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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

FCC Seeks Comment Regarding Possible)
Revision or Elimination of Rules)
Under The Regulatory Flexibility Act, 5) DA 09-1307
U.S.C. 610) CB No. 09-
) 102
)
)

COMMENTS BY NEW NETWORKS INSTITUTE AND TELETRUTH.

Case Study:

How Regulations Designed to Help Small Businesses Failed to Work and Harmed Broadband, Competition, Innovation, and the Economy. Teletruth Requests New Proposed Rulemaking Actions the FCC Should Take to Fix Future Problems.

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1.0 Summary

Case Study:

How Regulations Designed to Help Small Businesses Failed to Work and Harmed Broadband, Competition, Innovation, and the Economy. Teletruth Requests New Proposed Rulemaking Actions the FCC Should Take to Fix Future Problems.

Introduction:

This case study was done for the following FCC inquiry:

“The FCC Seeks Comment Regarding Possible Revision or Elimination of Rules Under The Regulatory Flexibility Act, 5 U.S.C. 610, CB Docket No. 09-102.”

Copy of the Regulatory Flexibility Act: <http://www.sba.gov/advo/laws/regflex.html>
SBA Guidelines for Agencies: <http://www.sba.gov/advo/laws/rfaguide.pdf>

As we will document, the FCC’s failure to take the Regulatory Flexibility Act (RFA) obligations seriously since 1998, combined with an overwhelming disregard for accurate data, removed America’s telecommunications, broadband, Internet, wireless and even media competition. It has cost America trillions of dollars in potential economic growth, harmed innovation and slowed America’s technological edge, not to mention closing down thousands of competitors. It also resulted in higher prices, slower broadband speeds, and a lack of choice for customers.

In short, the outcome of the FCC’s ignoring the basic tenets of the RFA has been to create harmful rules that eliminated competition --- the very competitors it was supposed to protect.

The Federal Regulatory Flexibility Act of 1980 (as amended) requires all federal agencies, including the FCC, to ensure that the regulations they enact do not directly harm small businesses. The agencies are also required to create essentially an impact study, known as the Regulatory Flexibility Analysis to determine if their new rules will harm small competitors.

"34. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared the present Initial Regulatory Flexibility Analysis (RFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this NPRM."¹ (Notice of Proposed Rulemaking)

The Regulatory Flexibility Act should have been a tool that the FCC and others could use to balance the voices of the well-financed incumbents and help the FCC create accurate impact studies, which would have informed the FCC of the potential harms that would

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occur if the FCC proceeded in creating laws that would eliminate small business competition on wireline and wireless services.

Also, Congress made sure that there were provisions in the Telecommunications Act of 1996 so that small businesses could compete in telecommunications and information markets and even removed barriers to entry for entrepreneurs. And the Federal Communications Commission (FCC) (“Commission”) is supposed to fulfill these obligations.

“SEC. 257. MARKET ENTRY BARRIERS PROCEEDING.(a) ELIMINATION OF BARRIERS- Within 15 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.

“b) NATIONAL POLICY- In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”

Teletruth, New Networks Institute and others filed comments and complaints pertaining to the FCC’s application of the Regulatory Flexibility Act, as well as a related use of the Data Quality Act in CC Docket No. 01-337, CC Docket No. 01-338, CC Docket 02-33, GN Docket No. 00-185, CS Docket No. 02-52, CC Docket No. 02-39, WC Docket No. 08-190, WC Docket No. 07-139, WC Docket No. 07-204, WC Docket No. 07-273, and WC Docket No. 07-21.

All of our warnings, (including comments made by the Small Business Administration’s Office of Advocacy), outlining how the FCC’s neglect would cause serious harms went unheeded.

As we will show, because the FCC failed to properly implement the Regulatory Flexibility Act’s statutes, there were new rules created that had direct harms to small business competitors in virtually every area of telecommunications, broadband, Internet, wireless and even media consolidation.

Therefore, we are asking the FCC to expand the examination of ‘rules’ to a more important examination – that the Regulatory Flexibility Act, including the data used, harmed small businesses and the FCC should initiate a Notice of Proposed Rule Making to help this FCC revamp the FCC’s methodology, process, data collection and analysis.

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NOTE: We have an active Regulatory Flexibility Act and Data Quality Act challenge that was filed as part of FCC 08-203, with the following related dockets, WC Docket No. 08-190, WC Docket No. 07-139, WC Docket No. 07-204, WC Docket No. 07-273, WC Docket No. 07-21

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-203A1.pdf

We hope that these comments will encourage the FCC to fix the previous problems with the Regulatory Flexibility Act implementation, correct the errors in data quality that plague all FCC decisions and previous rulemakings, and strengthen its commitments to competition, choice, innovation, and a robust economy.

We will address 3 areas of contention.

- A) The overall process of the FCC's dealing with the Regulatory Flexibility Act needs a serious overall.

For example, in our Reg. Flex filing in 2008, the FCC included this identical sentence in 13 different paragraphs – The FCC knows its decision may cause direct harms, yet doesn't seem to care.

"...the majority of these firms are small entities that may be affected by our action."

But it gets worse. The FCC is required under the Regulatory Flexibility Act to essentially do a market impact study on how their current rulings will harm small competitors. This paragraph with information from 1997 was used in multiple, recent FCC analyses to show that the current market is competitive. --- It is over a decade old.

"Wireless Communications Services: This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses... The Commission auctioned geographic area licenses in the WCS service. In the auction, held in April 1997, there were seven winning bidders that qualified as "very small business" entities, and one that qualified as a 'small business' entity."

This ignores the simple fact, known to the FCC because of its need to approve license transfers, these licenses have changed hands, sometimes more than once, and the wireless spectrum is far more concentrated now than it was in 1997, often shutting out small business.

From the use of decade-old data as 'boilerplate' in multiple dockets, the FCC's failure to even discuss alternatives of small entities being affected, or other basic processes, such as proper notification of impacted small businesses, the FCC needs to comply with the Regulatory Flexibility Act and Data Quality Act tenets.

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WE REQUEST THAT THE FCC OPENS A PROPOSED RULE MAKING INTO THE PREVIOUS FCC'S VIOLATIONS OF THE REGULATORY FLEXIBILITY ACT & THE DATA QUALITY ACT, AND REVAMP THE CURRENT PROCESS AND DATA COLLECTION.

- B) We will outline the harms for small Internet, broadband and phone competitors, specifically Internet Service Providers (ISPs) and Competitive Local Exchange Companies (CLECs), and the failure of the FCC's use of the Reg. Flex.

WE REQUEST THAT THE FCC CREATE A NEW PROPOSED RULEMAKING AND UNDO THE RULES CHANGED BY WC DOCKET 02-33 (FCC 05-150) - "FCC Eliminates Mandated Sharing Requirement on Incumbents' Wireline Broadband Internet Access. August 5, 2005

- <http://www.teletruth.org/docs/FCCISPelimDOC-260433A1.doc> (doc.)

WE REQUEST THAT THE FCC CREATE A NEW PROPOSED RULEMAKING AND REMOVE THE RULES RELATED TO DOCKETS WC Docket No. 04-313 and CC Docket No. 01-338, FCC 04-290, "In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers" --- ORDER ON REMAND, December 15, 2004

- C) We will examine the wireless spectrum auctions small business 'designated entity' harms because of the FCC's failure to use the Reg. Flex and do accurate tracking and data collection pertaining the small business wireless broadband markets. ---

How did AT&T, Verizon and the other large carriers get over \$8 billion dollars in small business wireless licenses with no tracking of the licenses and no serious analysis of the harms to the small business companies who did not win the bidding.

WE REQUEST THAT THE FCC CREATE A PROPOSE RULEMAKING AND GET REFUNDS OF ALL OF THE FRAUDULENT SMALL ENTITY DISCOUNTS FROM THE FCC'S WIRELESS SPECTRUM AUCTIONS.

Before we outline the issues with the Act and the ensuing rules that were created and need revamping and/or elimination, we present a timeline of the major trends in telecom, Internet and broadband, discuss how the Telecom Act created competition, which in turn created economic growth, and explain how the FCC deregulated competition out of business.

Note: We have created a 25 year analysis of AT&T, Verizon and Qwest's revenues, profits, construction, employees, depreciation, price of service and other leading indicators to give the reader a more detailed analysis of this time period. We also have 2 ebooks that discuss these issues with more detail. (See the bibliography for details.)

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2.0 Trends of the 1990's

During the 1990's there were six trend-lines of interest which intermingled in different ways.

