Employment Opportunity Commission are of near-legendary proportions. The Department of Labor isn't much better. Don't believe these agencies' cries for more employees to help with the backlog. Cut their staffs to caretaker level. Strip state and federal courts and administrative law judges of their jurisdiction to hear employment-related charges under any federal statute regulating employer-employee relations: the National Labor Relations Act and anti-union discrimination; Title VII of the Civil Rights Act, which prohibits race, sex, and natural origin discrimination; age discrimination under the Age Discrimination in Employment Act; handicap discrimination under the Americans with Disabilities Act; the Wage and Hour Law; the Family Medical Leave Act; virtually anything involving employment you can conceive of, with the exception of actions against pension and benefit plan fiduciaries under the Employee Retirement Income Security Act.

Instead, require all individual employment disputes under federal law to be subject to final and binding arbitration. Unless a company has already established a final and binding grievance or arbitration procedure for its own employees, arbitration will proceed according to rules established by the American Arbitration Association with arbitrators appointed by it, the Federal Mediation and Conciliation Service, or agreed to by the parties. Arbitrators would have authority to give injunctive relief as well as damages, including punitive damages. Decisions of arbitrators could be appealed only pursuant to the provisions of the Federal Arbitration Act, which largely limits appeals to fraud or misconduct by arbitrators and not to factual or legal mistakes. Or, if that seems too scary, give federal courts the authority to overturn obvious legal or factual errors made by arbitrators.

To encourage more companies to establish final and binding arbitration procedures for all employee disputes (including wrongful discharge, etc.) and not just those with respect to rights under federal law, *any* final and binding arbitration procedure recognized by federal courts under the Federal Arbitration Act would be permitted. This would encourage more companies to establish "peer review procedures" where final and binding decisions on employment disputes are rendered by panels of fellow employees who volunteer for the purpose. Employee peer review is a growing phenomenon among companies. Those who have it swear by it. Fellow employees are more sensitive to, and can be a better check on, arbitrary managers than third-party arbitrators with little or no appreciation of workplace realities. The same is true when dealing with fellow employees. They don't tolerate substandard job performance. Peer review panelists tend to apply to the conduct of fellow employees the same high standards they apply to themselves.

What about the legions of government employees, mostly lawyers, who enforce these federal laws—the General Counsel's Office of the National Labor Relations Board, the National Labor Relations Board's Administrative Law Judges, the EEOC, the Department of Labor, etc.? To paraphrase a recent campaign slogan: Give them severance pay and send them home to find honest work.

Encourage these arbitrations to proceed *without* lawyers. If both sides choose to proceed with a lawyer, make the loser pay the winner's attorney's fees *and* the entire fee of the arbitrator. If only one side has a lawyer and it loses, make it pay the entire fee of the arbitrator. If neither side has a lawyer, each pays its own costs and the arbitrator's fee is split 50–50.

Above all, keep first principles in mind when enacting these reforms. People are our most precious resource—empower them, not bureaucrats or unions. Reward companies which recognize this and treat their employees fairly.

*Contributing Editor Michael McMenamin is an employment lawyer in Cleveland.*

# Communication Cleanup

## A freedom of information act

By Peter Huber

The cost of processing and conveying information will consume a steadily growing fraction of every budget, private and public, for the rest of our lives, and quite possibly for the rest of American history. Manufacturing, transportation, energy, finance, education, medical care—the prosperity of almost every sector of the economy will hinge on telecommunications and information processing. Growing the information economy will be as critical to our national wealth as maintaining a stable currency. In fact, currency itself—which is no more than a primitive medium of communication—is fast giving way to newer, more private forms of data bases and electronic communication. Reed Hundt, chairman of the FCC, may be as important to our future as Alan Greenspan. All this means that getting telecom policy right is transcendently important.

But what's right? Telecom jurisdiction today is divided higgledy-piggledy among the Federal Communications Commission and countless state regulators. The Department of Justice and Judge Harold Greene, who still police the 1984 decree that broke up Bell, have a large and independent slice of the legal action. These various regulators and litigators oversee interstate telephony and all of broadcast under laws written in 1927 and 1934, and a consent decree drafted in 1982. Cable is regulated under a pair of rubbishy statutes enacted hastily, and almost thoughtlessly, in 1984 and 1992. Satellite is regulated mostly by analogy to telephone and television. The copyright law most relevant to broadband telecom was cobbled together in a truly

abominable piece of legislation passed in 1976.

