them. See para. 6 in the appendix.

~~4. Tone - I agree that if we give the impression that pure a la carte is generally superior to pure bundling, we will hurt the Commissions reputation, and lead us open to attack that this report is equally biased. I will bet the NCTA could get a letter signed by a large number of economists attacking us on this. I hope we can press OCH to agree to a less definitive tone in the first half. Just making the case that the first report was flawed for not properly analyzing the issue, and for not considering the potential advantages of a la carte, would raise less concerns, I think. Remember, we are trying to provide recommendations to Congress without the time to do the full analysis. We should show caution in our conclusions.~~

Some other thoughts on Bill's comments:

1. I don't follow his analysis of Ex 1. If Charlie is present, I don't see how an a la carte of \$4 or greater plus bundle price increases sales beyond pure bundling. In fact, if set at \$4, Aaron and Betty only buy one network each, and Charlie does not buy, reducing revenues a lot.
2. The analysis of mixed bundling often assumed that MVPDs could not offer it (i.e., were restricted to pure bundling, perhaps by their contracts with networks), and that the prices are set at pure a la carte profit-maximizing levels. I will think about whether this can be justified or not.
3. Bill's concern about saying that Aaron is subsidizing in ex. #5 is taken, and I will remove that discussion later.

Got to go. I will say more later.

Daniel

-----Original Message-----

From: William Sharkey
Sent: Fri 7/22/2005 10:05 AM
To: Sarah Whitesell
Cc: Daniel Shiman
Subject: RE: Pricing new consumer options

Sarah,

I don't have any further thoughts beyond what I said in my original comments. If MVPDs behave as monopolists, then it makes no sense to require a la carte without price regulation. They will either offer attractive a la carte pricing on a voluntary basis in their own interest, or they will satisfy our mandate by offering a la carte at high prices. If there is real competition, then the situation changes, and it is possible that prices, at least for popular programs would be bid down to reasonable levels.

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-----Original Message-----

From: Sarah Whitesell
Sent: Thursday, July 21, 2005 10:38 PM
To: William Sharkey
Cc: Daniel Shiman
Subject: RE: Pricing new consumer options

Bill, did you have any thoughts on the second half of the paragraph, in terms of how we combat the MVPDs' incentives to price new options unattractively relative to the bundle?
thx, S.

EXHIBIT 13

TELEVISION & CABLE

Factbook 2008

November 15, 2007

Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Commissioners Tate and McDowell,

I received your letter of November 14, 2007 regarding the *Communications Daily* article, "November FCC Meeting to Focus on Cable Industry," in which I am quoted as saying that certain figures I provided to the FCC "aren't well suited" to, as you state, "determining whether the 70% threshold of cable subscription rates in America has been met." As you will see in what follows, this caveat was meant to apply to certain raw figures, derived from the *Television & Cable Factbook*, that I provided the Commission. In fact, our clients can and do use our large database as the solid basis for further analysis and modeling. Naturally, I can offer no opinion as to whether any particular third-party analysis of our data is accurate or legitimate.

On October 10, 2007, I received a request from the FCC for two numbers: (1) the total number of basic subscribers of cable systems with channel capacities of 36 or more, and (2) the total number of homes passed by those same cable systems. As I believe you are aware, our data are gathered independently and are sold in print and digital form to all comers. Nevertheless, we were happy to provide the requested numbers to the Commission at no charge as a simple public service.

I became aware of the intended use of the numbers on Tuesday, November 13, 2007 when I read the *FCC Report and Order and Notice of Proposed Rulemaking, FCC 07-169*. In the spirit of "transparency and openness" that you cite in your letter, I am happy to provide some additional information about the figures I gave the Commission:

1. The data supplied to the FCC from the *Television & Cable Factbook* database is as reported by cable operators or individual cable systems. Some data for individual systems are not available and therefore not included in the totals we report. This includes data such as basic subscribers, homes passed, and channel capacity.
2. Many cable systems do not report channel capacity but instead report operating frequency. It is our understanding that cable systems that operate at 330 MHz and above deliver 40 channels. Therefore cable systems in our database for which we have

2115 Ward Ct. NW Washington, D.C. 20015 202-872-9202 www.warren-news.com

GR12B - 8266

Letter to Commissioners Tate and McDowell
November 15, 2007
Page 2

- no channel capacity but which operate at 330 MHz and above were included because the FCC request was for those with channel capacities of 36 or more.
3. The basic subscriber totals do not include digital basic subscribers (and therefore, exclude systems that are operating only digitally).
 4. In recent years, cable operators and systems have become particularly reluctant to provide current homes-passed figures. Warren provided all data that was supplied to us.

I should add that we are extremely confident in the data we are able to collect. For over 60 years, we have been the only research entity that directly surveys every cable system at least once every year. We believe the *Television & Cable Factbook* is the most accurate and most nearly complete source of cable data available anywhere.

Still, data compilations that depend on the voluntary cooperation of competitive enterprises obviously will have gaps, and it has been our practice not to attempt to fill these gaps with estimates, even using standard statistical methods. We prefer to leave this to our clients and subscribers. I regret that this may have been unclear in my October 10 communication with the Commission. Clearly, any future requests for data from the *Television & Cable Factbook* database should be accompanied by a discussion of its intended use, and its inherent limitations as well as its acknowledged strengths.