- a) The "Information Superhighway"
- b) The Internet boom
- c) The Telecom Act of 1996 established the rights of competitive companies.
- d) The rise of the competitors
- e) The market consolidation through mergers
- f) Wireless and cable broadband development

Starting in the early 1990's, the Clinton-Gore Whitehouse proposed to rewire America with fiber optics. Known as the "Information Superhighway", by the end of 1995, virtually every phone company announced plans to rewire multiple states and the state regulators 'deregulated' the local phone companies, giving them higher profits to fund the new infrastructure. By 2000, over ½ of the US should have been rewired with fiber optic services.

Alongside this infrastructure push came the development of the public Internet, the World Wide Web, and the evolution of online services. By the early 1990's groups of entrepreneurs and corporations created companies including AOL, CompuServe, and Prodigy, among the major US online services. There were also millions of people using electronic 'bulletin boards' to exchange information. However, with the World Wide Web and the creation of a browser, anyone with a modem attached to a computer could go online more easily. Using the customer's existing phone line and dialing up an Internet Service Provider, the ISP would connect the customer to the Internet. By 1996 there were already 15 million people using online services, including bulletin boards.

Alongside the Internet explosion and the promise of new infrastructure, the Telecom Act of 1996 was to open the networks to competitors of all types.

On the Internet and broadband side, ISPs could offer Internet Service using the customer's phone line or the phone companies' DSL (common carriage) service, and competitive D-LECs (Data-oriented Competitive Local Exchange Carriers) came into the market to wholesale the phone networks to offer their own DSL service over the incumbents' copper wiring.

On the residential and business phone service side, the Telecom Act established the right of companies to acquire at wholesale rates the local phone service components, options known as UNE-P and resale, which allowed companies, including AT&T and smaller companies, to offer local and long distance service. Hundreds of CLECs (Competitive Local Exchange Companies) sprang up right after the Act became law to serve both residential and business customers.

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Opening the markets to competition was not a ‘favor’. Once the networks were deemed open by completing a checklist of items, the Bell companies were able to enter the lucrative long distance market, something they had been unable to do since 1984 as the original agreement to break up AT&T prohibited the local phone companies from other businesses because they could take undue advantage of their market power.

And finally, we have the mergers of the Baby Bells. Starting in 1996-97 with Bell Atlantic-NYNEX and the Southwestern Bell-Pacific Bell mergers, the original seven Bell companies would start marrying their siblings. According to these companies, they needed to get larger to be an effective competitor, and go into the other Bell companies markets.

We’ll address the cable and wireless markets in future sections.

2.1 How It Played Out --- 1996-2000

The Telecom Act created the largest boom in telecommunication history because of the confluence of the Internet and competition. The phone companies had the largest growth in recorded history, through no action of their own.

From 1995 through 2000, the phone companies experienced hypergrowth of phone lines and services. For example, in 1996, while the growth rate of households was 0.64% (less than 1%), the number of phone lines increased 4.85%, a growth rate of 653% above household growth, while households grew 1.4% in 1997, local phone lines grew 6.41%, 359% more. The reason --- customers wanted a second line to access the Internet.

And the growth in America of the Internet was NOT caused by the phone companies, now AT&T or Verizon, though they benefited from it. The Internet was grown by the thousands of entrepreneurial companies that worked directly with local customers to help them get on the Internet.

By 2000, according to the Census, there were 9500 Internet Providers. According to ISP Planet, by the end of 2001, the majority of subscribers in the US were served by the independent ISPs, out of a total of 77 million subscribers.

”54.2 percent of American's accessing the Internet and the World Wide Web do so through thousands of independent ISPs scattered across the country, which totals some 77.5 million subscribers nationwide.”

In fact, neither Verizon nor SBC/AT&T (the incumbents) were in the Top 10 Providers according to ISP Planet, one of the respected publishers and researchers tracking the market.

The Internet would never have occurred had it been left up to the phone companies. The companies’ original foray into ‘online services’, started with various attempts in the 1980’s to mimic the French Minitel, rolled out in the late 1970’s. These were ‘closed’ systems that connected only to those within the network, and the companies lost over \$1/2 billion in audiotext and videotext gateways.

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Instead, thousands of small firms selling Internet service got customers to buy second lines, and these companies also had bought millions of lines.

And the Internet providers were the innovators, as they were the ones to first offer Internet service, work through the problems of email, deal with connecting the customer and all of the problems of implementation of hardware and software. And the hardware and software companies and other related industries, including web-designing, information architecture, and the thousands of applications, were all being developed prior to the phone companies entering the DSL markets, or had a serious presence as Internet providers.

Verizon and the other phone companies did not enter the DSL markets until 1998-1999. Here is an article with a timeline of DSL, which started right after the Telecom Act.

http://news.cnet.com/Making-waves-in-the-data-world/2009-1033_3-221422.html

Ironically, Pacific Bell and the other Bell companies realized that they needed marketing partners so they created programs to have independent ISPs sell the phone companies' DSL service. They would later do everything in their power to block these ISPs and take over the business in a myriad of documented ways.

<http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=4062>

It should also not be forgotten that Internet Providers and the other competitors were the first to deploy VOIP and other services, such as SDSL, symmetric DSL, meaning that the speed of service is fast in both directions. The phone companies have always emphasized "ADSL"--- the "A" stands for asymmetric for fast in only one direction. This was a consumer-oriented service designed to protect their much more expensive symmetric Special Access services.

One the phone side, AT&T and MCI, among others, were signing up customers for both local and long distance service and by 2004 approximately 17 million of the incumbent phone lines were competitive.

The Information Super Highway? All of the companies failed to upgrade their local loop wiring to fiber optics, even though they had made commitments and had collected billions per state to build out the networks. In fact, DSL was an afterthought --- a bait-and-switch. By 1998, it became obvious that the Bell companies would not deploy fiber-based broadband but there was an outcry for higher speeds to use the Internet. Thus, using the old copper wiring, the Bell companies started deploying ADSL.

2.2 2000-2008: The Rise and Fall of Competition.

The excitement of the Internet go-go years of the 1990's came to an abrupt halt by the new millennium.

First, the Internet companies (not the providers but those offering services across the Internet, like content or entertainment) imploded after years of too much hype for too long. However, by the end of 2001 there were over 77 million people online in the US, and those numbers would increase over the next few years.

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The Information Superhighway was no longer in vogue and in 2000, while building new networks was continually being discussed, only ADSL over copper wiring was being deployed. It was not until 2004 that AT&T announced U-Verse deployment and Verizon announced FiOS.

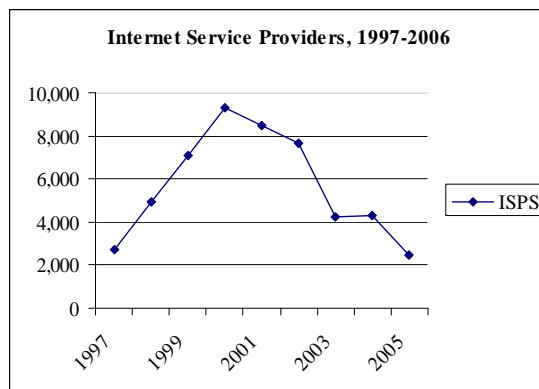
This 'lost decade' of infrastructure caused America to become 15th in the world in broadband as the countries were not held hostage by the incumbents' decisions of network upgrades.

However, there was a steady decline of all competition.

This chart clearly outlines what happened to competitive ISPs. Except for a few survivors, like AOL and Earthlink, who are a shadow of their former selves, today's market does not represent any significant competition to either the cable or phone companies' offerings, which have been able to bundle and take control of Internet Provisioning. Over 7000 independent ISPs went out of business, *(some were bought or merged, but the majority were squeezed out, as discussed below.)

US Internet Service Providers (ISPs)

Source: Census, 1997-2005



Internet Service Providers by Year,
1997-2005

1997	1998	1999	2000	2001	2002	2003	2004	2005
2,751	4,915	7,099	9,335	8,450	7,627	4,249	4,327	2,437

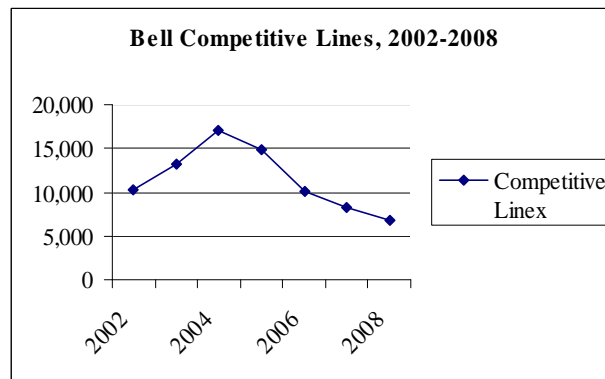
Source: Census, 1997-2005

2.3 Competitive Voice Lines Also Had a Sharp Rise and Fall.

This next exhibit highlights what happened before and after the FCC's decision. In 2002, there were 10.2 million competitive lines for local service, rising to 17 million by 2004.