The last Congress tried to fix the mess. It failed. In a classic exhibition of Washington at its overstaffed, overlobbied, constipated worst, proposals to deregulate gradually metamorphosed into proposals to regulate more than ever. Then they died merciful deaths. This was nothing new. Congress has been trying to pass a comprehensive new telecom law since 1981.

The Republicans are now promising action by Easter. They might consider this modest proposal (I don't really expect they will—this is a thought experiment): Write a new law that addresses only government, no one else. No new studies, rules, tariffs, or schedules. No new mandates, proscriptions, tribunals, boards, or commissions. A law, in short, that simply clears away an obsolete underbrush of law itself. It's what the industry most urgently needs.

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*Entry.* Monopoly is indeed a nasty thing. The biggest monopoly in town is always government. Franchise rules and entry regulation shore up existing monopolies. To fix monopoly, you have to go after and disable the worst monopolist, government itself. So...

Repeal the federal law that forbids phone companies from providing video services. Repeal the same law that (arguably) forbids cable companies from providing phone service. Preempt any state regulation to the contrary.

Authorize ATT, MCI, and any other interstate carrier or broadcaster to deploy in-state wireline or wireless networks. Preempt any contrary state regulation.

Repeal all existing rules that stop broadcasters from building or buying cable, or cable from entering broadcast, telephone from entering either, or any of the above from going into print or other media. Eliminate all rules that limit the aggregation of radio stations, broadcast stations, or cable properties. Eliminate all rules that restrict vertical combinations of media companies and content providers, like movie theaters and Hollywood studios. Leave in place only the antitrust laws—which can be applied firmly, case by case, based on up-to-date evaluations of what really would impede competition under current conditions in the rapidly converging telecom markets.

Preempt all state laws that forbid or cripple deployment of Satellite Master Antenna Television services (SMATV, or private cable) or Shared Tenant Services (private telephone exchanges). Eliminate all state and federal excise taxes, surcharges, or franchise fees imposed specifically on private or public carriers, broadcasters, or electronic publishers. These almost always represent attempts by government itself to cash in on monopoly rents.

Eliminate all restrictions on foreign ownership of U.S. telecom facilities. The one qualification might be to let U.S. trade negotiators keep the ones they specifically need as bargaining chips in negotiating for the elimination of telecom trade barriers.

*Radio Licenses.* Regulation of the wireless telecosm stands as an antiquated, statist ruin of the New Deal. Nobody but the federal government owns spectrum. Nobody but the FCC may decide how to use it. Nobody may sell, borrow, or lease, without the commission's say so. Moscow never exercised any powers more sweeping or inefficient than our very own Politburo on the Potomac. So...

Sell all new radio licenses at auction to the highest bidder. Sell off all existing spectrum under FCC control as soon as possible. Transfer large slabs of underused spectrum from other federal agencies (including the Pentagon) to the FCC. Then sell them off. When outstanding licenses expire, sell that spectrum too. Incumbent broadcasters will howl at the thought. Let them howl.

Authorize any owner of a radio license to sell it to anyone else. Repeal all FCC rules that prescribe how spectrum is to be used for broadcast, common carriage, or private purposes. Let broadcasters transmit data and paging. Let TV stations close shop on a Friday and reopen on Monday as wireless phone companies. Let taxi dispatchers go into interactive television.

Authorize all licensees to invoke common-law principles of trespass and nuisance in state or federal court to protect property interests in spectrum. In resolving disputes about interference, favor private suits over FCC regulation. The FCC can remain the last-resort regulator to ensure that transmitters operate at authorized frequencies, powers, and locations.

*Broadcasters and Carriers.* Both federal and state regulators doggedly struggle to maintain pristine lines between broadcasters and carriers. A well-defined law of common carriage remains useful—carriers take on special duties (non-discrimination) but get special privileges in return (wide immunity from defamation and copyright laws, for example). Outside the traditional realm of common carriage, however, bright lines aren't needed, and just create needless complication. So...