Sincerely,



Michael Taliaferro
Managing Editor

EXHIBIT 14

**STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL,
DISSENTING IN PART**

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report, MB Docket No. 06-189

Today's Report has taken an interesting journey in the past few weeks. For starters, it is about nine months overdue to Congress. Then it appeared that the Commission was going to ignore a mountain of evidence from independent analysts and prior Commission findings to favor a solitary study. According to press accounts, sometime in October, this lonely study was solicited over the phone from Warren Communications by a FCC staffer. A day or two later, the draft Report was circulated and arrived at a conclusion that was a radical departure for the FCC: that the cable industry had surged past the 70/70 threshold outlined in Section 612(g) of the Act in just one short year.

To reach this previously unattainable figure, the Commission was prepared to omit, or as some have said *suppress*, the FCC's own data as gathered from cable operators on Form 325 in favor of a study that was inserted into the record just last month without the benefit of public notice, scrutiny or comment. The author of this suddenly-dispositive analysis says that it should not be used for the 70/70 test due to large gaps in its evidentiary foundation. But the Commission was prepared to do so anyway because this flawed anomaly was the only fig leaf that could be found in an attempt to trigger an avalanche of unnecessary regulation to cascade down upon an otherwise competitive industry.

Let's compare some recent FCC reports to put this statistical prestidigitation in context. In the past, the FCC has used a variety of data sources, including our own numbers, to estimate cable subscribership. In a transparent fashion that allowed for ample public comment, our Video Competition Report historically has found that subscribership hovers at around 60 percent, falling well short of the second prong of the 70/70 test. The Commission arrived at this conclusion by using and analyzing information from several different sources and seeking public comment on them. For instance, in our Twelfth Annual Report, covering 2005:

- Using data from the FCC's 2005 Cable Price Survey, our staff estimated that 56.3 percent of houses passed subscribed to cable.
- Using data from the FCC's Form 325, our staff estimated 54 percent.
- Relying upon Nielsen and Kagan data, we cited 63.3 and 53.1 percent, respectively.

- The Warren Communications 2005 numbers determined that 67.8 percent of homes passed subscribed to cable.

Moreover, in the Eleventh Annual Report, which examined 2004 data, we similarly cited Kagan, Nielsen, Warren and our own Cable Price Survey sample data and Form 325 sample data in finding that the second prong of the 70/70 test had not been met.

Similarly, numerous independent analyses and studies have corroborated the conclusion that cable subscribership is well below the 70 percent threshold. In fact, incumbent cable operators are losing video subscribers. I do note that the Media Access Project and AT&T filed opinions late in this process claiming penetration above 70 percent, and those filings should be given appropriate consideration. But, even so, the great weight of the evidence strongly indicates otherwise for 2006 and all years prior.

Interestingly, this year, in a disturbing development, the FCC's most recent Form 325 data was not made available to commissioners for review until 7:09 p.m. last night. It was only made available once it was obvious that a majority of the Commission would not support the initial draft of this Report because it was such a dramatic departure based on mysterious statistical manipulation. But why was this data omitted or suppressed to begin with? Was it because it concluded cable penetration was only at 54 percent, just like last year? Similarly, only once it became public that this year's Report was generating controversy, third parties, such as AT&T and MAP, filed fresh *ex parte* opinions and analyses. I value their participation and I'd like to see the Commission encourage such debate during a brightly lit and transparent public comment period before we arrive at our conclusions. Hopefully, today's Report, coupled with our Notice of Inquiry, will allow us to move forward in our quest for the most accurate data we can find.

In the meantime, all indicators point to the conclusion that the video marketplace is more competitive now than ever through the rise of cable over-builders, traditional phone companies offering video, two vibrant DBS providers, free content on the Internet, and, once the digital TV transition is complete, a multitude of free HD and multicast video streams from broadcasters. This Report underscores that cable subscribership has declined over the past year, while the two satellite companies, DirecTV and EchoStar, gained 1.8 million customers and are now the second and third largest MVPDs. America's telecommunications companies are now competing vigorously for video customers, with Verizon alone serving nearly one million video subscribers.

Today, virtually every American enjoys multiple options for the delivery of video programming and more choices in content and services than ever before. I look forward to this trend continuing so that consumers can enjoy even more of the benefits of competition. In fact, one has to wonder whether Section 612(g) is relevant anymore. The provision was enacted in 1984 at a time when only one incumbent cable provider served a local franchise. The legislative history shows us that Congress was concerned that such companies could dominate the video market as the only game in town. But, as the result of responsible de-regulatory policies that have encouraged investment and new entry, the

average consumer has a choice of at least three video providers with over-builders and phone companies increasing that menu of options for millions more consumers. When competition flourishes, the need for regulation diminishes. The Report we adopt today underscores this fundamental point.

Lastly, I am puzzled as to why the majority now want to seek both 2006 and 2007 data in the context of this Report covering only 2006. As always, I fully support seeking any relevant data, provided we give adequate opportunity for public comment. The more data, analysis and public comment, the better. However, we already have the 2006 data from our Form 325 – with the exception that smaller cable operators do not file that form. But it is precisely the smaller operators that do not keep data in the form the Commission is now requesting from them. Smaller operators especially do not have the data from eighteen months ago that the majority wants. So the Commission is requesting data that simply cannot be provided in many circumstances. Will this resulting “gap” in data later be used as a basis to concoct projections that the 70/70 threshold has been met? Stay tuned.