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Without the ability to use the local networks, there was a steep decline and now there are 6.8 million lines left, some owned by AT&T and Verizon as a remainder of the legacy-AT&T and MCI service offerings. By 2008, only 6% of Bell lines are used by competitors; a 60% drop since 2004.



Competition Rise and Fall, 2002-2008
(000)

	2002	2003	2004	2005	2006	2007	2008	Decline	Total
Verizon	3,698	4,100	6,597	6,172	3,806	3,046	2,466	62.6%	39,883
SBC	4,476	6,682	7,363	5,977	4,358	3,849	3,142	57.3%	57,191
Qwest	2,070	2,482	3,181	2,666	1,906	1,385	1,167	63.3%	11,869
	10,244	13,264	17,141	14,815	10,070	8,280	6,775	60.5%	108,943
								6%	

Sources: Annual and Quarterly Reports.

2.4 Market Consolidation: Fast Forward 2009

January 1, 2009 marked the 25th Anniversary of the break up of AT&T. AT&T has largely been reassembled. Today, the new AT&T Inc. owns 22 states, which combined 6 potential competitors into one. Verizon owned 13 states (minus 3 sold off, VT, NH and ME) and territories spread throughout the US from the GTE and ALLTEL mergers. With the addition of Qwest, the last remaining Bell, the Bells control not only local service but also long distance service; they split broadband with the cable companies, including offering Internet service. And AT&T and Verizon control over 80% of the wireless markets.

By 2009, instead of competition flourishing, the FCC's decisions since 2004 effectively rewrote whole sections of the Telecom Act which closed all of the networks to competition. This has led to over 7000 Internet Service Providers being put out of business, as they could no longer offer their customers the faster networks, DSL. There has been a drop of 60% of wireline competitors since 2004, with a loss of over \$130 billion dollars because the FCC removed the competitors' ability to use their local networks for competitive local

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service. This closure of the networks directly harmed AT&T and MCI from being able to compete for local competition; the consequence was the 2 largest competitors were put out of business and up for sale, impacting all 50 states.

2.5 How Did Competition Die? They Were Deregulated Out of Business.

The Powell-Martin FCC essentially erased the laws that allowed Internet providers to use the higher-speed networks, as well as failed to investigate the claims that 40% of Internet Providers' orders for DSL were being lost, appointments missed, etc. This sub-standard customer service to competitors was even the basis of a lawsuit.

And this was happening on the phone side as well. A law suit, Trinko, was about a legacy-AT&T customer who had problems with the AT&T service – but the problem was that the incumbent had no interest in making sure that competitive companies' services were properly handled. The Trinko court refused to allow an antitrust remedy, leaving the job to an unwilling FCC.

Starting in 2000, the Bell companies were able to shift the entire focus of the word 'competition'. Michael Powell's FCC decided to 'let market forces' work, but at the same time proposed "intermodal" competition; which was to eliminate ALL of the competitors to let 2 companies, cable and telco incumbent, compete with each other – if at all. At the same time, in the House of Representatives, Bell-funded Rep. Billy Tauzin started pushing legislation "Tauzin-Dingell", to legislatively remove all of the competitors from the networks. We note Billy Tauzin had sponsored Michael Powell to be Commissioner. (In 2001, we filed a letter with Congress, requesting that Tauzin recuse himself of voting on telecommunications matters, as he was not only the Chairman of the House Commerce Committee, but had many ties to the Bell companies – the same companies that benefited from the bills he was pushing.)

<http://www.newnetworks.com/recusetauzin.htm>

The closing of the networks was made final because of a definitional shift that would alter the future of broadband. Traditionally, broadband is a service that provides a faster speed and is a telecommunication service. Internet Provisioning, connecting the customer to the Internet, is an 'interstate information service' as it should be. It is not the conduit but the application over the conduit. In 2005, the FCC changed the definition and created an 'Internet broadband' service – which is tying the application, the Internet, and the carriage, the transmission network, into one service. And information services do not have any obligations to rent to supply Internet providers or any other competitor, access to the networks.

Broadband and the Information Superhighway? America is 15th in the world in broadband, based on studies by a number of international organizations. There is no nationwide, very fast, fiber optic-based information superhighway. By 2009, 113 million homes should have been upgraded. America was charged some \$300 billion for these networks and money is still being collected today in the form of rate increases and tax perks.

When we discuss America's broadband world standing, the reader should note that in Hong Kong and Korea, among other countries, companies are supplying 100 Mbps services in both directions for \$40.00 --- close to the price of America's ADSL service, that is 30+ times slower and fast in only one direction.

Competition from mergers? Ironically, virtually every merger guaranteed that there would be direct competition by each Bell company for local and long distance service. SBC was supposed to compete in 30 cities outside their region by 2002. Verizon was to be in 24 out-of-region cities in the same timeframe. We now know that the Bell companies never competed with each other over these 25 years.

2.6 Cable Companies and Wireless Companies

The cable companies have become the only other major provider of broadband. Congress never attempted to open these networks to competitors, including competitive ISPs, and there was even a case, BrandX, that unsuccessfully sued to be allowed to use the cable networks.

It can be argued that having one network, the local phone monopolies, opened, would be enough to bring competition. It is now clear that a failure to open the cable networks did not help the growth of fast broadband nor even phone competition.

According to the NCTA, the cable companies only have 18% of the local phone market nationwide, though it varies by location, and they control the cable market, and have taken control of 50% of the broadband and Internet Provisioning services, again, because they could use their market power to block competition and they had the only high-speed service.

From the point of view of small business competition, this has meant that with only one network statutorily opened, the FCC should never have closed it to competition because there were no other choices for competitors. Ironically, the Brand X decision did not, as the FCC erroneously stated, require that DSL be regulated the same as cable.

3.0 The Problems with the FCC's Process and Data.

NOTE: Teletruth has an existing Regulatory Flexibility Act challenge and Data Quality Act challenge that was filed in 2008 as part of Docket FCC 08-203.

http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-08-203A1.txt

<http://www.teletruth.org/docs/Teletruthforbearance.doc>

We bring this up because it addresses some of the issues we bring up here.

Instead of taking the time to write something new, we will rely on our previous filings as they have never been addressed; no changes were ever made to fix the Reg. Flex.

In May 2002, Teletruth filed a Regulatory Flexibility Act challenge as part of dockets CC Docket No. 01-337, CC Docket No. 01-338, CC Docket 02-33, GN Docket No. 00-185, CS Docket No. 02-52, CC Docket No. 02-39

- <http://www.newnetworks.com/teletruthrfacomments.html>

Our findings: The Commission's violations of the RFA include:

- The Commission has provided little more than a "boilerplate" RFA analysis which does not satisfy either the intent or specifics of the law or protect the public interest.
- The information supplied about the marketplace in virtually ALL RFA's had no relationship to the current marketplace and could be decades old.
- The Commission failed to do a proper 'impact' analysis to determine the harms their regulations would have.
- The Commission has failed to be proactive as defined by the law in seeking small business competitor comments on the RFA.
- The Commission has failed to articulate, consider or offer meaningful alternatives to the core impacts of its proposed rulings as required by law.

Addressing each issue (and incorporating the 2008 Reg. Flex)

3.1 The Commission has provided little more than a "boilerplate" RFA analysis which does not satisfy either the intent or specifics of the law or protect the public interest.

It seems that the FCC never actually examines any market in the RFA but simply puts in standard boilerplate materials. This violates the RFA according to SBA's Guidelines.²

"The RFA establishes an analytical process, not merely procedural steps, for analyzing the impact of regulations on small entities. **Boilerplate analyses or certifications will not satisfy the law.** The law anticipates that something substantive will emerge from the

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process to ensure that public policy is enhanced." ³(Emphasis added)

Note: There is a later version of the SBA's Office of Advocacy's Regulatory Flexibility Act Guidelines, published in 2003. <http://www.sba.gov/advo/laws/rfaguide.pdf>

Advocacy writes that there has to be a 'factual basis' for the decisions.

"What is a 'factual basis?' The Office of Advocacy interprets the 'factual basis' requirement to mean that, at a minimum, a certification should contain a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification."⁴

Having a "factual basis" also requires that the FCC DOES NOT use 'boilerplate' data, which we argue was done in virtually every other Reg Flex analysis.

