European Conference of Postal and Teleco Administrations (CEPT)
Electronic Communications Committee (ECC)
August 31 – September 1, 2009

FCC's practices with respect to Impact Assessment on regulatory proceedings

The ECC wants to create a process to assess at the developmental stage the potential impact of a decision or recommendation on spectrum management at the European level. Thus, it seeks to establish a formal sequence of considerations that will be included to assess the outcome of decisions, among other things, in economic terms, compared with the outcome, if an action is not taken. It also seeks a means of comparing outcomes of hypothetical alternatives to the decision being considered. To that end, the European Communications Office (ECO) organized a training seminar for ECC members in Copenhagen from August 31 through September 1, 2009, and requested Federal Communications Commission (FCC) input regarding application of impact assessments in the development of US regulation.

The FCC process for making decisions is generally governed by the U.S. Constitution, Communications Act of 1934,[1] Communications Satellite Act of 1962,[2] as well as the Administrative Procedure Act (APA) as amended.[3] The Communications Act was substantially revised by the Telecommunications Act of 1996,[4] which generally provides for a pro-competitive, deregulatory approach to communications regulation, while retaining emphasis on the public interest.[5] With few exceptions, the APA requires an agency to publish general notice of its proposal and provide an opportunity to comment thereon before the agency promulgates a rule. In addition to those noted above, there are a number of specific statutes giving the FCC authority or imposing obligations in certain specific contexts.

Among the specific statutes that we consider are several mechanisms for assessing the impact of our rulemakings. Some of the major statutes and an Executive Order are summarized below. This is by no means an exhaustive list of the considerations, nor an indication of priority. More importantly, it is not intended to be a statement of FCC's policy on any issue.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires agencies to review regulations to ensure that, while the regulations accomplish their intended purposes, they do not unduly inhibit the ability of small entities to compete.[6] Major goals of the RFA are to:

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[1] 47 U.S.C. §§ 151 *et seq.*
[2] 47 U.S.C. §§ 701 *et seq.*
[3] 5 U.S.C. §§ 551 *et seq.*
[4] Pub. L. No. 104-104, 110 Stat. 56, codified throughout Title 47, United States Code.
[5] *See* H.R. Conf. Rep. No. 230, 104th Cong., 2d Sess. at 1 (1996).
[6] 5 U.S.C. §§ 601–612.

- increase agency awareness and understanding of the impact of their regulations on small business;
- require that agencies communicate and explain their findings concerning such impact to the public; and
- encourage agencies to provide flexibility and regulatory relief to small entities, where appropriate.

The key consideration of this statute is whether the rule would have a significant negative economic impact directly on a substantial number of small entities that are, or may be, subject to the requirements of the rules in the item.[7] If the rule would have a significant negative economic impact on a substantial number of small entities, the federal agency must prepare a regulatory flexibility analysis that addresses the impact of the rule on the small entities directly regulated by the rule.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) governs an agency's collection of information, and generally requires approval by the Office of Management and Budget (OMB) before an agency can impose an information collection requirement on 10 or more persons.[8] This statute covers most means of collecting information. The "collection" may be written, oral, mandatory, or voluntary. It also doesn't matter whether the collection is called a "reporting," "disclosure," or "recordkeeping" requirement. In addition, if an agency wants to collect information, it generally must give the public notice of, and an opportunity to comment on, the proposed information collection.

National Environmental Policy Act and the National Historic Preservation Act

Pursuant to the National Environmental Policy Act (NEPA), "major Federal actions significantly affecting the quality of the human environment" must be accompanied by an analysis of the environmental impact.[9] The FCC's implementing rules set out procedures to be followed in implementing NEPA and other similar statutes.[10] In addition, section 106 of the National Historic Preservation Act (NHPA),[11] requires agencies to take into account the effect of a federal undertaking on historic properties. An example of a case where significant NEPA and NHPA issues may arise is the construction of a communications tower.

Congressional Review Act

Before most rules can go into effect, agencies must submit a report to each House of Congress and the General Accounting Office (GAO) containing: a copy of the rule; a concise

[7] A small business that is solely a client, customer, or end user of another telecommunications service provider would generally not be included in the Regulatory Flexibility Analysis. This is because, although such an end user might well be a small entity facing a significant economic impact (*e.g.*, rate increases), this is as an indirect result of the regulatory action.
[8] 44 U.S.C. §§ 3501–3520.
[9] 42 U.S.C. §§ 4321–4347.
[10] 47 C.F.R. §§ 1.1301-1.1319.
[11] 16 U.S.C. § 470f.

statement of the rule; and the proposed effective date of the rule. Prior to submitting the report, an agency must obtain a determination from the OMB as to whether or not the rule is "major." A "major" rule is one that is likely to affect the economy in the amount of $100 million or more; result in a major increase in costs or prices for consumers, individual industries, governments, or geographic regions; or have a significant adverse impact on competition.

Designating a rule as "major" triggers certain additional Congressional Review Act[12] requirements. If a rule is "major," in addition to submitting a report concerning the new rule, the promulgating agency must also submit to GAO: (1) a complete copy of any cost-benefit analysis; and (2) a description of the agency's actions pursuant to the requirements of the RFA.

Executive Order 12866

Executive Order 12866 (E.O. 12866) establishes guiding principles that federal agencies (excluding independent federal agencies) should follow when developing regulations. It should be considered in the very early stages of the process. It encourages the use of cost-benefit analysis, risk assessment, performance-based regulatory standards, and provides a regulatory planning process for federal agencies. E.O. 12866 has three main components: regulatory philosophy and principles; regulatory planning process; and centralized review of agency rulemaking. For our purposes it is more productive to limit the discussion to the first two components.

1. Regulatory Philosophy and Principles

E.O. 12866 notes that federal agencies should promulgate regulations only insofar as the regulations are:

- required by law;
- necessary to interpret the law;
- or made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.

2. Regulatory Planning Process

E.O. 12866 states that the heads of agencies should meet early in each year's planning cycle to seek a common understanding of priorities and coordinate regulatory efforts to be accomplished in the upcoming year. In order to satisfy this requirement, each agency has to prepare and submit a Regulatory Plan of the most important *significant regulatory actions* that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. Among other things, this Regulatory Plan must include:

- statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;

[12] 5 U.S.C. §§ 801 *et seq.*

- summary of each planned significant regulatory action including to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;
- summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;
- statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency; and
- the agency's schedule for action, including a statement of any applicable statutory or judicial deadlines.

The key consideration of E.O. 12866 is whether a rule is a significant regulatory action. "Significant regulatory action" is defined as any regulatory action that is likely to result in a rule that may:

- have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;
- create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Generally, for every rule that is a significant regulatory action, the federal agency should prepare an economic impact analysis. This assessment of the potential costs and benefits of the regulatory action must include among other things, an explanation of the manner in which the regulatory action is consistent with a statutory mandate, and to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.