The second most puzzling request is requiring 2007 data to be submitted into a proceeding pertaining to the 2006 video market. Shouldn't 2007 data be included in our 2007 report proceeding? What relevance does 2007 data have to the 2006 video market? Now that all of the 2006 data has finally been brought to light, as of twenty-seven hours ago, we should close the book on 2006. After all, Congress is waiting. At the end of the day, the great weight of the 2006 evidence makes clear that cable penetration falls far short of the 70/70 threshold. Because I find this last-minute maneuver to be illogical, and dubious, I dissent from this portion of today's Report.

I support all other portions of this Report. I thank the team in the Media Bureau for their hard work.

EXHIBIT 15

From: Rmcd

Sent: Tuesday, November 13, 2007 6:32 PM

To: Cristina Pauze; Angela Giancarlo; John Hunter; Brigid Calamis

Subject: RE: FCC Announces Public Forum on WWOR-TV License Renewal in New Jersey -- PLI OUTLINE

Great. When they're all done, could someone please print them out for me and put them on my chair? Thx!

From: Cristina Pauze

Sent: Tuesday, November 13, 2007 5:08 PM

To: Angela Giancarlo; Rmcd; John Hunter; Brigid Calamis

Subject: RE: FCC Announces Public Forum on WWOR-TV License Renewal in New Jersey -- PLI OUTLINE

My outline is in the K: drive too.

From: Angela Giancarlo

Sent: Monday, November 12, 2007 6:38 PM

To: Rmcd; John Hunter; Cristina Pauze; Brigid Calamis; Angela Giancarlo

Subject: RE: FCC Announces Public Forum on WWOR-TV License Renewal in New Jersey -- PLI OUTLINE

Here is my section of the PLI speech outline. This is in the K: drive under speeches. See everyone late morning. -- Angela

From: Rmcd

Sent: Sunday, November 11, 2007 8:48 PM

To: John Hunter; Angela Giancarlo; Cristina Pauze; Brigid Calamis; RMCSTAFF

Subject: RE: FCC Announces Public Forum on WWOR-TV License Renewal in New Jersey

Sounds like we need to ask the Bureau if Commissioners are supposed to go. I bet it's just the Bureau. If so, let's stay away from it - no videos or statements, unless other offices jump in like that.

Re tomorrow (Monday): I will be babysitting the overhaul of the minivan's transmission. I'll be available by phone and Blackberry. I'll continue to work on my Media Inst. speech and other matters. Re the FCBA/PLI speech: even though it now looks like we'll have the House hearing the same day, I'd still like for everyone to make an outline of what we've done this year and what lies ahead. We may still need to produce a video, and it could come in handy for hearings, press briefings and such. BTW, if the Nov. 27 meeting date sticks (and it may not b/c at least the multi-cast leasing item won't get three votes, so he may pull it) I think we could still have a press briefing the day after or so. If it doesn't stick, let's postpone until after media ownership (Dec. 18). Thoughts?

Brigid and Cristina: On Tuesday, I'll need some time meet with Cristina re the six media items on the Nov. meeting agenda.

Question for everyone: do we dissent on the video competition report? The books have been cooked to trigger the "70/70" rule. So, while it's unusual to dissent from a report, should I be voting for something that is statistically suspect and severely departs from earlier Commission methodology and findings in order to "justify" policy I disagree with? Food for thought. Just don't get indigestion.

Lastly, the more I think about it, the more I feel as though I should postpone the NYC trip. There's just too much going on around that time that will require intense preparation. But, what do y'all think?

I'm going to bed early tonight. I'm still getting over the virtual all-nighter in Seattle.

Cheers,

- R

From: John Hunter
Sent: Sun 11/11/2007 4:44 PM
To: Angela Giancarlo; Cristina Pauze; Brigid Calamis; RMCSTAFF
Subject: Re: FCC Announces Public Forum on WWOR-TV License Renewal in New Jersey

We heard the same message from Sen. Lautenberg. This looks like a Bureau hearing to me too. Don't they have the responsibility to make a recommendation to the Commission? I'm not sure what we would want to say at this point in the proceeding.

Sent from the BlackBerry of John Hunter

----- Original Message -----
From: Angela Giancarlo
To: Cristina Pauze; Brigid Calamis; RMCSTAFF
Sent: Sun Nov 11 15:55:11 2007
Subject: Re: FCC Announces Public Forum on WWOR-TV License Renewal in New Jersey

I read this as the Bureau is conducting the hearing. Should we expect an invitation? Or, an invitation to send a video greeting? Would we want to do that? (I have no opinion, but thought I'd throw these out for thought.)

----- Original Message -----
From: Cristina Pauze
To: Brigid Calamis; RMCSTAFF
Sent: Sun Nov 11 13:01:06 2007
Subject: Re: FCC Announces Public Forum on WWOR-TV License Renewal in New Jersey

Here' another unprecedented move. Have they asked Rob to go? Rudy has made a big dealo over this station (re whether it serves NJ or NYC) and so has his former boss, Sen. Lautenberg.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Brigid Calamis
To: RMCSTAFF
Sent: Fri Nov 09 16:06:01 2007
Subject: FCC Announces Public Forum on WWOR-TV License Renewal in New Jersey

FOR IMMEDIATE RELEASE
November 8, 2007

NEWS MEDIA CONTACT
Mary Diamond (202) 418-2388
Email: mary.diamond@fcc.gov

FCC Announces Public Forum on WWOR-TV License Renewal in New Jersey

Washington, DC – The Media Bureau of the Federal Communications Commission today announced it will hold a public forum in New Jersey regarding the license renewal of WWOR-TV. Fox Television Stations, Inc. filed an application seeking

renewal of its license for WWOR-TV, Secaucus, New Jersey, on February 1, 2007. Petitions to deny that application were filed by Voice for New Jersey and by the Office of Communication of United Church of Christ, Inc. and Rainbow/Push Coalition.