"Prior to the enactment of SBREFA amendments in 1996, the RFA required only that a certification be supported by a 'succinct statement explaining the reasons for the certification,' and since such statements were not subject to judicial review, even as part of the record on review, agencies could avoid substantive explanations by using boilerplate certifications. The amended version of the RFA now requires that certifications be supported by a 'statement of factual basis.' In amending the RFA, Congress intended that agencies should do more than provide boilerplate and unsubstantiated statements to support their RFA certifications."⁵

3.2` The information supplied about the marketplace in virtually ALL RFA's had no relationship to the current marketplace and was decades old.

When we discuss boilerplate, it is of the worst kind – The FCC has used data that is decades old in ALL of these cases. For example, this paragraph is from a 2008 NRPM, reflecting on the current small competitors and marketplace. It uses data from 1997:

"Wireless Communications Services: This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A "small business" is an entity with average gross revenues of \$40 million for each of the three preceding years, and a 'very small business' is an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these small business size standards. The Commission auctioned geographic area licenses in the WCS service. **In the auction, held in April 1997, there were seven winning bidders that qualified as "very small business" entities, and one that qualified as a 'small business' entity.**" (Emphasis added)

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3.3 The FCC’s data in the 2008 RFA used data from 1992, 1997, 1998, 1999, 2000, 2001, 2002 and 2005 and it is never the most current data available.

Using data from 1992, 1997, 1998, 1999, 2000, 2002, and 2005 is simply not acceptable, nor is it even the latest data the FCC actually could use from its own previous decisions. This is a summary of some of the small businesses that were listed under wireless carriers and wireless broadband companies. The FCC uses the ‘auction’ information, which in the case of 1992 is 16 years old, to discuss the current markets. It is not the most recent data by any stretch of the imagination.

Wireless Small Businesses Listed in the FCC’s RFA, FCC 08-203

Wireless Carriers	license	date
Paging	804	
Cellular and Other Wireless Telecommunications	1,378	
Cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR	432	
Common Carrier Paging.	360	
Paging Metropolitan Economic Area licenses	57	2000
Wireless Communications Services.	8	1997
Wireless Telephony.	221	1997
Broadband Personal Communications Service -C	90	1997
Broadband Personal Communications Service D, E, and F	93	1999
Broadband Personal Communications Service 347 CDE	48	1999
Broadband PCS 422 C and F	29	2001
Narrowband Personal Communications Services		
220 MHz Radio Service – Phase I Licensees	1,515	1992
220 MHz Radio Service – Phase II Licensees	39	1998
Phase II: 216 EA licenses and 9 EAG licenses	14	1998
800 MHz and 900 MHz Specialized Mobile Radio Licenses	60	
700 MHz Guard Band Licensees.	6	2000
39 GHz Service.	18	2000
Wireless Cable Systems. small MDS (now BRS) and LMDS		
LMDS auctions	133	1998-99

We will come back to this issue when we discuss the harms to small wireless providers.

However, the FCC claimed that using 1997 data was allowable because it was based on census data.

“We also reject TeleTruth’s argument that the Commission violates the RFA by relying on outdated 1997 Census Bureau data to identify the number of ISPs potentially affected by our final rules in the RFA. The

1997 Census Bureau data were and still are the most current data available. According to TeleTruth, data compiled by both the SBA and Boardwatch/ISP-Planet, an ISP-focused periodical, indicate that the number of ISPs is close to 7,000, rather than the 2,751 ISPs identified by the RFA. Although TeleTruth cites to higher numbers, the Census Bureau has not released the more recent (2002) results for telecommunications providers or for ISPs. Thus, the RFA in this proceeding and this FRFA appropriately rely on the most up-to-date 1997 Census Bureau data and therefore comply with the RFA.”⁶

In our analysis, we presented the fact that there were other data sources that had more accurate, up to date data; yet the FCC, instead of admitting that they were wrong said – take us to court.

“TeleTruth DQA Reply at 1-10. *See* TeleTruth TRO Reply at 15. TeleTruth also argues that the *Triennial Review Order* and other Commission orders have violated the DQA in various respects. *See* TeleTruth TRO Reply at 18-25. We need not reach the merits of these complaints in this remand proceeding. To the extent a party believes that a Commission order has violated federal law, that party should seek recourse in the context of a petition for reconsideration of the order at issue or before an appropriate court, not in the context of a subsequent rulemaking proceeding.”⁷

One would expect that the agency would actually clean up its act when it was faced with such blatant data issues and not circle the wagons and suggest we take legal actions. The problem here is simple --- virtually no small business has \$100,000 or more to take a legal challenge against a regulatory agency. The FCC knows this so it can put the burden back on those it knows do not have the resources to challenge their bad decisions relating to small business.

3.4 The Commission has failed to do a proper ‘impact’ analysis to determine the harms their regulations would have.

Under the Regulatory Flexibility Act, the FCC is required to essentially do an impact study to examine just how their decision will harm these small competitors, and what alternatives they should put into place.⁸

”The RFA requires federal agencies to consider the impact of regulations on small entities in developing the proposed and final regulations. If a proposed rule is expected to have significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis must be prepared. “

The 2008 document lists 54 different small business categories of companies and at least 13 of them have identical language:

“...the majority of these firms are small entities that may be affected by our action.”

As the SBA Advocate writes, there has to be alternatives identified and more than simply hand-waiving.

"As a preliminary step, an agency should develop a profile of different-sized entities likely to be affected by the rule. In addition, an agency needs to assess how each of these different-sized entities will be affected. This means that the agency needs to specify the number and type of entities affected, compliance costs, objectives to be achieved, and comparisons of regulatory alternatives to the regulation — alternatives that would minimize economic impacts without sacrificing stated objectives. Data, models, and assumptions should be identified and evaluated explicitly, together with adequate justifications for the alternatives selected."⁹

3.5 The Commission has failed to be proactive as defined by the law in seeking small business competitor comments on the RFA.

The RFA documents do not appear, except at the end of a long and complicated document, or in the Federal Register, which is not read in any normal course of business. The RFAs are not linked to/from the FCC's website, nor are they ever referenced or highlighted in any way as something that would be of interest to the small business.

For example, in the press release/announcement of the DSL broadband as information services docket, CC Docket 02-33, there was no mention of Comments sought for the RFA.¹⁰

This failure to actively and aggressively solicit comments on events that harm small businesses is a direct violation of the Act, which requests that the agency take a proactive role: According to the SBA:

"Section 609(a)–(b) requires the head of the agency to ensure that proactive steps are taken to engage participation by small entities in the review of the rule during the early stages of the rulemaking."¹¹

And the Act states:

“The publication of general notice of proposed rulemaking in publications likely to be obtained by small entities.” (5 U.S.C. § 609(a)(2)).¹²

“The direct notification of interested small entities.” (5 U.S.C. § 609(a)(3)).¹³

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However, the FCC claimed that they fulfilled their obligations.

“5. We also reject TeleTruth’s argument that the Commission violates the RFA by failing to conduct proper outreach to small businesses for purposes of compiling a comprehensive record in this proceeding. The Commission has satisfied its RFA obligation to assure that small companies were able to participate in this proceeding. Specifically, the RFA requires the Commission to ‘assure that small entities have been given an opportunity to participate in the rulemaking,’ and proposes as example five ‘reasonable techniques’ that an agency might employ to do so. In this proceeding, the Commission has complied with the RFA by employing several of these techniques: it (1) has published a ‘notice of proposed rulemaking in publications likely to be obtained by small entities’; (2) has “included] . . . a statement that the proposed rule may have a significant economic effect on a substantial number of small entities” in the *Interim Order and NPRM*; (3) has solicited comments over its computer network;¹⁸ and (4) has acted ‘to reduce the cost or complexity of participation in the rulemaking by small entities’ by, among other things, facilitating electronic submission of comments.”¹⁴

Let us make clear that the FCC’s “in publications likely to be obtained by small entities” is the Federal Register.

“16 *Id.* § 609(a)(2). TeleTruth has provided no reason to believe that small carriers would be unfamiliar with the Federal Register, in which all federal regulations pertinent to those companies’ operations are published. We note that a summary of the *Interim Order and NPRM* was published in the Federal Register at 69 FR 55128 (Sept. 13, 2004)”¹⁵

This answer is a truly embarrassing answer from the Agency. No one reads the Federal Register on a regular basis, especially small entities who are trying to keep their businesses alive. In areas that matter, when the Agency is preparing to do harm to the ‘small entities’, they have an obligation to do more than publish in the Federal Register.