Authorize any common carrier to transmit anyone's content, including its own. Leave copyright laws in place. Authorize any broadcaster to carry anyone's content, not just its own. Legalize "time brokering," under which broadcasters sell air time in small increments to willing buyers.

Let broadcasters refuse to broadcast whatever they don't like,

including political messages. Let cable companies refuse to transport whatever they don't like, including broadcast channels. Abolish the abominable Copyright Royalty Tribunal and all the compulsory license laws it administers. Place cable companies under traditional copyright laws once again. If they want to retransmit anyone else's transmissions, make them buy them in the open market.

*Prices.* Large parts of the telecosm are already competitive today, or will be very soon. Price regulation here is a destructive anachronism. So...

Abolish all remaining price regulation of wireless services (there isn't much left anyway). Abolish all price regulation of interstate wireline services, like ATT's and MCI's (there isn't much left there, either). Whether or not the long-distance market is adequately competitive, regulation no longer does any visible good. Outlaw the filing of tariffs for any of these services. The tariffs in these markets just facilitate price fixing.

Abolish all price regulation of video services, whether supplied by cable, telephone, direct broadcast satellite, SMATV, VCR, disk, or other technology. Outlaw the filing of tariffs for these services, too.

Authorize every common carrier to meet or beat prices offered by competitors, even if that results in what would otherwise be an (unlawful) "discriminatory" price.

*Universal Service.* When all else fails, this is always the last-ditch excuse for regulating what should be let alone. So...

Abolish all state and federal laws that impose service obligations on new and nondominant entrants into any market. Promote universal telecom service the same way we promote universal hamburgers: by open entry and free competition.

*Free Speech.* Abolish any law that passes First Amendment muster only on the theory that airwaves are somehow "scarcer" than print, or that wires are "natural monopolies," or that electronic media are inherently different and less deserving of protection. The only real scarcity in the business is a creation of government itself. The answer to government scarcity is market plenty.

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# The Asset Test

## A privatization agenda

By Robert W. Poole Jr.

The GOP sweep of both houses of Congress should make possible what has long eluded free-market proponents: a national agenda for privatizing government functions. After all, the Republicans were elected on a shrink-big-government-and-balance-the-budget platform. And, as mayors and governors across the country are demonstrating, privatization is a proven tool for doing just that.

Wasn't federal privatization tried during the Reagan years? Not really. Despite a lot of rhetoric, nothing much happened until 1987, Reagan's seventh year in office. In that year, Conrail was sold off, the only real asset sale of the entire Reagan years. In 1987, Reagan also created a "privatization czar" post in the Office of Management & Budget (which Bush subsequently abolished) and appointed a President's Commission on Privatization, whose rather tepid report appeared in March 1988, far too late to have any impact.

Besides a lack of presidential leadership, the major obstacle was Congress, which not only vowed to oppose nearly every proposed privatization measure, but on many occasions voted to prohibit the government from even *studying* such proposals. So with the startling shift of power this fall, think-tank reports from the '80s were being dusted off all over Washington. Rep. Chris Cox (R-Calif.) even proposed the creation of a Privatization Committee in the House.

Thus, it is beginning to look as if the United States might finally join Australia, Britain, France, Germany, Italy, New Zealand, and other democracies in divesting government corporations and assets to the private sector. Over the past decade, nearly $500 billion of state-owned enterprises have been sold off worldwide. The proceeds have been used to reduce current budget deficits, to redeem outstanding bonds and save interest costs, or, in developing countries such as Mexico, to fund otherwise unaffordable public-works projects.

One major component of a federal privatization agenda would be to sell off federal enterprises and assets. No one has ever attempted to assess the possible market value of the government's numerous assets and enterprises. The General Accounting Office lists 45 government corporations (including the well-known Amtrak, Tennessee Valley Authority, and U.S. Postal Service, but also such lesser-known entities as the African Development Foundation, the National Credit Union Administration Central Liquidity Facility, and the Rural Telephone Bank). In addition, there is a whole set of government-sponsored enterprises, such as Fannie Mae, Freddie Mac, and Sallie Mae, most of which already have partial private ownership. Clearly, some of these are viable business enterprises which would command billions of dollars if offered for sale. Others would either have to be radically restructured or liquidated. All told, there are probably scores