The petitioners contend WWOR-TV has failed to provide a program service and adequately meet the needs of its Northern New Jersey viewers. The licensee disputes the claim that WWOR-TV's programming efforts have fallen short of its public interest obligation.

The Media Bureau has not reached a determination with respect to these claims and has decided to hold a local, public forum in which the public and other interested parties can express their views and concerns on this matter. Such public input will assist the Commission in resolving the matters at issue in this proceeding.

The hearing date, time, and location are as follows:

Date: Wednesday, November 28, 2007

Time:

Location:

4:00 p.m. – 6:00 p.m.

Paul Robeson Campus Center
Rutgers-Newark
350 Dr Martin Luther King Blvd.
Newark, NJ 07102
<http://roberson.rutgers.edu/>

Press inquiries should be directed to Mary Diamond, at 202-418-2388.

-FCC-

Brigid N. Calamis
Office of Commissioner Robert M. McDowell
Federal Communications Commission
(202) 418-2200
brigid.calamis@fcc.gov

EXHIBIT 16

From: Anthony Dale
Sent: Wednesday, December 14, 2005 1:24 PM
To: Daniel Gonzalez
Cc: Aaron Goldberger
Subject: nric documents

Importance: High

aaron and i are going thru the documents. bottom line is that there are statements in there that have policy implications. this stuff needs to be scrubbed hard.

*** Non-Public: For Internal Use Only ***

EXHIBIT 17

MEMORANDUM

To: Jim Schlichting
CC: Michael Wilhelm
From: Jeff Cohen
Date: May 11, 2006
Re: Dale Hatfield Report on E911

On May 10, 2006, Dale Hatfield presented his tentative findings and recommendations in advance of finalizing his report on E911. His proposed outline for the report is as follows:

- I. Background/Introduction.
 - a. Summary of Mr. Hatfield's earlier E911 report and the purpose and scope of the current report.
 - b. Description of different location solutions, including those in use and those not.
 - c. Breakdown of the widely deployed technologies by air interface (CDMA, GSM and iDEN), including relative advantages and disadvantages.
 - d. Discussion of emerging and less widely deployed technologies, such as indoor GPS solutions.
- II. Current state of the art in E911 location technologies.
- III. Technical and other challenges facing small carriers.
 - a. Issues encountered by transition to CDMA and GSM.
 - b. Technical and economic challenges.
 - c. Residual AMPS and TDMA subscribers.
- IV. Position location issues for nomadic VoIP. (This would constitute a minor portion of the report and would be presented from a wireless perspective.)
- V. Principal findings and conclusions.

Dale primarily was interested in informing us, in advance, of certain issues he identified in the course of his work that he thought might be of a sensitive nature. Based on his research to date, and participation in recent meetings regarding the results of APCO's Project LOCATE (a project to conduct independent testing of wireless location data delivered to PSAPs), Dale explained that it is difficult to evaluate the current state of the art in location technologies, and therefore the current levels of E911 accuracy being

achieved, until certain threshold issues concerning the parameters and methods of testing are resolved. Dale noted that presently there are no FCC rules or industry standards that identify general parameters for accuracy testing, and that the public safety community and the carriers are at odds on the testing parameters and procedures that should be used. Although Dale was not at liberty to share specifics of the Project LOCATE results, he suggested that, without agreement between the public safety community and carriers on testing methods, the results of this project may suggest that serious deficiencies in wireless E911 accuracy exist, which may be alarming to the public, and likely lead to contentious debate within the industry.

Dale identified two primary factors affecting how accuracy is judged: how to weight the test calls, and the problem of providing in-building location fixes.

Depending on whether and how calls are weighted, testing results can vary greatly. For example, PSAPs may be of the view that test calls should be made randomly (and weighted equally), because in theory wireless E911 calls can be placed in any situation and the location must be accurate in every case. Carrier may be of the opinion that, in evaluating overall accuracy of their Phase II systems, test calls should be weighted depending on, for example, the frequency or likelihood of calls made from particular locations. Thus, if only 10% of wireless 911 calls are made from a difficult area to obtain a location fix (such as inside a building, underground, in an urban canyon, etc.), then the accuracy levels obtained in such situations should be weighted accordingly.

Regarding the in-building issue, as an initial matter, Dale pointed out that increasing numbers of wireless 911 calls will be made from indoors, as a result of wireline to wireless conversions, and that technology increasingly is being deployed to permit coverage deeper within buildings. According to Dale, handset-based technology, which relies on line-of-site to satellites, offers very poor in-building location capability, as does, albeit to a lesser extent, network-based solutions. Essentially, wireless Phase II service is very limited, if not completely unavailable, for wireless 911 calls placed within buildings. Dale added that the indoor location problem is shared by wireless and nomadic VoIP services.