We note that the Regulatory Flexibility analyses are also an unknown to small entities, or almost anyone, to be frank, as it is an appendix in the back or long unreadable documents, that only lawyers and policy wonks are familiar with.

Plain English Summaries and other outreach should have been also adopted. We also suggested to the Commission in 2002 that the FCC should have plain English versions of many of the dockets for this very reason.

3.6 The Commission has failed to articulate, consider or offer meaningful alternatives to the core impacts of its proposed rulings as required by law.

Every RFA is required to offer alternatives to the plan ruling being proposed.

"The VI. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

"14. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives"¹⁶

Lack of providing any reasonable analysis or alternatives has also been questioned by SBA in other comments.¹⁷

"2. The Commission Does Not Sufficiently Discuss the Regulatory Burden on Small Entities Nor Does it Propose Alternatives Designed to Minimize the Burden.

"The Commission does not adequately discuss any significant economic impact its access proposal may have on small business nor does it propose sufficient alternatives that might minimize this impact, as is required by the RFA."¹⁸

But the FCC, of course, disagreed, claiming that “the Commission provided notice to parties regarding the range of policy outcomes that might result from this Order.”

“6. We also disagree with commenters that claim that the Commission did not specifically consider the impact of eliminating UNEs on small businesses or describe alternatives to minimize any impact in the RFA. Although the Small Business Administration Office of Advocacy (SBA) recommends that we issue a revised RFA to account for the impact our rules might have on small competitive LECs, we believe it is not necessary since the *Interim Order and NPRM* explained in detail the ruling of the D.C. Circuit in *USTA II*, which gave rise to this proceeding; posed specific questions to commenters regarding the proper implementation of that decision; and solicited comment from all parties. While the NPRM did not specify particular results the Commission would consider – and the RFA therefore did not catalogue the effects that such particular results might have on small businesses – the Commission provided notice to parties regarding the range of policy outcomes that might result from this Order. As indicated above, a summary of the *Interim Order and NPRM* was published in the Federal Register, and we believe that such publication constitutes appropriate notice to small

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businesses subject to this Commission's regulation. Indeed, far from discouraging small entities from participating, the *Interim Order and NPRM* and the associated RFA elicited extensive comment on issues affecting small businesses. These comments have enabled us to consider the concerns of competitive LECs throughout this Order. Moreover, in Part C, below, we attempt to estimate the number of competitive LECs that will be affected by the rules we adopt herein. We therefore reject arguments that small entities were prejudiced by any lack of specificity regarding specific results potentially resulting from this proceeding."¹⁹

This kind of intellectual poppycock, where the Agency essentially condemns whole industries to death while they did not fulfill their obligations under the law, helped to put the CLEC industry into bankruptcy or sold off. In the ruling, the FCC removed the rights of the competitive CLECs to acquire networks at wholesale and it is now clear there were no serious alternatives. AT&T and MCI, the 2 largest local phone competitors, were put out of the local business, which helped to force their sale. And as we pointed out, after the FCC's decision there has been a 60% loss of competitive lines.

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4.0 Wireless Spectrum, Broadband and the Regulatory Flexibility Act

How can AT&T and Verizon be “very small businesses”?

- A) WE REQUEST THAT THE FCC OPEN A NOTICE OF PROPOSED RULEMAKING
- B) THE FCC SHOULD SECURE REFUNDS OF ALL OF THE FRAUDULENT SMALL ENTITY DISCOUNTS FROM THE FCC’S WIRELESS SPECTRUM AUCTIONS.
- C) IT SHOULD HAVE A NEW RULE THAT GIVES PREFERENCE TO SMALL ENTITIES WITH ENFORCEMENT, OR
- D) OPENING UP THE CURRENT SPECTRUM THAT WERE GOTTEN THROUGH FALSE FRONTS.

The issue from the point of view of the Regulatory Flexibility Act surrounds the spectrum auctions and the spectrum that was allocated to small businesses. The FCC’s data and its failure to examine the issues has led to a massive \$8 billion dollar spectrum scam.

<http://www.newnetworks.com/wirelesscomplaint.htm>

Commissioner Adelstein on April 25, 2006 wrote:

"We missed a real opportunity to shut down what almost everyone recognizes has the potential for the largest abuse of our Designated Entity program: giant wireless companies using false fronts to get spectrum on the cheap."

In our previous discussion, the information used pertaining to the small business spectrum markets was from 1992, 1993, 1994-2002, and when we examined the details that were included in the Regulatory Flexibility Act analysis of this market, most of the companies that were part of these early spectrum deals were either sold off or went out of business. Had the FCC collected accurate data and tracked the spectrum deals, it would have noticed that their ‘small business’ spectrum had turned into a scam in the 1990’s.

Let’s be more specific. Here is the FCC discussion in their April 25th ruling on small business regulations.

“Throughout the history of the auctions program, the Commission has endeavored to carry out its Congressional directive to promote the involvement of designated entities in the provision of spectrum-based services. Congress recommended that the Commission, in assisting designated entities, consider the use of various mechanisms such as tax credits and bidding preferences. Yet, in so doing, Congress also mandated that the Commission safeguard the award of the benefits it distributed to

‘prevent unjust enrichment as a result of the methods employed to issue licenses’.”

The policy of small business spectrum licenses, also called “entrepreneur” licenses, is not new. It was discussed in the first FCC report on wireless competition in 1995.

“46. The Commission has allocated 120 MHz [**43] to broadband PCS, which has been licensed in six bands; three bands each containing thirty MHz (Blocks A, B and C), and three bands each containing ten MHz (Blocks D, E and F) ... In the auctions for Blocks C and F, the Commission has limited bidder eligibility to "entrepreneurs" with less than \$125 million in gross revenues and \$500 million in total assets. Winning bidders for these entrepreneurs' blocks may pay for their licenses in installments and small businesses (under \$40 million in gross revenues), including small businesses owned by minorities and women and small rural telephone companies, are eligible for bidding credits and enhanced installment payments. Rural telephone companies are eligible to obtain smaller, geographically partitioned broadband PCS licenses in order to provide service in their rural, wireline service areas.”

4.1 Designated Entities or Deceptive Entities?

This out and out deception is not new. It’s been around for years, and it is growing. The FCC has only ignored this issue, even while Commissioner Copps noted that these practices “erode the integrity of our auctions by masquerading as small carriers”, and will impact the current and future auctions, not simply the past auctions.

“I expressed concern about misuse of our Designated Entity program – calling for action to fix it in advance of the AWS auction. As I explained then, I believe the DE program plays a critical role in ensuring that smaller carriers have a fighting chance to obtain spectrum resources. But at the same time, we have a solemn obligation to take a strong stand against abuses of the program. We must not allow deep-pocketed companies or individuals to erode the integrity of our auctions by masquerading as small carriers. It is critically important that we act to ensure reforms that protect against fraud in time for the upcoming AWS auction.”

4.2 Cingular, AT&T, SBC, BellSouth, and T-Mobile and Their Designated Entities.

As previously noted, this problem has been going on for a while, thanks to the failure of the FCC to properly monitor and enforce the small business statutes. According to the Cingular 10K for 2002, (published in 2003), the company had put in over \$4.3 billion

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dollars to play-act as a small company. Salmon PCS was "formed to bid as a very small business", thus, it only existed to help Cingular get use of low cost licenses. Cingular also had a deal with T-Mobile over another group called "Factory".

"The Company has investments in affiliates for which it does not have a controlling interest that are accounted for under the equity method. The more significant of these investments are GSM Facilities, LLC (Factory), a jointly-controlled infrastructure venture with T-Mobile for networks in the New York City metropolitan area, California and Nevada, and **Salmon, formed to bid as a "very small business" on FCC licenses and build out and operate wireless voice and data communications systems using those licenses.** Investments in and advances to equity affiliates consist of the following." (Emphasis added)

Cingular Investment in and Advance to Equity Affiliates (In the millions)

	2001	2002
Investment in Factory	\$1,275	\$1,966
Investment in Salmon	\$262	\$236
Advanced to Salmon	\$475	\$101
Other	\$11	\$13
	\$2,033	\$2,316

We note: T-Mobile is owned by a foreign concern, "Deutsche Telecom", Germany's largest phone company.

Here are Cingular's own words in 2006, claiming to be the largest wireless US company. Cingular (now called AT&T Mobility) was owned by BellSouth and SBC. Cingular also bought AT&T Wireless (AWE, previously spun out of AT&T Corp.). SBC has renamed itself AT&T Inc.

