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Consolidation, Coordination, Competition, and Coherence: In Search of a Forward Looking Communications Policy

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Coherent national communications policy making has increasingly eluded us. Missteps and false steps have impeded progress. The courts, the Congress, and the Federal Communications Commission (FCC or Commission) have clashed regularly. The result has been a lack of direction, as the involved factions attempt to cope with new technology's unfulfilled promises.

The challenge for policymakers is to pursue coherent policies in an intellectually honest manner. It is an awesome task to reweave the frayed fibers of social policy, economic reality, and constitutional constraint; but, this is necessary to achieve a strong national communications policy.

Legislative and regulatory initiatives are valuable in some situations. For the foreseeable future, however, it will be more important to examine and define fundamental goals rigorously. The sixty-year-old Communications Act of 1934 (Communications Act or Act) has survived largely intact, and it may be able to endure well into the future. In fact, the Act's least enduring parts are likely to be the more recent additions—the 1984 and the 1992 Cable Acts. The latter already supplants much of the former, but both

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the First and Fifth Amendments loom as potential threats to major portions of the latter.

Enduring policies should be based on considerations beyond current events. For example, the recent rash of proposed mega-mergers is not the building block for long-term policies. Thankfully, Congress did not rewrite the Communications Act as a kneejerk reaction to potential mergers between the Baby Bells and cable multisystem operators—a “trend” that may have evaporated before it even really emerged. This may serve as a lesson about the potential folly of purely reactive legislation in the communications sector. To seek a more enlightened future course, we should begin by assessing the policy disarray that has been created.

In the common carrier arena, evolution is stalled. Reviewing courts have rejected a number of the Commission’s attempts to adopt important new policies, most recently concluding that the Commission lacked statutory power to exclude nondominant carriers from filing tariffs.¹ Combined with lengthy delays in implementing other significant new rules and policies (including, for example, approval of video dialtone applications), such developments have left the common carrier sector without any clear policy direction and with uncertainty about the scope of the agency’s jurisdiction to regulate changing markets. Broadcasters also have received little policy guidance. Constitutional and policy disagreements about sexually explicit and violent broadcasting have plagued the industry and have consumed an inordinate amount of administrative resources. At the same time, efforts to improve children’s programming and to assess other content-related policies have floundered amid a vigorous battle of advocates and major questions about whether (or when) the First Amendment boom will be lowered on the Commission’s and Congress’s restrictions on broadcasters.

Judicial attacks on the comparative hearing process have added uncertainty to the traditional licensing scheme.² Although the FCC has continued to relax ownership rules, it has grappled continually with the tension between its commitment to ownership diversity and its desire to promote broadcasters’ potential economies of scale through duopolies and multiple ownership. Finally, the networks still confront a confounding

1. *MCI Telecomm. Corp. v. AT&T*, 114 S. Ct. 2223 (1994).

2. *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (vacating and remanding an FCC comparative licensing decision with instructions for the agency to consider the applications without regard to its policies favoring the integration of ownership and management); *see also Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992) (vacating and remanding an earlier decision in the same case).

future. Legal and economic questions breed hesitancy about possible multimedia growth strategies.³

Cable television still labors under probably the most complex and least comprehensible communications policy regime. It is hard to predict future policy developments for an industry which has endured countless policy changes in the four decades of its existence. To confound matters further, the Supreme Court's rather obtuse decision in the recent *Turner Broadcasting* case⁴ is open to at least two contradictory interpretations. One portion of the Court's opinion suggests that at least some regulatory restrictions on cable television, which would not be permitted if imposed on print media, will be permitted—despite the First Amendment—because of cable's perceived role as a "gatekeeper."⁵ The open question is how broadly a relaxed level of First Amendment scrutiny will be applied. If it were applied as a broad "exception" to cable's general status as a protected First Amendment speaker, the rationale would uphold the FCC's regulatory thrusts under the 1992 Cable Act. Alternatively, a narrow interpretation of this "exception" would allow regulation only where a regulation directly addresses cable's "gatekeeper" functions—as in the case of the must-carry or third-party access rules. This would subject much (if not most) cable regulation to heightened scrutiny under cable's newly affirmed status as a protected First Amendment speaker. Under the latter interpretation of the Supreme Court's decision, courts could invoke the First Amendment to amputate substantial portions of the 1992 Cable Act, thereby restoring the industry to its prior less-regulated status—most recently during the second half of the 1980s. The FCC will have to be reactive, rather than proactive, until the true meaning of the majority opinion in *Turner Broadcasting* emerges.