Other parameters identified by Dale that can impact the reported accuracy levels, include yield (network-based technologies provide a greater yield of Phase II data as compared to handset-based), the relative strengths and limitations of network- and handset-based technologies, and "time to first fix" (GPS has inherent delays in obtaining a location fix). Differing opinions as to how any one of these factors is emphasized leads to disagreement on the level of accuracy of a given E911 Phase II solution. For example, even though a network-based approach may produce a larger location radius than a handset-based system, some may find such an approach "more accurate" due to its relatively higher yield and shorter time to first fix.

Dale noted that he would be following up on the ongoing Project LOCATE discussions, and by the end of next week, would have a better sense of the outcome of

Dale Hatfield Report on E911
May 11, 2006
Page 3 of 3

this effort. He then will be in a position to provide a delivery date for his report. WTB will have the opportunity to review the report and request any changes or omissions prior to Dale delivering a final report to the Bureau.

EXHIBIT 18



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

April 13, 2007

The Honorable Mike Doyle
United States House of Representatives
401 Cannon House Office Building
Washington, D.C.

Dear Congressman Doyle,

Thank you for your letter of March 13, 2007, concerning the Commission's contract with Mr. Dale N. Hatfield. First, let me say how much I appreciate Dale Hatfield's past work here at the Commission. I have known Dale since I first came to the Commission as a staffer in 1997. He spent many years as a respected member of the Commission staff, including serving as the Chief of the Office of Engineering and Technology, Chief Technologist, and as the head of the Office of Plans and Policy. He is a distinguished engineer, and has made considerable contributions to the field. His work has been valuable to the Commission in the past, and his insights are welcome at the Commission in the future.

I have made 911 a priority for the Commission, and I share your view that the public expects us to get these issues right. One of the first issues that I turned to as Chairman was ensuring that all Americans' 911 calls reach emergency operators regardless of whether they are using a wireline phone, wireless phone, or an Internet phone. I have pursued, and will continue to pursue, the best sources of information to guide the Commission's decision making on emergency 911 issues and to ensure that appropriate actions are taken to safeguard all Americans.

In your letter, which I received the afternoon prior to my appearance before the Subcommittee on Telecommunications and the Internet, you asked that I be prepared to answer questions on this matter at the hearing that following morning. Given your request, I asked my staff to brief me on their recollections of the Hatfield contract and events that occurred more than a year before. You also requested that we gather all contractual materials, and all communications between Mr. Hatfield and the Commission related to the second report. Since then, we have reviewed all contractual materials related to Mr. Hatfield, collected every communication (including emails, memoranda, letters and call logs) between the Commission and Mr. Hatfield related to the second report, and additionally collected every such communication internally within the Commission. I appreciate the opportunity to now provide you with all of the details about the contract and to more fully answer the questions you raised.

In short, in 2001 the Commission entered into a contract with Mr. Hatfield to study E-911 issues, which resulted in 54-page report submitted to the Commission in October 2002. In 2003, the Commission entered into a new contract with Mr. Hatfield to provide assistance to the Commission with the "next steps" identified in his 2002 report. The Commission issued three orders under the 2003 contract in 2003, 2004 and 2005. In the three years since the 2003 contract, however, Mr. Hatfield has not provided any further reports to the Commission. In 2005-06, Mr. Hatfield established a timeline for delivery of a second report, but did not deliver a report under these deadlines. Mr. Hatfield billed \$9,500 of the \$10,000 authorized for the 2005-06 year, but indicated that he still had significant work to do. His contract was suspended in May 2006. Although the Commission is no longer paying for his services, we welcome any data he has compiled or reports that he has completed since that time.

The attached narrative fulfills your request for an "explanation of why Mr. Hatfield's full report was terminated after he presented his findings to Commission staff," and also contains the "detailed timeline of the events surrounding the report and its premature termination." The additional documentary information you requested accompanies this letter, including:

- All contractual materials related to Mr. Hatfield's second report; and
- All communications, including emails, memoranda, letters and call logs between Mr. Hatfield and the Commission related to the second report.

With respect to your request for "a list of tentative findings that Mr. Hatfield presented to Commission staff," Mr. Hatfield did not provide anyone at the Commission with a copy of any conclusions in writing. The few tentative findings presented to the Commission staff are contained in a summary memorandum prepared by Bureau staff of the May 2006 meeting between Mr. Hatfield and Bureau staff, which is appended to this letter as Exhibit E. In addition, in an effort to be as complete as possible, we have also included copies of all other documents produced by Commission staff related to Mr. Hatfield's second report, as well as a report submitted to the Commission that was authored by Mr. Hatfield in his capacity as a consultant on behalf of parties that the Commission regulates. See attached Exhibit G.

Please do not hesitate to contact me if you have any further questions.

Sincerely,



Kevin Martin
Chairman

Timeline and Specific Questions

In October 2001, before I became Chairman, the Commission entered into a contract with Mr. Hatfield to work on E911 issues. The purchase order issued under this contract was initially for \$6,000, and was subsequently increased on three separate occasions in the amounts of \$5,000, \$10,882.00 and \$10,700, for a total authorized amount of \$32,522. Of this amount, \$32,293.70 was paid to Mr. Hatfield. Mr. Hatfield prepared and filed a fifty-four page report with the Commission on October 15, 2002, one year after initially being retained by the Commission, entitled "A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced 911 Services." His report is publicly available on the Commission's E911 website, and is attached at Exhibit A to this letter.