"Cingular Wireless is the largest wireless company in the United States, with more than 54 million subscribers who use the nation's largest digital voice and data network."

4.3 SBC-AT&T-BellSouth-Cingular – Other Data

AT&T had a number of different groups that were added to the Cingular mix, which they call "Variable Interest Entities" This is from the 2005 Cingular Annual Report.

"These (Variable Interest) entities were formed to enable individuals and businesses with limited assets and revenues to partner with, and receive financing from, large businesses, such as the Company or AT&T

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Wireless, to bid on licenses that were otherwise unavailable to large entities. To date, the activities of these entities have consisted primarily of acquiring licenses through acquisitions and FCC auctions and network construction.”

4.4 Application of the Regulatory Flexibility Act for Wireless. – Bad Data.

In our previous discussion of the data used in the RFAs, a large portion of the market information pertained to wireless spectrum including the following taken from our Comments in 2008.

Wireless Spectrum Auctions and Wireless Services and Year.

	Licenses	Year
Paging Metropolitan Economic Area licenses	57	2000
Wireless Communications Services.	8	1997
Wireless Telephony.	221	1997
Broadband Personal Communications Service -C	90	1997
Broadband Personal Communications Service D, E, and F	93	1999
Broadband Personal Communications Service 347 CDE	48	1999
Broadband PCS 422 C and F	29	2001
Narrowband Personal Communications Services		
220 MHz Radio Service – Phase I Licensees	1,515	1992
220 MHz Radio Service – Phase II Licensees	39	1998
Phase II: 216 EA licenses and 9 EAG licenses	14	1998
800 MHz and 900 MHz Specialized Mobile Radio Licenses	60	
700 MHz Guard Band Licensees.	6	2000
39 GHz Service.	18	2000
Wireless Cable Systems. small MDS (now BRS) and LMDS		
LMDS auctions	133	1998-99

This is embarrassing--- but what is worse is that the FCC, at any time, could have actually examined these markets in more detail and included updates to the market analysis, which they, in fact have as licenses are filed with the FCC.

Let’s go through the information supplied in this one paragraph and ask the fundamental question --- What happened to the 8 winning bidders mentioned in this paragraph and is it valid to use data from 1997.

“Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A ‘small business’ is an entity

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with average gross revenues of \$40 million for each of the three preceding years, and a ‘very small business’ is an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these small business size standards. [1] The Commission auctioned geographic area licenses in the WCS service. **In the auction, held in April 1997**, there were seven winning bidders that qualified as ‘very small business’ entities, and one that qualified as a ‘small business’ entity.” (Emphasis added)

Teletruth went to the actual auction information and tracked the companies since 1997— We did all this using Google and Yahoo searches, as well as the SEC’s EDGAR database and the FCC materials. The FCC could have done the exact same thing.

To sum up: 4 of the 8 spectrum companies’ licenses were sold off by 2002, one company never rolled out their services, one company couldn’t be found, and two others are non-profit co-operatives who receive USF funds.

Wireless Spectrum Auction "Designated Entities", 1997

Bal\Rivgam, L.L.C.	Signed a deal with Gabelli and sold off spectrum to Nextwave. Was supposed to roll out "the first commercial 2.3 GHz WCS network in the U.S”
Omnipoint Data Company, Inc.	Omnipoint completed a merger with VoiceStream Wireless. On May 31, 2001, Deutsche Telekom AG (German company) acquired 100% of VoiceStream.
Telecorp Management Corp Inc	In 2002, TeleCorp became a wholly-owned subsidiary of AT&T Wireless.
Pioneer Telephone Association, Inc	Cooperative, non profit.
Valley Telephone Cooperative, Inc.	Cooperative, non-profit
Metricom, Inc.	Went Bankrupt in 2003. In November 1999, the Company issued and sold to MCI WorldCom, Inc. 30 million shares at \$10 per share, Vulcan Ventures got 30 million shares at \$10 per share, for \$600 million.
Pacific Triangle Communications	Can’t find post 1997 auction. Most likely a spectrum speculator
Cellutec	Never rolled out anything and asked for an extension of buildout requirements in 2007.

Source of Designated Entities (Small and Very Small Business):

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http://www.fcc.gov/Bureaus/Wireless/Public_Notices/1997/d970886a.html

Here are some of the highlights we found.

- A) The FCC had more recent data on many of these companies. For example, in the case of Telecorp, the FCC knew about this transaction as they had to approve it in 2002.
<http://www.fcc.gov/transaction/attwireless-telecorp.html>
- B) Giving very small business spectrum to large corporate concerns that consolidated the industry should have been noticed early on as it has raised havoc with the rights of small businesses ability to compete.

4.5 Wireless Spectrum Conclusion

If the FCC had actually tracked these companies as it was required to do, it could have noticed these pattern years ago. It failed to do its job. The FCC had the power to redo the Regulatory Flexibility Act to discuss what had occurred to the companies they mentioned in bulk. In fact, the FCC's own merger decision of Telecorp in 2002, or the tracking the legal actions against Gabelli, all should have been put into this analysis.

The FCC lost any compensation for the 25%-35% discounts that were applied to this auction when these companies were sold. We estimate that over \$8 billion dollars of spectrum payments were lost.

The details of our investigation are in our previous filing.

- A) WE REQUEST THAT THE FCC OPEN A NOTICE OF PROPOSED RULEMAKING
- B) THE FCC SHOULD SECURE REFUNDS OF ALL OF THE FRAUDULENT SMALL ENTITY DISCOUNTS FROM THE FCC'S WIRELESS SPECTRUM AUCTIONS.
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- D) OPEN UP THE CURRENT SPECTRUM THAT WERE GOTTEN THROUGH FALSE FRONTS.

5.0 Small Business Broadband Internet Provisioning

"We've been begging the FCC to establish a National Broadband Policy. On Feb. 14th the FCC took action—only it might turn out to be as bloody for ISPs as the St. Valentine's Day Massacre was for George "Bugs" Moran's North Side Gang in Chicago, circa 1929."²⁰

Patty Fusco, Managing Editor, ISP Planet, March 1, 2002

- WE REQUEST THAT THE FCC OPEN A NOTICE OF PROPOSED RULEMAKING AND REMOVE THE RULES RELATED TO DOCKET CC 02-33 AND FCC 05-150 - "FCC Eliminates Mandated Sharing Requirement on Incumbents' Wireline Broadband Internet Access. August, 5th, 2004.
- WE REQUEST THAT THE FCC OPEN A NOTICE OF PROPOSED RULEMAKING AND REVISE THE RULES RELATED TO DOCKETS WC Docket No. 04-313 and CC Docket No. 01-338, FCC 04-290, "In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers" --- ORDER ON REMAND. December 15, 2004.

We have outlined how the FCC's failure to do a proper Regulatory Flexibility Act analysis for Internet Providers, including accurate data, had a direct and sad consequence--- eliminating over 7000 small Internet Providers, putting most of the CLECs and D-LECs out of business or severely harming their businesses.

But, it is not simply about process but about essentially manipulating the story to suit the FCC's previous political needs – help AT&T-SBC and Verizon get rid of all competition. This paragraph is from a 2008 Docket. It is using data pertaining to the independent ISP companies and it is from 2002.

"Internet Service Providers. The SBA has developed a small business size standard for Internet Service Providers (ISPs). ISPs "provide clients access to the Internet and generally provide related services such as web hosting, web page designing, and hardware or software consulting related to Internet connectivity." Under the SBA size standard, such a business is small if it has average annual receipts of \$23 million or less. According to Census Bureau data for 2002, there were 2,529 firms in this category that operated for the entire year. Of these, 2,437 firms had annual receipts of under \$10 million, and an additional 47 firms had receipts of between \$10 million and \$24,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action."

As we pointed out in our background, using 6 year old data (or 8 year old data) clearly is a violation of basic principles of market research. For example, in this case using data from 2002, the FCC's decisions on line-sharing had yet to happen, AT&T and MCI were still the

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largest competitors to SBC and Bell Atlantic soon to be Verizon, and the entire market was changing, in a large part because of the consolidation of the Verizon and the New-AT&T.

In the line sharing analysis, the FCC used data from 1997, which essentially, as we will show, gave a distorted picture of the ISP market.

5.1 FCC Data Is Not the Most Recent and Had Mistakes

The FCC did not use the most current data in 2008. There is later information than 2002 from the Census. This timeline was taken directly from the Census bureau. It shows that there is data from 2003, 2004, 2005 and 2006 which is more accurate.