Finally, a variety of still-emerging media have contributed little more than a set of additional acronyms—e.g., DBS (direct broadcast satellite), MMDS (multichannel multipoint distribution service), ADSL (asymmetric

3. *E.g.*, *In re Evaluation of the Syndication and Financial Interest Rules*, 8 FCC Rcd. 3282, *reconsideration granted in part*, 8 FCC Rcd. 8270 (1993), *aff'd sub nom.* *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309 (7th Cir. 1994) (resulting in the relaxation of the financial interest and syndication rules applicable to the networks, and authorizing their complete sunset in November 1995, unless an FCC review to be completed in 1995 determines that the relaxed rules should be retained, in whole or in part).

4. *Turner Brdcast. Sys., Inc. v. FCC*, 114 S. Ct. 2445, *reh'g denied*, 115 S. Ct. 30 (1994).

5. *Id.* at 2466 ("The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.").

digital subscriber line)—to the jargon. Whether these “fringe” distribution media will evolve into significant market forces remains to be seen. What is clear, however, is that regulation will not propel them to market prominence.

This lack of direction and the resulting sense of frustration is hardly surprising. The conditions for inertia are clear and prevalent. First, the government consistently has failed to bring any coherence to the potentially conflicting policy goals of encouraging marketplace freedoms and regulating in the “public interest.” The sixty-year-old Communications Act directed the FCC to bring order to a chaotic business through regulation. Efforts to preserve licensees’ status as “public trustees,” however, tend to ring hollow amid an industry that has been urged by deregulation, constitutional mandate, and economic promise to pursue efficiency and profit maximization above virtually all else.

Perhaps the latest evidence of this is the *Turner Broadcasting* decision itself. Once defended as an essential aspect of the FCC’s commitment to broadcast localism, the cable must-carry rules now are justified as a response to an economically dysfunctional marketplace. Deregulation has deprived “localism” of any meaningful content, to the extent that neither regulators nor jurists can seriously find a substantial government interest to justify a regulation of expression, such as the must-carry rules. The result constitutionally elevates broadcasters’ balance sheets over the First Amendment. Should we permit government regulation of speech to save local broadcast television, if we can find little good to say about it? Although the *Turner Broadcasting* decision wraps itself in the appealing verbiage of “diversity,” the opinion seems to acknowledge that there is nothing very diverse about the broadcast services protected by must-carry.

Although the Fowler FCC argued that the public interest and the profit interest were identical, the claim remains the target of significant skepticism. Policies of localism and diversity once appeared to have meaning and purpose; they now have been reduced to empty concepts. Today, their prime significance is that they may allow a broader range of entrepreneurs to profit from media ownership and operation. The benefits of these policies for the “public” are open to substantial debate.

Second, our national communications policymaking apparatus remains leaderless; economic goals, more than social policies, dictate its future. Government officials advocate their narrow responsibilities; in the telecommunications field, agencies’ flexibility of action remains subject to the constraints of the decade-old AT&T antitrust consent decree—the

Modification of Final Judgment (MFJ).⁶ The changing tides of international trade objectives, antitrust enforcement policies, and inconsistent industrial policies exert more influence on the direction of national communications policy than almost any other principles. Policymakers view communications more as a potential engine of economic growth than as a business sector that is infused with unique constitutional considerations—all because of the vital economic role that information distribution and processing play in today's world.

We may move into the next decade without a significant revision of the Communications Act or the adoption of major new national communications policies. It may be tempting to sit back and let technology and economics drive market developments.⁷ The courts, Congress, the Commission, and the Department of Justice could intervene intermittently and narrowly to deal with major developments or politically charged controversies. After all, we essentially have proceeded this way for years. Moreover, other countries have adopted the "U.S. model" in regulating newly privatized communications media.

Before accepting the status quo, however, it may be useful to consider how to address, more effectively, four important concepts: consolidation, coordination, competition, and coherence.

Consolidation: There are two critical aspects to this concept. The first is concentration of control among industry players. There is uncertainty about whether substantial consolidation will or should occur. There is no reason to believe, however, that we should have special rules for the media to encourage or frustrate consolidation. Antitrust principles will change over time in order to properly address new issues. The MFJ has served a monumental purpose, but now should be relegated to history, along with many of the existing statutory and regulatory ownership limits. The market should be more fluid; existing rules often impose rigidity, thus creating artificial barriers to assessing reality.