In September 2003, again before I became Chairman, the Commission entered into a second contract with Mr. Hatfield for consulting services on E911 issues, at a rate of \$250 per hour. In September of 2003, the Commission issued a purchase order under this contract in which Mr. Hatfield was to assist the Commission with "next steps" identified in his 2002 report. The purchase order was funded in the amount of \$27,000, of which only \$3,000 was paid to Mr. Hatfield. Specifically, under this order, Mr. Hatfield's task was described as follows:

"In 2002 Dale Hatfield researched and prepared a key report for the Commission that analyzed the state of E911 deployment across the nation. The report raised several important next steps for the Commission and other stakeholders, including addressing network architecture issues, standards, and protocols. Given Dale's extensive engineering and policy experience, particularly his work on the 2002 report, he is uniquely suited to assisting [sic] the Commission in this effort. In particular, we expect Dale to assist the Commission in establishing and implementing the appropriate technical fora to address E911 network architecture issues. We view Dale's continuing role in E911 policy as critical to advancing U.S. public safety."

In September 2004, the Commission issued another order under the September 2003 contract, in which Mr. Hatfield was again to assist the Commission with "next steps" identified in his 2002 report. The 2004 order was initially funded in the amount of \$21,000.. None of this amount was paid to Mr. Hatfield, as he did not submit any invoices for payment that year. Specifically, under this order, Mr. Hatfield's task was described as follows:

"In the continuing need for accurate assessment of the state of E911 deployment across the nation [sic]. Mr. Hatfield's prior work raised several important next steps for the Commission and other stakeholders, including addressing network architecture issues, standards, and protocols. Given Dale's extensive engineering and policy experience, he is uniquely suited to assisting [sic] the

Commission in this continuing effort. In particular, we expect Dale to assist the Commission in defining the appropriate technical fora to address E911 network architecture issues. We view Dale's continuing role in E911 policy as critical to advancing U.S. public safety."

In September 2005, the Wireless Telecommunications Bureau issued a further order under the 2003 contract with Mr. Hatfield. Under this order's statement of work, Mr. Hatfield was to provide:

"Follow up on status of suggested Commission actions identified in his October 2002 report, including what remains undone and whether a need continues to exist for such actions given the current status of e-911 [sic] deployment and other technology developments, and an assessment of whether there are new actions recommended to be taken in light of today's environment;
Provide an independent view of the technical and other challenges faced by smaller carriers/telecommunications providers in deploying Phase II service, as referenced in the Tier III Order, which was released by the Commission earlier [in 2005], as well as any problems with urban canyon and in-building settings;
Evaluate the current state of location technologies, including fore [sic] each of the switch, network, and handset elements; [and]
Provide an independent assessment/view regarding methods of verifying compliance with the Commission's accuracy requirements."

This order was extended specifically at the request of the Wireless Telecommunications Bureau. At the time, the Bureau recognized that Mr. Hatfield had not performed any work during the 2004-05 year. Nonetheless, the Bureau sought extension of Mr. Hatfield contract and identified the specific tasks that Mr. Hatfield was to perform, which were incorporated directly into the statement of work. The Bureau suggested that Mr. Hatfield's work would be particularly relevant "in light of a major upcoming e-911 [sic] deadline in early FY06." In addition, the Bureau suggested that "Mr. Hatfield's expertise would be helpful as the Commission proceeds to deliberate next steps regarding the [National Reliability and Interoperability Council] recommendation and any future NRIC or [Emergency Services Interconnection Forum] efforts regarding establishment of e911 standards." See attached email at Exhibit B.

Although I was not personally aware of the contract extension, the 2005 extension was approved by my Chief of Staff in the context of 264 routine contracting actions during the month of September 2005, the last month of the fiscal year, 66 of which were for the Wireless Telecommunications Bureau. Even when the contract was extended, there was some concern regarding whether an extension of Mr. Hatfield's contract was justified. In particular, concern was expressed that Mr. Hatfield had failed to produce any further data to the Commission since his initial report in 2002, and had failed to submit any invoices to the Commission under the order issued in September 2004. See attached email Exhibit

C. Nonetheless, an additional order was issued in September 2005 in the amount of \$10,000 at the request of the Wireless Telecommunications Bureau.

In February 2006, Mr. Hatfield met with several staff members in the Wireless Telecommunications Bureau to address the scope of his work and provide an outline of a proposed report. A summary of the February 2006 meeting drafted by Bureau staff was provided to Mr. Fred Campbell of my offices. See attached email Exhibit D. At that time, there were no findings or conclusions included beyond: "V. Principal findings and conclusions." In that summary, Mr. Hatfield provided a schedule for completion of his work. He was to provide a draft of his report by March 1, 2006 for review and comment. Consistent with his original contract, the Commission was provided an opportunity for review and comment. Specifically, the FCC could provide "its feedback (including an opportunity to remove any discussions of a sensitive nature)" by March 15, 2006. His final report was to be completed and submitted by March 22, 2006. Mr. Hatfield later indicated that he would not meet that deadline but that he could complete the report by the end of March. See attached email at Exhibit E.

By May 2006, Mr. Hatfield had still not completed his report. He met again with staff from the Wireless Telecommunications Bureau on May 10, 2006, to provide an update. A summary of the May 2006 meeting with the Bureau was also prepared by Bureau personnel, but was not provided to me or my staff. See attached email Exhibit F. At that meeting, Mr. Hatfield apparently provided some brief tentative conclusions and recommendations, which are recited in the summary memorandum. However, Mr. Hatfield also suggested that additional work was necessary. In particular, he indicated that an ongoing APCO-International study (Project LOCATE) would provide him with specific additional information needed to form his conclusions, and that once he had this information a delivery date for his report could again be set. We also do not have copies of any slides used during these meetings, but would welcome their submission to the Commission. On April 10, 2007, APCO-International publicly released and filed their Project LOCATE report.