Here is the links to 2003, 2004, 2005 and 2006 data provided by the Census,

- 2003 data for ISPs
- <http://www.census.gov/epcd/susb/2003/us/US51.HTM>
- Data 2004 for ISPs.
- <http://www.census.gov/epcd/susb/2004/us/US51.HTM>
- Data 2005 for ISPs.
- <http://www.census.gov/epcd/susb/2005/us/US51.HTM>
- The Census released data from 2006, updated March 2008. Table 3.4.1. Internet Service Providers (NAICS 518111) – Estimated Sources of Revenue and Expenses for Employer Firms: 2004 through 2006
http://www.census.gov/svsd/www/services/sas/sas_data/sas51.htm

5.2 Accurate FCC Assessment Could have Changed the Triennial Review and Other Rulings Pertaining to ISPs.

The FCC bad stats missed the rise and fall of the ISP markets. According to the Census, in 2000 there were 9335 independent, mostly small ISPs operating in America. By 2005, there has been a 45% drop in the number of independent ISPs in the US.

US Internet Service Providers (ISPs) Source: Census

	1997	1998	1999	2000	2001	2002	2003	2004	2005
Companies:	2,751	4,915	7,099	9,335	8,450	7,627	4,249	4,327	4,417
FCC:						2,529			

The FCC never examined this timeline accurately as it used data in 2002 from 1997, did not examine that the FCC's decision as well as a lack of enforcement quickly lowered the ISPs' ability to compete.

5.3 The FCC claimed that it was not required to do an impact study on ‘entities’ it does not directly regulate.

“First, we reject TeleTruth’s contention that the Commission fails to assess the impact of its unbundling rules on small Internet Service Providers (ISPs), and that this failure violates the RFA. Although we understand that our rules will have an economic impact in many sectors of the economy, including the ISP market, the RFA only requires the Commission to consider the impact on entities *directly* subject to our rules. The RFA is not applicable to ISPs because, as we previously noted, ISPs are only *indirectly* affected by our unbundling actions.³ In the interest of ensuring notice to all interested parties and out of an abundance of caution, we have previously included ISPs among the entities potentially indirectly affected by our unbundling rules, although we have been explicit in emphasizing that ISPs are only indirectly affected by these rules. On this subject, we note that the D.C. Circuit has consistently held that the RFA imposes no obligation to conduct a small entity impact analysis of effects”²¹

5.4 The FCC Does Regulate ISPs on Multiple Levels.

This “we do not regulate” is patently a lie. The FCC does regulate the ISPs. It regulates the transmission services that the ISPs depend on to reach their customers and it is a primary part of their business. In 2004, when the FCC removed the requirements to provide line-sharing to independent ISPs it stated:

“...the Order requires that facilities-based wireline broadband Internet access service providers continue to provide existing wireline broadband Internet access transmission offerings, on a grandfathered basis, to unaffiliated ISPs for one year. The Order also requires facilities-based providers to contribute to existing universal service mechanisms based on their current levels of reported revenues for the DSL transmission for a 270-day period after the effective date of the Order or until the Commission adopts new contribution rules, whichever occurs earlier.” (Emphasis Added)

The FCC concedes that this ruling replaces requirements the Bells have today to resell to ISPs using "Computer Inquiry".

"49. The Commission notes that the Computer Inquiry requirements are only applicable to the BOCs, which are not small entities, but that ISPs, including small ISP entities, may obtain access to the BOCs' network to provide broadband Internet access service pursuant to these requirements. Indeed, the Commission notes in the NPRM that ISPs

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currently purchase transmission services under tariff to provide their own information services."²²

And to top it off, the FCC made an outrageous claim: That there would be less regulation, which would be good for small entities.

"If it classifies and regulates this service as an information service, providers of this service, including those providers that own transmission facilities, could be subject to minimal and/or reduced regulatory requirements. The Commission believes that this would have a positive economic impact on small entities to the extent that it avoids placing restrictions on their operations."²³

To read a full analysis of the issues surrounding the CLECs and ISPs' wholesale sell-off by the FCC see our 2002 comments.

Yet the Commission's claim that it does not directly regulate ISPs is directly contradicted by several contemporaneous and more recent proceedings. The FCC has broadly interpreted its Title I powers to include regulation of the behavior of information service providers. It adopted, without rulemaking, a "policy statement" that restricts the behavior of ISPs, and is actively pursuing cases against ISPs who allegedly violate these principles in their network management and traffic allocation practices. Hence the FCC not only impacts small business ISPs who are the customers of the regulated ILECs who are no longer subject to Computer Inquiry rules, but it *directly* tells the remaining ISPs how they may select what information they may carry and how they can prioritize it.

5.5 Conclusion:

- WE REQUEST THAT THE FCC OPEN A NOTICE OF PROPOSED RULEMAKING AND REMOVE THE RULES RELATED TO DOCKET CC 02-33 AND FCC 05-150 - "FCC Eliminates Mandated Sharing Requirement on Incumbents' Wireline Broadband Internet Access. August, 5th, 2004.
- WE REQUEST THAT THE FCC OPEN A NOTICE OF PROPOSED RULEMAKING AND REVISE THE RULES RELATED TO DOCKETS WC Docket No. 04-313 and CC Docket No. 01-338, FCC 04-290, "In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers" --- ORDER ON REMAND. December 15, 2004.

The FCC never fulfilled its obligations under the Reg. Flex Act to make sure that its laws did not harm the small broadband and Internet competitors-- CLECs, DLECs and ISPs

- a) The FCC did not have accurate data.

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- b) The FCC did not do a serious market analysis and impact study on the impacts of their rulings would have on these small businesses.
- c) The FCC did not provide reasonable alternatives to make sure that these companies would not be harmed.

The outcome of this failure was the elimination of competition for broadband Internet. Today, the cable and phone companies have essentially stolen the marketplace from those entrepreneurs that created it by blocking these companies' access to faster networks, such as DSL, cable modem service or even the newer Verizon's FiOS or AT&T's U-Verse.

This did not simply hurt these companies but it harmed ALL of the users of these small companies as they could not deliver quality services when their primary vendor, the incumbents, did everything in their power to block their ability of these small companies to deliver.

It has also put into question the future of broadband and the Internet.

AT&T now controls 22 states and has one only primary competitor in most markets – the cable company. It has been able to vertically integrate local, local, long distance DSL/broadband, Internet Provisioning and the outcome of the market consolidation is now showing signs of problems. Net Neutrality would never need to even be discussed if there were serious competition. The term did not even enter the public consciousness until after the FCC's 2005 ruling (FCC 05-150). Before that ruling, the ISP market was open to new entrants. A customer could simply change providers if their Internet Service Provider/broadband provider blocked, filtered or degraded service. The current policy closes market entry and attempts to substitute regulation of the content of the remaining cable/ILEC duopoly. Given that ISPs are the modern equivalent of publishers, the FCC has essentially stifled a free press in favor of having two government-managed publishers.

And worse, the trend lines are clear. The cable and phone companies are now considering 'metering' of broadband service, and if both companies do it, then there are no choices. Absent open entry of wireline ISPs into the marketplace, there is no way to know when or whether this metering is based on true cost issues or whether it is an attempt to abuse their now-highly-concentrated market power.

REQUEST: We request that the FCC open a notice of proposed rulemaking into the following rules:

- FCC's ISP eliminates common carriage access for Internet providers. FCC 05-150
- <http://www.teletruth.org/docs/FCCISPelimDOC-260433A1.doc> (doc.)

“FCC Eliminates Mandated Sharing Requirement on Incumbents’ Wireline Broadband Internet Access The Federal Communications Commission today adopted policies that will bring more and better broadband services to consumers by eliminating facilities sharing requirements on facilities-based wireline broadband Internet access service providers.”

- FCC's Removal of Wholesale Rates and blocking competitors from using fiber-based networks. ---In the Matter of, Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers WC Docket No. 04-313, CC Docket No. 01-338
- <http://www.teletruth.org/docs/undbundlingorder.doc> (doc.)

“In our *Triennial Review Order*, we recognized the marketplace realities of robust broadband competition and increasing competition from intermodal sources, and thus eliminated most unbundling requirements for broadband architectures serving the mass market.²⁴ Our efforts there made it easier for companies to invest in equipment and deploy the high-speed services that consumers desire. The *Triennial Review Order* had the effect of limiting unbundled access to next-generation loops serving the mass market. In this Order, the Commission takes additional steps to encourage the innovation and investment that come from facilities-based competition.²⁵ By using our section 251 unbundling authority in a more targeted manner, this Order imposes unbundling obligations only in those situations where we find that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition. This approach satisfies the guidance of courts to weigh the costs of unbundling, and ensures that our rules provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition.²⁶

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6.0 CODA: Our Warnings Went Unheeded. --- America Lost a Generation of Technology, Economic Growth and Cheaper and Higher Quality Products.