The second aspect of this concept is the consolidation of media—including the overused buzzword "convergence." The courts' historical approach to creating rigid distinctions among the media—e.g., "scarcity" in broadcasting—is obsolete. Electronic media have become increasingly

6. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

7. European and other national and regional policymakers, by contrast, have attempted—albeit not always successfully—to adopt new, and potentially far-reaching, policies. For example, despite endless squabbling among its member nations, the European Commission slowly has begun to develop important new policies in areas such as equipment standardization, network interconnection, and carriage of "local" content.

transparent. A television set might show the same program from any one of several sources: broadcasting, cable, DBS, MMDS, videocassette, videodisc, or compact disc (CD-ROM or CD-I). If the medium once was the message, the message is now the message. Accordingly, policies should not be defined by the characteristics of the distribution technology; they should be expressed more generally and broadly.

Coordination: The government must make sense of itself, and supply some policy leadership. Terminating the MFJ (even if its principles are embodied temporarily in laws) will restore the courts to their traditional and appropriate role of deciding cases. The government then will have two remaining challenges: providing leadership at the national level and fostering more effective federal-state partnerships. The European Union (EU) has nurtured international cooperation through concepts such as "subsidiarity" and "harmonization."⁸ Its relative success is significant, because the EU has no tradition of federalism.

Competition: This is perhaps the most troubled and troublesome concept. The country undoubtedly has a commitment to competition as a vehicle to realize desirable objectives. At times, however, there has been ambivalence about whether competition is a means to an end or an end in itself. The Communications Act clearly indicates that unbridled competition is not always the preferred approach. The basic choice of spectrum licensing, rather than a private spectrum market, reflects a legislative preference for "managed competition."

One of the major problems with present competition policy, however, is that government authorities lack information as to market forces. For example, a merger of a Bell Operating Company and a large cable company might be desirable, depending upon the answers to some fundamental questions, such as the following: Are a switched/low capacity telephone network and an unswitched/high capacity cable system noncompetitive? Would a merger create scale economies for the resulting firm? If the answer to both questions were in the affirmative, presumably the government would allow the merger; if the answers were negative, presumably it would not. At present, however, government agencies cannot reliably assess these issues.

If the government stays with its present competition policy, it must make rational decisions about how other policies that promote or require

8. "Subsidiarity" refers to the concept of promoting the implementation of EU policies at the lowest (most decentralized) possible level of government, e.g., at the member-state level. "Harmonization" refers to the concept of permitting EU member-states to modify EU directives to suit national conditions, as long as such modifications do not result in a departure from the basic thrust of the directive.

competition fit with the basic scheme for distributing spectrum. The FCC's attempts to "pretend" that there is a vigorously competitive market and to make choices based on that assumption have created dysfunction and conflict. If more competition is preferable (for whatever reason), then we must reevaluate some of the basic principles that have guided the communications industry for six decades. For example, in a rough and tumble marketplace, historical perspectives on, and regulatory approaches toward, "universal service" and the "public interest" will not work; in fact, concerns about these issues may disappear altogether.

Coherence: Whatever the direction chosen, we will need an understanding of the broad impact of our choices. Regulation of cable television is simply foolhardy, without acknowledging a rule's effect on cable's competitive market position and the government's supposed policy commitments to broadband, multimedia networking. Freeing local phone companies to enter the video distribution business is a dramatic step with possible cataclysmic effects on the entire market. It is encouraging that legislators appear attuned to the broader implications of this policy choice, and are considering widespread changes to provide guidance for future action.

Coherence should not be equated with equivalence or even-handedness. Coherence demands not a "level playing field," but rather an honest recognition that seemingly narrow policy choices can have widespread effects. It requires a real effort to reconcile the effects of differing policies. We may well find compelling reasons to distinguish among differing activities and to apply distinct policies to them. At the very least, however, we should be honest and forthright about the distinctions, and realistic about the potential constitutional constraints. Again, we need more detailed data and analysis.

From all indications, we have entered an era of abundance. More frequencies are being allocated, and spectrum generally is being used more intensively and efficiently. Distribution facilities are being constructed at an unparalleled pace; the news of the death of alternative distribution pipelines is both premature and exaggerated. The emergence of new media may result in the entry of major new market participants. With less regulation and more outlets, the opportunity for increasingly diverse content has grown. Whether the opportunity will be seized, however, remains to be seen.

Our policies have grown out of scarcity and a fear of market dominance. In some cases, often inconsistently, we have adopted policies to address abundance rather than scarcity. Broad reassessment and reappraisal seem appropriate. The challenge for the next decade will be to

move from the management of a scarce and powerful resource to the exploitation of a more abundant and even more powerful one. For the policymaker, the central task will be trying to allocate—or at least oversee and channel—the benefits of abundance.