In late May 2006, I learned about the existence of the new order from my personal staff and the fact that Mr. Hatfield was working on another report. My personal staff contacted Mr. Hatfield and asked him about the nature of his work and his proposed report. Mr. Hatfield declined to indicate to my personal staff what tentative conclusions, if any, he had reached. He declined to provide a summary of his findings. He also declined to provide a draft of his proposed report to my personal staff at the time. To this date, Mr. Hatfield has not provided the Commission with a draft of his report or a copy of his conclusions in writing.

By this time, the Commission had already acted on several 911 issues. For example, from December 2005 to March 2006, the Commission acted upon more than a dozen E911 handset penetration deadline waiver requests, and was continuing to address implementation of the 911 rules adopted in June 2005 for interconnected voice over Internet protocol providers.

In addition, in March 2006 I announced plans to create a new Public Safety and Homeland Security Bureau that would focus on all of the various technical issues relating to E911, including the issues Mr. Hatfield had been examining. Given the recent Commission actions on VoIP 911 and pending wireless E911 issues, and my plans to create the new Bureau, I concluded that it was not in the public interest to continue to pay an outside third-party to address wireless E911 issues. Moreover, more than three years had lapsed since he was initially retained to assist the Commission in addressing the next steps identified in his 2002 report. He had not done any additional work in 2004-05. In 2005-06, he had not produced the promised draft report to the Commission and suggested that significant additional work remained to be done. Mr. Hatfield ultimately billed the Commission \$9,500 of the \$10,000 budgeted for his task in 2005, and as such should have been in the very final stages of his work. In light of all of these factors, the contract was suspended in May 2006 and Mr. Hatfield was instructed to compile his final invoices and cease billing the Commission for his E911 work.

In your letter, you cited several tentative conclusions from Mr. Hatfield regarding rural E911 deployment, E911 coverage in indoor environments, and location accuracy methods. While these topics may have been within the scope of Mr. Hatfield's proposed report to the Commission, Mr. Hatfield did not present any tentative conclusions to me or members of my personal staff, and as such they did not impact the decision to suspend Mr. Hatfield's contract. To the extent he provided such tentative conclusions to Bureau staff, they are contained in the memorandum summarizing Mr. Hatfield's May 2006 meeting with them. We also do not have copies of any slides used during these meetings, but would welcome their submission to the Commission.

Neither Mr. Hatfield's research nor his proposed report was suppressed by suspension and non-renewal of the contract. Nor was the suspension of the contract related to any tentative conclusions he may have reached. Nor was it ever indicated to Mr. Hatfield that he could not pursue work on E911 issues on his own. Although we are not currently paying Mr. Hatfield for his advice, we would welcome any report he may have now finished. We understand that Mr. Hatfield may have approached other parties about contracting him to further study these issues and finish any reports. Again, we would welcome any reports he may finish if others choose to pay him for that work. To the extent Mr. Hatfield wishes to use any data he may have developed pursuant to the canceled contract for other purposes, including issuing a report, he may do so. Even under the most restrictive interpretation of his contract, Mr. Hatfield could seek written permission from the Commission to disclose any data generated under the contract.

While there was one inquiry from an outside party about that possibility, Mr. Hatfield has not made any such official request to date; I would, however, grant any such request he makes.

EXHIBIT 19

**ROUTINE ACTIONS BY THE ENFORCEMENT BUREAU
NOT REQUIRING INDIVIDUAL APPROVAL
BY THE CHAIRMAN'S OFFICE**

1. Responding to due diligence requests. (These requests are usually from outside attorneys about whether there are pending investigations against specific licensees or stations. Attorneys typically make these requests as part of their "due diligence" in performing a transaction and, therefore, the requests are extremely time-sensitive.) **Note:** Because of confidentiality concerns, we are careful not to disclose more than the fact that we have investigations against a particular licensee or station.
2. Audit workpaper review. (Audits often include a review by our audit staff of the workpapers prepared by independent auditors. The reviews take place in the independent auditors' offices and there may be some informal back and forth between our audit staff and the independent auditors.) **Note:** If the workpaper review results in major finding that may warrant enforcement action, OCH should be notified.
3. Routine FOIA responses
4. Acting on extension of time requests
5. Responding to routine public inquiries about enforcement issues
6. Entering into statute of limitations tolling agreements to facilitate settlements
7. Responding to or asking for clarification of LOI information.
8. Writing thank-you notes to consumers who have provided declarations for an enforcement action, e.g., the Dynasty NAL
9. Responding to routine requests for publicly available documents
10. MDRD routine letter rulings, including:
 - A. New Formal Section 208 Complaint Transmittal Letters: When a new formal complaint is filed, MDRD is required, under section 1.735 of the Commission's rules (47 C.F.R. § 1.735), to issue a letter transmitting the complaint "promptly" to each defendant, along with a schedule detailing the due date for the answer and the date of the initial status conference.
 - B. Supplementation of Pleadings in Formal Section 208 Complaint Cases: On occasion, MDRD needs to issue letters asking parties to supplement or amend their pleadings when they do not contain all the information required under the Commission's rules.
 - C. Section 208 Formal Complaint Case Requests for Confidential Treatment of Information from the Public Record: Parties to formal complaint proceedings sometimes request, pursuant to 47 C.F.R. § 0.459 and/or 47 C.F.R. § 1.731, that restrictions be placed on the disclosure of proprietary and confidential information

that they have submitted in the proceeding. MDRD issues letters rulings on such requests.