We had a front row seat to this entire debacle as we filed over 20 different documents and submitted impact studies, surveys and reports pertaining to the harms caused by bad data, or a failure to enforce basic laws, stop predatory pricing or sub-standard customer service issues. In the end, however, the FCC closed down competition, blocking ISPs and CLECs from using the networks. We were also members of the FCC Consumer Advisory Committee, and had an inside view of the workings of the ‘consumer’ issues at the FCC.

Here are some of our activities:

- In 1999 we filed a complaint with the NY state Attorney Generals’ Office over predatory pricing and sub-standard customer services to Internet Providers that directly impacted the customer.
- <http://newnetworks.com/nyispcomplaint.htm>
- In 2000 we conducted a national survey of ISPs, focusing on the incumbent treatment, including customer service and installations, as well as separate surveys in Massachusetts, Texas, New York, Kansas, among other states.
- <http://www.newnetworks.com/ispsummary.html>
- In 2001 we released a report on the how the Bell companies were harming the Competitive CLECS, and had help to cause \$120 billion in CLEC losses.
<http://www.newnetworks.com/clecham.htm>
- In 2001 we outlined how the Bell’s failure to deploy fiber put major telecom firms into bankruptcy and started the ‘telecom crash.’
- <http://www.newnetworks.com/fiberopitcfiasco.htm>
- In 2001 we released our 3rd survey – revealing that the phone companies were making much harder to get DSL and compete.
- <http://www.newnetworks.com/prispsurvey2001.htm>
- In 2001, we created the “Broadband Bill of Rights”, working with Congressmen Nadler.
- <http://www.newnetworks.com/broadbandbill.htm>
- In 2002 we created a small business impact study examining the current problems and future harms to Internet providers and D-LECs that would be created if specific changes to the laws were put through. It related to the following dockets CC Docket No. 01-337, CC Docket No. 01-338, CC Docket 02-33, GN Docket No. 00-185, CS Docket No. 02-52, CC Docket No. 02-39.
- <http://www.newnetworks.com/smallbusinessimpactstudy.html>
- In May 2002, Teletruth filed a Regulatory Flexibility Act Challenge as part dockets CC Docket No. 01-337, CC Docket No. 01-338, CC Docket 02-33, GN Docket No. 00-185, CS Docket No. 02-52, CC Docket No. 02-39
- <http://www.newnetworks.com/teletruthrfacomments.html>
- In 2002, Teletruth created a forum with the Small Business Administration’s Office of Advocacy to discuss the issue of small competitors and potential harms the

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FCC's proposed rules would have on the industry. SBA filed an ex parte letter on this topic

- <http://newnetworks.com/prsbaexparte.htm>
- In 2004, we filed a Data Quality Act Complaint with the National Internet Alliance (NIA) over FCC generated information about Internet Service Providers, using 8 Year old data. October 2004.
- <http://www.teletruth.org/docs/TeletruthNIAISPnumbersDataQualityAct.pdf>
- In 2008 we filed another Regulatory Flexibility Act challenge as well as a Data Quality Act complaint (still undecided), pertaining to WC Docket No. 08-190, WC Docket No. 07-139, WC Docket No. 07-204, WC Docket No. 07-273, WC Docket No. 07-21)
- <http://www.teletruth.org/forbearance.htm>
- Comments on National Broadband, 2009
- <http://www.newnetworks.com/broadbandcommentsrelease.htm>
- eBook "\$300 Billion Broadband Scandal", 2005
- <http://www.newnetworks.com/broadbandscandals.htm>
- eBook "The Unauthorized Bio of the Baby Bells", Foreword by Dr. Bob Metcalfe, 1999.
- <http://www.newnetworks.com/downloadbook.html>
- 25th Anniversary Report on AT&T, Verizon and Qwest Financial Indicators,
- <http://www.newnetworks.com/attverizontwentyfifth.htm>
- Broadband Filings, 1998-2004
- <http://www.newnetworks.com/Collected%20Broadband%20Information.htm>
- Data Quality Act Complaints, 1994-2009
- <http://www.newnetworks.com/Teletruthdataqualityfilings.htm>

ENDNOTES:

¹ From the Federal Register listing for "CC Docket No. 01-337'--- "Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services".

² Source: "The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies", U.S. Small Business Administration, Office of Advocacy 1998

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Unbundled Access to Network Elements, Review of the Section 251 Unbundling, Obligations of Incumbent Local Exchange, Carriers, WC Docket No. 04-313, CC Docket No. 01-338, ORDER ON REMAND, Adopted: December 15, 2004

⁷ Ibid.

⁸ A Guide to the Regulatory, Flexibility Act, U.S. Small Business Administration Washington, D.C., May 1996

⁹ "The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies", U.S. Small Business Administration, Office of Advocacy 1998

¹⁰ http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2002/nrcc0202.html

¹¹ "The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies", U.S. Small Business Administration, Office of Advocacy 1998

¹² Ibid.

¹³ Ibid.

¹⁴ Unbundled Access to Network Elements, Review of the Section 251 Unbundling, Obligations of Incumbent Local Exchange, Carriers, WC Docket No. 04-313, CC Docket No. 01-338, ORDER ON REMAND, Adopted: December 15, 2004

¹⁵ Ibid.

¹⁶ "The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies", U.S. Small Business Administration, Office of Advocacy 1998

¹⁷ "Promotion of Competitive Networks in Local Telecommunications Markets, SBA Comments , WT Docket No. 99-217, September 2, 1999"

¹⁸ . Ibid.

¹⁹ Unbundled Access to Network Elements, Review of the Section 251 Unbundling, Obligations of Incumbent Local Exchange, Carriers, WC Docket No. 04-313, CC Docket No. 01-338, ORDER ON REMAND, Adopted: December 15, 2004

²⁰ "Taxing Proposal For Broadband Internet Access" Patty Fusco, Managing Editor, ISP Planet, March 1, 2002http://isp-planet.com/politics/2002/broadband_tax.html

²¹ WC Docket No. 04-313, CC Docket No. 01-338, ORDER ON REMAND Adopted: December 15, 2004 Released: February 4, 2005)

²² Ibid.

²³ From the Federal Register for CC Docket 02-33 "Appropriate Framework for Access to the Internet Over Wireline

²⁴ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, para. 278 (2003) (Triennial Review Order), corrected by Errata, 18 FCC Rcd 19020 (2003) (Triennial Review Order Errata), vacated and remanded in part, affirmed in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (USTA II) cert. denied, 125 S.Ct. 313, 316, 345 (2004).

²⁵ See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3701, para. 7 (1999) (*UNE Remand Order*); see also *Triennial Review Order*, 18 FCC Rcd at 16984, para. 3 (discussing “the difficulties and limitations inherent in competition based on the shared use of infrastructure”).

²⁶ In this Order on Remand, the Commission puts into place new rules applicable to incumbent LECs’ unbundling obligations with regard to mass market local circuit switching, high-capacity loops, and dedicated interoffice transport. These new rules moot various petitions that asked the Commission to stay the application of certain rules adopted in the *Triennial Review Order*. Accordingly, we dismiss as moot the August 27, 2003, emergency joint petition for stay filed by the CHOICE Coalition; the September 4, 2003, joint petition for stay filed by BellSouth, Qwest, SBC, Verizon, and the United States Telecom Association; the September 22, 2003, emergency petition for stay filed by Sage Telecom; the emergency stay petition filed by DCSI Corporation *et al.* on September 22, 2003; the September 25, 2003, emergency petition for stay filed by NuVox; and the September 26, 2003, petition for emergency stay filed by Allegiance Telecom, Cbeyond, El Paso Global Networks, Focal, McLeodUSA, Mpower, and TDS Metrocom. See Coalition for High-Speed Online Internet Competition and Enterprise Emergency Joint Petition for Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Aug. 27, 2003); BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., the United States Telecom Association, and the Verizon Telephone companies, Joint Petition for Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 4, 2003); Sage Telecom, Inc. Emergency Petition for Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 22, 2003); DCSI Corporation, Emergency Stay Petition, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 22, 2003); NuVox Communications, Inc. Emergency Petition for Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 25, 2003); Allegiance Telecom, Inc., Cbeyond Communications, LLC, El Paso Global Networks, Focal Communications Corporation, McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp. and TDS Metrocom, LLC Petition for Emergency Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 26, 2003).