D. New Section 208 Informal Complaint Transmittal Letters: When a new informal complaint is filed, MDRD is required, under section 1.717 of the Commission's rules to issue a letter forwarding the complaint to the appropriate carrier for investigation. 47 C.F.R. § 1.717

E. Extensions of Deadline to Convert Informal Section 208 Complaints to Formal Complaints: Section 1.718 of the Commission's rules allows a complainant whose informal complaint has not been satisfied to file a formal complaint raising the same claims. 47 U.S.C. § 1.718. Section 1.718 further provides that the formal complaint will be deemed to "relate back" to the filing date of the informal complaint for statute of limitations purposes, if it is filed within six months from the date of the carrier's responding report. Parties who engage in settlement discussions following the filing of an informal complaint sometimes ask the Commission to extend the six-month deadline for converting to an informal complaint. MDRD usually issues letters granting such requests in order to give the parties more time to pursue the settlement option.

F. Requests for Extension of Time, Schedule Changes and Other Ministerial Matters: MDRD occasionally receives routine requests regarding: extensions of time to submit papers or to serve discovery; requests to change meeting dates; permission to file a motion, and other ministerial matters. MDRD releases letters rulings on such requests.

EXHIBIT 20

Clarity on Personnel Actions:

A. Actions that require approval by Dan Gonzalez:

1. Outside Hires (all sources, federal government only, etc.):
 - a. postings, re-postings;
 - b. all selection.

2. Internal postings:
 - a. Promotions beyond the FPL, example GS-4 OAC to SA GS-5, GS-14 to GS-15, upward mobility, etc.:
 - i. postings, re-postings;
 - ii. all selections.

 - b. To seek all, any or specific candidates:
 - i. postings & re-postings;
 - ii. all selections.

 - c. Informational postings and selections required by NTEU.

3. Details:
 - a. Within B/O;
 - b. Between B/Os.

4. Reassignments:
 - a. Bargaining Unit (w/NTEU OK);
 - b. Managerial/Supervisory;
 - c. Non-Bargaining Unit/Non-Managerial/Supervisory.

5. Accretions: all.

6. Student appointments (required yearly).

7. Co-op conversions.

8. Part-time to full-time and full-time to part-time.

9. Paid student volunteers.

10. Volunteers under the "Gifts Act".

B. Action that DO NOT require approval by Dan Gonzalez:

11. Career ladder promotions up to the position's FPL.

12. Unpaid student volunteers.

EXHIBIT 21

From: Catherine Deaton
Sent: Friday, May 18, 2007 12:45 PM
To: [REDACTED]

Subject: NO CONTACT WITH OTHER BUREAUS
Importance: High

Please Heed and Follow:

REMINDER DO NOT GO DIRECTLY TO OTHER BUREAUS FOR CONTACTS/ANSWERS TO ANY QUESTIONS YOU MIGHT HAVE.

If you need assistance, please come to me. I will go up the chain for you.

This even goes for internal EB-HQ contacts, you must not go direct.
Come to me.

You can continue to talk to other EB Agents in field offices however.
You can continue to make direct contact with EDG too.

Thanks for your cooperation.

EXHIBIT 22

New Rule Regarding Work on Research and Papers

From: Marcia Glauberman

Sent: Tue 10/24/2006 11:06 AM

To: [REDACTED]

CC: [REDACTED]

Subject: FW: New Rule Regarding Work on Research and Papers

Yesterday, George Williams, Anne Levine, Dan Hodes, John Scott, Andy Wise, Dan Bring, and Tom Tanasovich met with Judy and Marcia to discuss a number of issues at one of our periodic Economist/Analyst meetings.

For those of you who did not attend our meeting (Scott Roberts, Daniel Shiman, and Jane Frenette), we need to pass along a most important recent directive regarding work that has not been formally authorized by the Media Bureau Front Office and reiterate a few other related points.

You may not work on anything other than your current official work projects, which means you can't use downtime in the office to create possible future papers or presentations on any topic. This rule holds true for any work, including research and papers, you may have previously worked on during your work hours.

If you are doing any work other than work on the formally assigned projects, you should stop as of today. Projects that were authorized in the past are not necessarily considered to be authorized at this time. You should not undertake any work besides the official projects you have been assigned as part of the Division's on-going proceedings (current price survey proceedings, competition report, quadrennial review, localism in radio (Edison project), quick turnaround data requests) without getting an OK from the MB Front Office via Royce, Judy, or Marcia. We are available to discuss any such projects and the proper procedures for seeking approval.

Also, as a reminder, we want to reiterate that you can't send anything out for publication, or present at a conference, without management approval, which at minimum means MB Front Office approval. Finally, we want to again emphasize that you can't use any data you acquire from your work at the FCC to write papers (or to update/revise previously written papers) on your own time without explicit approval.

Thank you for your cooperation. Please let us know if you have any concerns or questions about these issues.

Marcia and Judy

Non-Public - For Internal Use Only